



EBA/RTS/2014/03

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27 March 2014

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# EBA FINAL draft regulatory technical standards

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On own funds – multiple dividends and differentiated distributions (part four) under Regulation (EU) No 575/2013 (Capital Requirements Regulation – CRR)

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# 1. Executive summary

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Regulation (EU) No 575/2013 (Capital Requirements Regulation – CRR) lays down requirements concerning own funds which are expected to apply from 1 January 2014, and mandates the EBA to prepare draft regulatory technical standards (RTS) in this area.

These draft regulatory technical standards (RTS) relate to Article 28(5) of the CRR, which mandates the EBA to specify whether and when multiple distributions<sup>1</sup> would constitute a disproportionate drag on own funds, and the meaning of preferential distributions.

Under the CRR, and notably with reference to recital 72 thereof, institutions may pay, on Common Equity Tier 1 (CET1) instruments with fewer or no voting rights, distributions that are a multiple of those paid on instruments with higher levels of voting rights. In practice, in most cases institutions have one voting instrument, i.e. an instrument with ‘full’ or ‘the highest’ voting rights, which will be used as the reference for the distributions on the instruments with fewer or no voting rights.

The EBA mandate has two aspects, one related to (i) multiple distributions and one related to (ii) preferential distributions which have been considered separately for joint-stock companies and non-joint stock companies. The provisions of the draft RTS detail in particular whether and when multiple distributions would constitute a disproportionate drag on capital and the meaning of preferential distributions regarding preferential rights to payments of distributions on the one hand, and the order of payments of distribution on the other. The draft RTS also go into detail about the consequences of not meeting the criteria provided in terms of (dis)qualification of instruments as CET1 capital.

The provisions on multiple distributions propose harmonised criteria for the limitations of distributions on instruments with multiple distributions and ensuring that the future loss absorbency of CET1 instruments is not compromised by disproportionate distributions constituting a drag on own funds. Only a subset of those instruments would be considered not to create a disproportionate drag on capital, and could therefore be included in CET1. The draft RTS specify a way of identifying that subset by proposing criteria to be met by those instruments.

In these final draft RTS, the EBA has restricted the provisions relating to multiple distributions to joint stock companies. For these, the ordinary voting shares are the most flexible instruments that an institution could use to increase equity. In most cases, there is no clear need for joint stock companies to issue shares without voting rights other than to protect the voting rights of their current shareholders. As this protection generally has a cost which may create a drag on capital, quantitative limits on differentiated distributions due to different voting rights are justified. These limits are expressed (i) in terms of the amount of distribution on one instrument with a dividend

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<sup>1</sup> As defined in Article 4(110) of Regulation (EU) 575/2013.

multiple compared with the amount of distribution on one voting instrument and (ii) in terms of the total amount of distribution paid on CET1 instruments.

The provisions for preferential distributions apply to both joint stock and non-joint stock companies. Preferential distributions are deemed to exist when holders of CET1 instruments are at an advantage compared with other holders of CET1 instruments of the same institution. The objective of the provisions on preferential distributions is to ensure that there is sufficient flexibility of payments for all CET1 instruments.

For joint stock companies, the approach is the same as for multiple distributions. For non-joint stock companies, and in order to take into account the specific features of this type of institution, the approach is based on a set of criteria not strictly based on the setting of hard quantitative limits but combining different factors related to general features of instruments issued by non-joint stock companies. These criteria reflect in particular on the nature of the holders of the non-voting instruments, the existence of a legal cap on the voting instruments, the voting rights and the average level of distributions.

These RTS will be part of the single rule book to enhance regulatory harmonisation in Europe and improve the quality of bank capital.

## 2. Background and rationale

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### **Draft RTS on own funds – part four**

On 26 June 2013, the revised Capital Requirements Directive (CRD) and Capital Requirements Regulation texts were published in the Official Journal of the EU. These aim to apply the internationally agreed standards adopted within the context of the Basel Committee for Banking Supervision (known as the ‘Basel III framework’) in the European Union.

The EBA has developed these RTS proposals in accordance with the mandates contained in Article 28(5) of the CRR.

### **The nature of RTS under EU law**

These draft RTS are produced in accordance with Article 10 of the EBA Regulation<sup>2</sup>. In accordance with Article 10(4) of the EBA Regulation, the RTS shall be adopted by means of a regulation or decision.

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

Shaping these rules in the form of a regulation would ensure a level playing field by preventing diverging national requirements and would ease the cross-border provision of services. At present, an institution that wishes to take up operations in another Member State has to apply different sets of rules.

### **Background and regulatory approach followed in the draft RTS**

Until the date of application of the CRR (1 January 2014), the applicable regulatory framework for own funds was derived from Directives 2006/48/EC and 2006/49/EC, in particular Articles 56 to 67, as enacted in national law by each Member State. The CRD was complemented by the publication of two sets of guidelines from the Committee of European Banking Supervisors (CEBS), the predecessor of the EBA. The first set of guidelines, published in December 2009,

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<sup>2</sup>Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC.

relates to hybrid capital instruments<sup>3</sup>. The second set of guidelines, published in June 2010, refers to elements of Article 57(a) of the CRD<sup>4</sup>.

In December 2010, the Basel Committee on Banking Supervision (BCBS) published its 'global regulatory framework for more resilient banks and banking systems' to address the lessons from the financial crisis. The CRR provisions related to own funds translate these BCBS proposals into EU law. Both reforms raise the quality and quantity of the regulatory capital base.

While recognising that institutions can issue instruments with dividend multiples, European co-legislators have introduced a mandate for the EBA to ensure that these features are framed in such a way that they do not lead to a disproportionate drag on capital, both in terms of single own funds instruments and total own funds.

Given the wording of the CRR, which creates some uncertainty about the legal scope of the EBA's mandate on multiple distributions, the EBA contacted the EU Commission services for clarification. In particular, it was not clear to the EBA that non-joint stock companies were included in the scope of the mandate for multiple distributions.

The view of the EU Commission services was that non-joint stock companies were not included in the mandate for multiple distributions. However, the view of the EU Commission services was also that it could not be excluded that certain structures of instruments, including multiple dividends leading to a drag on own funds, should fall under the mandate for preferential distributions.

In these final draft RTS, the EBA has restricted the provisions relating to multiple distributions to joint stock companies. For these, ordinary voting shares are the most flexible instruments that an institution can use to increase equity. In most cases, there is no clear need for joint stock companies to issue shares without voting rights other than to protect the voting rights of their current shareholders. As this protection generally has a cost which may create a drag on capital, quantitative limits on differentiated distributions due to different voting rights are justified. These limits are expressed (i) in terms of the amount of distribution on one instrument with a dividend multiple compared with the amount of distribution on one voting instrument and (ii) in terms of the total amount of distribution paid on CET1 instruments.

The provisions for preferential distributions apply to both joint stock and non-joint stock companies. For joint stock companies, the approach is the same as for the mandate on multiple distributions.

For non-joint stock companies, the legal framework may be different, notably for cooperative societies. Cooperative shares (with voting rights) are generally issued at par, and the return for the shareholders is generally limited to the dividend payment (no access to reserves in

<sup>3</sup><http://www.eba.europa.eu/CMSPages/GetFile.aspx?nodeguid=97f3cd8f-855c-40de-a98b-b923e8eaa4ad>

<sup>4</sup>[http://www.eba.europa.eu/documents/Publications/Standards---Guidelines/2010/Guidelines\\_article57a/Guidelines\\_article57a.aspx](http://www.eba.europa.eu/documents/Publications/Standards---Guidelines/2010/Guidelines_article57a/Guidelines_article57a.aspx)

liquidation, redemption at par and no dilution effect when new shares are issued, no possibility to sell apart from redemption by the institution itself as the institution generally constitutes the only market for its own capital instruments). In addition, the dividend payment on the voting shares may be subject to a cap and when the cap on dividends is low this may also reduce the ability of the cooperative society to raise capital by issuing voting shares.

Another issue that may be taken into account is that most non-joint stock companies apply the principle of 'one person, one vote'. When the non-voting shares may be subscribed to only by holders of voting shares, issuing non-voting shares will not influence the level of voting rights. When shareholders have the flexibility to decide on the dividend to be paid on voting and non-voting shares, the situation of an institution where a shareholder subscribes to one voting share and several non-voting shares will be the same as the situation of an institution where a shareholder subscribes to several voting shares.

The requirement that the dividend multiple shall be predetermined and fixed for joint stock companies is justified by the concern that the non-voting shares should behave like voting shares, mainly in case of recapitalisation, where the non-voting shares should also be subject to dilution. For non-joint stock societies, even for voting shares, there is no clear dilution effect if there is a recapitalisation.

For this reason, the approach proposed for non-joint stock companies is not strictly based on the setting of hard quantitative limits, as for joint stock companies, but takes into account other factors, such as the fact that the non-voting shares should be held by voting members, that voting shares are in some cases subject to a legal cap or that in general, the level of distributions for non-joint stock companies is limited.

3. EBA FINAL draft Regulatory Technical Standards on on Own funds- multiple dividends and differentiated distributions[part four] under Regulation (EU) No 757/2013 (Capital Requirements Regulation- CRR)

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EUROPEAN COMMISSION

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

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

**of **XXX****

**on [...]**

**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 .../..**

**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 firms and amending Regulation (EU) No 648/2012<sup>5</sup>, and in particular third subparagraph of Article 28(5) thereof,

Whereas:

(1) The drag on own funds should not be disproportionate in terms of both the distributions on any individual Common Equity Tier 1 instrument as well as the distributions on the total own funds of the institution. Therefore, the notion of a disproportionate drag on own funds should be established by providing rules covering both of these aspects.

(2) The mandate on the potential disproportionate drag on own funds set out in Article 28(5)(b) of Regulation (EU) No 575/2013 does not cover instruments falling under Article 27 since those are exempted by virtue of Article 28(1)(h)(iii) of that Regulation.

(3) The meaning of preferential distributions should be based on features of the instruments that reflect the requirements of Article 28(1)(h)(i) of Regulation (EU) No 575/2013 that no preferential distribution treatment regarding the order of the distributions or other preferential rights should exist, including for preferential distributions of Common Equity Tier 1 instruments in relation to other Common Equity Tier 1 instruments. Given that Article 28(h)(i) of Regulation (EU) No 575/2013 distinguishes between preferential rights to payment of distributions and preferences regarding the order of distribution payments, rules on preferential distributions should cover both cases.

(4) Different rules should apply to the Common Equity Tier 1 instruments of institutions mentioned in Article 27 of Regulation (EU) No 575/2013 ('non-joint stock companies') when justified by specific features of voting instruments and non-voting instruments. When only the holders of the voting instruments may subscribe to the non-voting shares, then there is no deprivation of voting rights for holders of non-voting instruments.

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<sup>5</sup>OJ L 176, 27.6.2013, p. 1.

Therefore, the differentiated distribution on the non-voting instrument of non-joint stock companies is not driven by the absence of a voting right in the same way as for joint stock companies. Also, when there is a cap on the distribution of the voting instrument set under applicable national law, the limits devised for joint stock companies should be replaced by other rules that ensure the absence of a preferential right to payment of distributions.

(5) A different treatment for non-joint stock companies is only justified if the former institutions do not issue capital instruments with a predetermined multiple distribution that would be set contractually or in the statutes of the institution. If they do, concerns relating to the preferential right to payment of distributions are the same as for joint stock companies and the same treatment should therefore apply.

(6) This should not prevent non-joint stock companies from issuing other capital instruments with differentiated distribution provided that they demonstrate that those instruments do not create a preferential right to payment of distributions.. This demonstration should be based on the assessment of the level of distributions on voting instruments and the level of distributions on total Common Equity Tier 1. The institution should demonstrate that the level of distributions on the voting instruments is low by reference to other capital instruments and that the pay-out ratio on Common Equity Tier 1 instruments is low.

(7) In order for non-joint stock companies to assess whether the level of the pay-out ratio is low, a benchmark should be established. In order to take into account that pay-out ratios may fluctuate depending on the yearly result, this benchmark should be based on the average over the five previous years. Given the novelty of the introduction of this rule, and its potential effect, a phasing-in of the rules on the calculation of the level of the pay-out ratio should be provided.

(8) Some non-joint stock companies are not able to issue instruments that are as flexible as common shares in case of an emergency recapitalisation, understood in the sense of upcoming EU legislation on recovery and resolution specifying when institutions are subject to early intervention measures. In those cases, those institutions would need to issue capital instruments to facilitate recovery; therefore, it should be acceptable for those institutions, where the non-voting instruments are usually only held by holders of voting instruments, to exceptionally sell non-voting instruments also to external investors. Furthermore, capital instruments provided for emergency recapitalisation should contain the prospect of an adequate upcoming advantage to be gained after the recovery phase. Therefore, it should be acceptable for those institutions to exceed the limits imposed on the payout ratio after the recovery phase in order to provide that potential upside to the holders of Common Equity Tier 1 instruments provided for the purposes of emergency recapitalisation.

(9) Under Article 10 of Regulation (EU) No 1093/2010, competent authorities may, in accordance with national law, partially or fully waive the application of the requirements

set out in parts Two to Eight of that Regulation to credit institutions affiliated to a central body. In addition, under the same Article, competent authorities may waive the application of Parts Two to Eight of that Regulation to the central body on an individual basis where the liabilities or commitments of the central body are entirely guaranteed by the affiliated institutions. On the basis of that Article, competent authorities should be able to waive the requirements under this Regulation for intragroup capital instruments. Competent authorities should also be able to assess the compliance with the requirements set by this Regulation on the basis of the consolidated situation of the institutions that are in the scope of those waivers, notably with regard to the calculation of the payout ratio.

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

(11) 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.

HAS ADOPTED THIS REGULATION:

*Article 1*

**Amendments to COMMISSION DELEGATED REGULATION (EU) No 241/2014**

COMMISSION DELEGATED REGULATION (EU) No 241/2014 is amended as follows:

The following Articles 7b to 7e are inserted after Article 7:

.....

*'Article 7b*

*Whether and when multiple distributions would constitute a disproportionate drag on own funds*

1. Distributions on Common Equity Tier 1 instruments referred to in Article 28 of Regulation (EU) No 575/2013 shall be deemed not to constitute a disproportionate drag on capital if all of the following conditions are met:
  - (a) The dividend multiple is a multiple of the distribution paid on the voting instruments and not a predetermined fixed amount;
  - (b) The dividend multiple is set contractually or under the statutes of the institution;

- (c) The dividend multiple is not revisable;
- (d) The same dividend multiple applies to all instruments with a dividend multiple;
- (e) The amount of the distribution on one instrument with a dividend multiple does not represent more than 125% of the amount of the distribution on one voting Common Equity Tier 1 instrument.

In formulaic form this would be expressed as:

$$l \leq 1.25 \times k$$

where:

*k* shall represent the amount of the distribution on one instrument without a dividend multiple;

*l* shall represent the amount of the distribution on one instrument with a dividend multiple;

- (f) The total amount of the distributions paid on all Common Equity Tier 1 instruments during a one year period does not exceed 105% of the amount that would have been paid if instruments with fewer or no voting rights received the same distributions as voting instruments.

In formulaic form this would be expressed as:

$$kX + lY \leq (1.05) \times k \times (X + Y)$$

where:

*k* shall represent the amount of the distribution on one instrument without a dividend multiple;

*l* shall represent the amount of the distribution on one instrument with a dividend multiple;

*X* shall represent the number of voting instruments;

*Y* shall represent the number of non-voting instruments;

applied on a one- year basis.

2. Where the condition of paragraph 1(f) is not met, only the amount of the instruments with a dividend multiple that exceed the threshold defined therein shall be deemed to cause a disproportionate drag on capital.
3. Where any of the other conditions of paragraph 1 are not met, all outstanding instruments with a dividend multiple shall be deemed to cause a disproportionate drag on capital.

*On the meaning of preferential distributions regarding preferential rights to payments of distributions*

1. For Common Equity Tier 1 instruments referred to in Article 28 of Regulation (EU) No 575/2013, a distribution on a Common Equity Tier 1 instrument shall be deemed to be preferential relative to other Common Equity Tier 1 instruments where there are differentiated levels of distributions, unless when the conditions of Article 7b are met.
2. For Common Equity Tier 1 instruments with fewer or no voting rights issued by institutions referred to in Article 27 of Regulation (EU) No 575/2013 [‘non-joint stock companies’], where distribution is a multiple of the distribution on the voting instruments and that multiple distribution is set contractually or statutorily, distributions shall be deemed not to be preferential if all of the following conditions are met:
  - (a) The dividend multiple is a multiple of the distribution paid on the voting instruments and not a predetermined fixed amount;
  - (b) The dividend multiple is set contractually or under the statutes of the institution;
  - (c) The dividend multiple is not revisable;
  - (d) The same dividend multiple applies to all instruments with a dividend multiple;
  - (e) The amount of the distribution on one instrument with a dividend multiple does not represent more than 125% of the amount of the distribution on one voting Common Equity Tier 1 instrument.

In formulaic form this would be expressed as:

$$l \leq 1.25 \times k$$

where:

$k$  shall represent the amount of the distribution on one instrument without a dividend multiple;

$l$  shall represent the amount of the distribution on one instrument with a dividend multiple;

- (f) The total amount of the distributions paid on all Common Equity Tier 1 instruments during a one year period does not exceed 105% of the amount that would have been paid if instruments with fewer or no voting rights received the same distributions as voting instruments.

In formulaic form this would be expressed as:

$$kX + lY \leq (1.05) \times k \times (X + Y)$$

where:

*k* shall represent the amount of the distribution on one instrument without a dividend multiple;

*l* shall represent the amount of the distribution on one instrument with a dividend multiple;

*X* shall represent the number of voting instruments;

*Y* shall represent the number of non-voting instruments;

applied on a one- year basis.

3. Where the condition of paragraph 2(f) is not met, only the amount of the instruments with a dividend multiple that exceed the threshold defined therein shall be disqualified from Common Equity Tier 1.
4. Where any of the other conditions of paragraph 2 are not met, all outstanding instruments with a dividend multiple shall be disqualified from Common Equity Tier 1 capital.
5. For the purpose of paragraph 2, where the distributions of Common Equity Tier 1 instruments are expressed, for the voting or the non-voting instruments or for both, with reference to the purchase price at issuance of the instrument, the formulas shall be adapted as follows, for the instrument or instruments that are expressed with reference to the purchase price at issuance:
  - (a) *l* shall represent the amount of the distribution on one instrument without a dividend multiple divided by the purchase price at issuance of that instrument;
  - (b) *k* shall represent the amount of the distribution on one instrument with a dividend multiple divided by the purchase price at issuance of that instrument.
6. For Common Equity Tier 1 instruments with fewer or no voting rights issued by institutions referred to in Article 27 of Regulation (EU) No 575/2013 [non-joint stock companies], where the distribution is not a multiple of the distribution on the voting instruments, distributions shall be deemed not to be preferential where either of the conditions referred to in paragraph 7 and all of the conditions referred to in paragraph 8 are met.
7. For the purposes of paragraph 6, either of the following conditions shall apply:

- (a) The instrument with fewer or no voting rights can only be subscribed and held by the holders of voting instruments and the number of the voting rights of any single holder is limited;
  - (b) The distributions on the voting instruments issued by the institutions are subject to a cap set out under applicable national law.
8. For the purposes of paragraph 6 all of the following conditions shall apply:
- (a) The institution demonstrates that the average of the distributions on voting instruments during the preceding five years, is low in relation to other comparable instruments;
  - (b) The institution demonstrates that the payout ratio is low, where a payout ratio is calculated in accordance with Article 7d. A payout ratio under 30% shall be deemed to be low.
9. For the purposes of point (a) of paragraph 7, the voting rights of any single holder shall be deemed to be limited in the following cases:
- (a) where each holder only receives one voting right irrespective of the number of voting instruments for any holder;
  - (b) where the number of voting rights is capped irrespective of the number of number of voting instruments held by any holder;
  - (c) where the number of voting instruments any holder may hold is limited under the statutes of the institution or under applicable national law.
10. For the purposes of this Article, the one year period shall be deemed to end on the date of the last financial statements of the institution.
11. Institutions shall assess the compliance with the conditions in paragraph 7 and 8, and inform the competent authority on the result of their assessment, at least in the following situations:
- (a) Every time a decision on the amount of distributions on Common Equity Tier 1 instruments is taken;
  - (b) Every time a new class of Common Equity Tier 1 instruments with fewer or no voting rights is issued.
12. Where the condition of point (b) of paragraph 8 is not met, only the amount of the non-voting instruments for which distributions exceed the threshold defined therein shall be deemed to entail preferential distributions.
13. Where the condition of point (a) of paragraph 8 is not met, the distributions on all outstanding non-voting instruments shall be deemed to be preferential unless they meet the conditions of paragraph 2.

14. Where neither of the conditions of paragraph 7 are met, the distributions on all outstanding non-voting instruments shall be deemed to be preferential unless they meet the conditions of paragraph 2.
15. The requirement referred to in the first part of point (a) of paragraph 7, or the requirement referred to in point (b) of paragraph 8, or both requirements shall not apply where both of the following conditions are met:
  - (a) an institution is in breach of or, due *inter alia* to a rapidly deteriorating financial condition, is likely in the near future to be in breach of any of the requirements of Regulation (EU) 575/2013;
  - (b) the competent authority has required the institution to urgently increase its Common Equity Tier 1 capital within a specified period and has assessed that the institution will not be able to rectify or avoid the breach referred to in point (a) within that specified period, where the relevant requirements among the above-mentioned are not waived.

#### *Article 7d*

#### *Calculation of the payout ratio for the purposes of point (b) of Article 7c(8)*

1. For the purposes of point (b) of paragraph 8 of Article 7c, institutions shall calculate the payout ratio in one of the following ways, to be applied in a consistent manner over time:
  - (a) As the sum of distributions related to total Common Equity Tier 1 instruments over the previous five year periods, divided by the sum of profits related to the last five year periods;
  - (b) for the period from the date of application of this Regulation until 31 December 2017 only:
    - (i) In 2014, as the sum of distributions related to total Common Equity Tier 1 instruments over the previous one year period, divided by the sum of profits related to the last one year period;
    - (ii) In 2015, as the sum of distributions related to total Common Equity Tier 1 instruments over the previous two year periods, divided by the sum of profits related to the last two year periods;
    - (iii) In 2016, as the sum of distributions related to total Common Equity Tier 1 instruments over the previous three year periods, divided by the sum of profits related to the last three year periods;

- (iv) In 2017, as the sum of distributions related to total Common Equity Tier 1 instruments over the previous four year periods, divided by the sum of profits related to the last four year periods.

2. For the purposes of paragraph 1, profits shall mean the amount reported in row 010 of sheet 3 of Annex III, or, where applicable, the amount reported in row 010 of sheet 3 of Annex IV of Regulation xx/xxx [*Draft Implementing Technical Standards on supervisory reporting - EBA-ITS-2013-02*] with regard to supervisory reporting of institutions according to regulation (EU) No 575/2013.

#### *Article 7e*

##### *On the meaning of preferential distributions regarding the order of distribution payments*

For the purposes of Article 28 of Regulation (EU) No 575/2013, a distribution on a Common Equity Tier 1 instrument shall be deemed to be preferential relative to other Common Equity Tier 1 instruments and regarding the order of distribution payments where at least one of the following conditions is met:

- (a) distributions are decided at different times;
- (b) distributions are paid at different times;
- (c) there is an obligation on the issuer to pay the distributions on one type of Common Equity Tier 1 instruments before paying the distributions on another type of Common Equity Tier 1 instruments;
- (d) a distribution is paid on some Common Equity Tier 1 instruments but not on others, unless the condition of point (a) of paragraph 7 of Article 7c is met.'

#### *Article 2*

##### **Entry into force**

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

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

*For the Commission*  
*The President*

*[For the Commission  
On behalf of the President*

*[Position]*

## 4. Accompanying documents

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### 4.1 Cost-benefit analysis / impact assessment

#### Introduction

As per Article 10(1) of the EBA Regulation (Regulation (EU) No 1093/2010 of the European Parliament and of the Council), when any draft technical standards/guidelines developed by the EBA are submitted to the Commission for adoption, there should be an analysis of 'the potential related costs and benefits' that would arise from the implementation of the technical standards. This should provide the reader with an overview of the findings as to identification of the problem to be addressed by the technical standards, the options considered to address the problem, and the potential impacts of implementing the options examined.

#### Problem definition and objectives

##### Issues identified by the European Commission regarding own funds

As documented in the impact assessment accompanying the CRR, the EU banking system entered the financial crisis holding capital resources of insufficient quantity and quality. In particular, the European Commission identified the following **problem drivers**<sup>6</sup> which are relevant to the issues addressed in the current RTS.

- Certain capital instruments did not fulfil loss absorption, permanence and flexibility of payments criteria.
- Regulatory adjustments were not being applied to the relevant layer of an institution's regulatory capital.
- Regulatory adjustments were not harmonised among Member States.

Problem drivers (i) to (iii) are covered in the CRR in Part Two, Title One (Own Funds), and Part Ten, Title One (Transitional Provisions). To address these problem drivers, the Commission defined the following **operational objectives**:

- permanence and flexibility of payments of going-concern capital instruments to enhance loss absorption;

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<sup>6</sup> Cf. the impact assessment accompanying the CRR:  
[http://ec.europa.eu/internal\\_market/bank/docs/regcapital/CRD4\\_reform/IA\\_regulation\\_en.pdf](http://ec.europa.eu/internal_market/bank/docs/regcapital/CRD4_reform/IA_regulation_en.pdf)

- appropriate application of regulatory adjustments from the relevant layers of capital to enhance loss absorption of regulatory capital;
- development of a harmonised set of provisions for the definition of capital.

The general approach followed in the CRR to realise those objectives, consists of modifying both eligibility criteria and regulatory adjustments as adopted by the Basel Committee while allowing for adjustments that are necessary to take due account of the specific situation in the European Union<sup>7</sup>.

### Issues addressed by the RTS and objectives

The draft RTS address the problem of insufficient loss absorption capacity and permanence and flexibility of payments of CET1 from two different angles.

- a) The disproportionate drag on capital potentially stemming from multiple dividend distribution rules.
- b) The preferential nature of some forms of dividend distribution.

The CRR has mandated the EBA to define whether and when multiple distributions constitute a disproportionate drag on institutions' CET1 capital.

The CRR has also mandated the EBA to define the meaning of preferential distributions.

### Baseline current regulatory framework and market practices

National Supervisory Authorities (NSAs) were asked to provide evidence of the existence of both differentiated distributions and multiple dividend distributions in their jurisdictions. From the feedback provided by 21 NSAs<sup>8</sup> it was clear that differentiated distributions exist in seven jurisdictions, while multiple distributions or dividends exist in four jurisdictions.

Two of the NSAs that do not currently report the existence of differentiated or multiple dividend distributions expect issuances of these instruments once the CRR comes into force.

### Options considered

The disproportionately high drag on capital, as a result of potentially excessive distribution of multiple dividends, is likely to undermine the capitalisation of institutions and, hence, their loss absorbency capacity.

<sup>7</sup> See policy option 3.5 in the 'Eligibility of capital instruments and application of regulatory adjustments' section of the impact assessment accompanying the CRR.

<sup>8</sup> The 21 jurisdictions covered are: AT, BE, BG, CZ, DE, DK, EL, ES, FI, FR, HU, IE, IT, NL, NO, PL, PT, RO, SE, SL and UK.

The EBA initially assumed that both joint stock and non-joint stock companies were included in the mandate for multiple distributions. However, consultation with the Commission services revealed that only joint stock companies are covered by the mandate for multiple distributions, whereas both types of companies are covered by the mandate for preferential distributions.

### Multiple distributions for joint stock companies

*Proposal 1: The draft RTS propose a double limitation on the distribution of multiple dividends, where applicable. The EBA, before concluding that this double limitation is the most appropriate solution, has examined market practices.*

The dual limitation is expressed as follows:

RULE 1 establishes a cap equal to 125% on the ratio of the notional amount of multiple dividend yielding shares over the notional amount of the benchmark, non-multiple dividend yielding, non-voting shares.

The EBA has proposed this cap based on data on the maximum ratio that is being observed in one of the few jurisdictions where multiple dividend rules are applied. In addition, the proposed ratio of 125% is compatible with academic papers' estimations on the dividend premium that is paid out to non-voting shares. Instruments with diminished voting rights are the only ones that, in accordance with the CRR, can be subject to differentiated dividend distribution.

RULE 2 establishes a cap equal to 105% on the ratio of the aggregate nominal amount of dividends distributed when the multiple dividend distribution is used over the aggregate nominal amount of dividends that would have been distributed to both multiple and non-multiple dividend shares had the multiple dividend shares been transformed into non-multiple dividend yielding, non-voting shares. Otherwise stated, the total distribution of non-multiple and multiple dividends cannot exceed by more than 5% the total distribution that would have been granted to the same total number of instruments in the absence of a multiple dividend distribution.

### Different rules for joint stock and non-joint stock companies regarding preferential distributions

*Proposal 2: The RTS introduce different limits on the issuance of non-voting shares on joint stock companies versus non-joint stock companies.*

For joint stock companies, ordinary voting instruments are permanent, characterised by fully flexible dividend distribution and, where needed, can be made more attractive to new investors by, for instance, decreasing the issue price and increasing dilution without needing to increase the dividend payout. One of the main reasons for joint stock companies to issue non-voting shares is to protect the voting rights of existing shareholders. Although the issuance of non-voting shares is a justifiable practice with strategic benefits to the institutions, it has to be weighed, from a prudential perspective, against the risk (i.e. the cost) of disproportionate drag on capital that may

arise from multiple dividend rules associated with non-voting shares. To this end, the RTS propose stricter conditions around the issuance of non-voting shares with multiple dividends on joint stock institutions.

For non-joint stock institutions, and in particular cooperatives, ordinary voting shares are generally issued at par and the return/yield to the shareholders is generally limited to the dividend payment, i.e. there is no access to reserve in liquidation, redemption is at par and there is no dilution effect when new shares are issued and no possibility to sell. In addition, the dividend payment on voting shares may be subject to a cap. As a result, the ability of cooperative institutions to raise capital through the issue of voting shares is more limited than the same ability of joint stock institutions.

In addition, many non-joint stock companies apply the principle of 'one person, one vote'. When the non-voting shares may be subscribed to only by holders of voting shares, issuing non-voting shares will not influence the level of voting rights. When shareholders have the flexibility to decide on the dividend to be paid on voting and non-voting shares, the situation (in terms of dividend payment) where the shareholder subscribes to one voting share and several non-voting shares will be the same as the situation where the shareholder subscribes to several voting shares.

In order to avoid a disproportionate impact on the capability of cooperatives to issue capital instruments, when needed, the draft RTS propose a different regulatory treatment for cooperatives.

## Differentiated treatment for different models of non-joint stock companies

### a. Options examined

*Proposal 3: The RTS propose to treat non-joint stock companies differently in the following cases:*

- *when non-voting instruments may be purchased only by holders of the voting instruments (case A);*
- *when a cap on holding voting instruments exists (case B).*

Case A: The draft RTS propose that no regulatory limit is necessary. In this case, all non-voting instrument holders also hold voting instruments. Holders of non-voting instruments by definition all have a voting right, since they also own a voting instrument. The notion of deprivation of a voting right that should be compensated does not apply in this case. In practice, it is nevertheless still necessary to assess the overall level of dividend distributions. Therefore, the institution must demonstrate to the competent authority that both the distribution on voting instruments and the payout ratio for CET1 instruments are low in order for the limit not to apply.

Case B: When the voting instrument is capped under applicable national law, the assumption is that the distributions on the voting instrument will be low and therefore the limit suggested for joint stock companies would not be appropriate.

When the institution is either in case A or in case B, the limit will not be applied, provided that the institution demonstrates to the competent authority that both the distribution on voting instruments and the payout ratio for CET1 instruments are low. To ensure that the payout ratio is low, the EBA has considered the implementation of a cap. The options considered for implementing the cap are the following:

▪ *Option 1: point-in-time caps*

- sub-option (a): a cap of 30% on the annual payout ratio; and
- sub-option (b): any other cap, greater than 30%, on the annual payout ratio.

The rationale for considering ‘point-in-time’ options comprises a requirement that would not allow any annual payout ratio to exceed a certain threshold. There are only two EU countries where a minority of non-joint stock companies distributed dividends that currently breach the payout ratio of 30% (see the empirical evidence on payout ratio below). Thus, the threshold of 30% would be considered appropriate should the ‘point-in-time’ option be chosen.

▪ *Option 2: average-moving-window caps*

- a cap of 30% on the five-year average payout ratio.

Despite the fact that the ‘point-in-time’ option provides a straightforward approach, it has been observed that, on some occasions in a few jurisdictions, the payout ratio fluctuates significantly over time. This may result in breaches of the 30% cap should the ‘point-in-time’ option be followed. To allow for a more flexible regime, where the payout ratios could be adjusted over a longer periods, the cap on the five-year average payout ratio was also considered. The historical evidence in one jurisdiction showed that there are non-joint stock companies which have exceeded even the five-year average payout ratio. However, the increase of the cap to levels above the 30% cap would make the proposed regime excessively relaxed in the future (once the cap is applied), without allowing more companies to comply with the proposed cap at present (only one company would benefit from the increase of the cap to 40%). Thus, the option of calculating the cap as a function of the five-year average payout ratio is preferable to the ‘point-in-time’ option.

▪ *Option 3: a combination of ‘point-in-time’ and ‘average-moving-window’ caps*

Given that it is desirable that the proposed cap be applied in the future, without considering the past payout ratios, the companies could adjust their payout ratios more effectively in the future. However, if the five-year average is to be calculated from the first year of implementation then, unavoidably, the calculation would include five years of past observations, making the calculation heavily dependent on the past payout ratios. To avoid this, it has been proposed that the five-year average be built up gradually without taking into account the past observations. This would lead to a 'point-in-time' cap of 30% after the first year of the implementation, to a '2-year average' cap of 30% after two years of implementation and eventually to a '5-year average' cap after five years of implementation.

Of all these options, option 3 was considered the most preferable.

#### **b. Empirical evidence supporting the preferred option**

Two Member States provided evidence to support the policy options considered for the cap on payout ratios; one Member State provided data on annual payout ratios and one Member State on five-year annual ratios.

##### *Annual payout ratios*

In 2012, only 6.6% of cooperative banks had annual payout ratios above the 30% cap. The total value of risk-weighted assets (RWA) of these banks represented approximately 10.7% of the country's RWA. The ratio of banks breaching the 30% cap is small at national level and it is negligible at EU level. The increase of the cap from 30% to 40% would have resulted in 6.1% of cooperative banks being above the cap, representing 10.6% of the country's RWA. Thus the change in the cap from 30% to 40% would not have any impact on enabling more banks to comply with the proposed framework.

##### *Five-year payout ratios*

Another Member State provided the impact assessment team with a summary table indicating the number of banks that have payout ratios above the five-year average payout ratio of 30%. The sample comprises 10 non-joint stock banks operating with differentiated distributions over three overlapping five-year periods, i.e. 2006-2010, 2007-2011 and 2008-2012.

The evidence showed that:

- For 2008-2012, all 10 non-joint stock (**100%**) companies exceeded the proposed cap. The (simple) average of the payout ratio for this period was **65%**.
- For 2007-2011, **80%** of the non-joint stock companies in the sample exceeded the threshold with an average payout ratio of **48%**.

- For 2006-2010, **60%** of the non-joint stock companies in the sample exceeded the threshold with an average distribution of **36%**.

### **Economic impact of the proposals**

The impact of the proposals is estimated to be negligible. On the operational front, the new proposals are not expected to impose any additional cost related to the implementation of the proposed rules. The impact of the double limitation on multiple dividend distributions and of the cap on payout ratios on the capital ratios is expected to be negligible and to be noted only in certain countries and banks. At EU level, the economic impact arising from the need to restore capital adequacy is estimated to be close to zero.

## Summary of responses to the consultation and the EBA’s analysis

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
<b>Note:</b>	<i>articles of the CRR are referenced as ‘Article xx of the CRR’ whereas articles of the draft RTS are referenced only as ‘Article xx’. Please also note that article references are to the numbers of the articles as in the CP.</i>		
	One respondent had no comments on the CP.		
	One respondent suggested clarifying the link between (d) and (e) of Article 7c and suggested a drafting to that effect.		
	Four respondents expressed concerns about a possible increase of distributions on voting instruments and thus a disproportionate drag on capital as a consequence of the implementation of the RTS as distributions on voting instruments need to be higher to fulfil market expectations about non-voting instrument distribution.		
	One respondent was uncertain as to whether the proposed rules would allow non-joint stock companies to operate with more than two classes of CET1 capital instruments where distributions within each class are identical, but each class receives different distributions.	Non-joint stock could operate with more than two classes of CET1 instruments if the conditions in paragraph 5 and 6 of Article 7c of the final draft RTS are met.	
	One respondent suggested that it was unclear whether paragraph 5 to 10 of Article 7b would apply to joint stock companies as well.	The EBA considered it clear that those paragraphs only apply to non-joint stock companies but the final drafting further clarifies that this is the case.	

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	<p>One respondent suggested that the principle of substance over form should prevail in the case where the voting instrument generates zero distributions and where the ownership of the instrument qualifying for distributions is limited to members only. Those instruments should be entirely excluded from the scope of the RTS.</p>	<p>This type of situation has been taken into consideration by the EBA. Those instruments generally already benefit from special treatment under the RTS, even if they haven't been excluded.</p>	
	<p>One respondent considered that non-joint stock companies are at a disadvantage relative to joint stock companies and especially relative to listed joint stock companies. The latter may be less affected and may find it easier to issue new capital compared to cooperative banks.</p>	<p>The EBA has taken into account special characteristics of non-joint stock companies when drafting the RTS.</p>	
	<p>One respondent considered that there should be a specific exemption treatment for internal instruments to address instruments that are only held within a cooperative group, and proposed to add an article to that effect.</p>	<p>This is already covered by the CRR itself. A recital has been added. Under Article 10 of the CRR, competent authorities may, in accordance with national law, waive the application or the requirements specified in parts Two to Eight of the CRR to credit institutions affiliated to a central body, or to the central body itself. The treatment of intragroup instruments under these RTS could be in the scope of these waivers. Similarly, the calculation of the payout ratio for these RTS may be on a consolidated basis if this is deemed by competent authorities to be within the scope of the waiver in</p>	<p>Recital added.</p>

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
		Article 10 of the CRR.	
	Two respondents suggested various drafting suggestions.	Those drafting suggestions have been taken into consideration inasmuch as they were still relevant after the more substantial changes that have been applied to the paper.	
<b>Need for definitions</b>	<p>One respondent urged the EBA to define terms ‘recapitalisation’ and ‘other emergency situations’ or to explicitly include supervisory approval in Article 7b(10).</p> <p>Another respondent suggested that ‘other emergency situations’ should be understood with a broad meaning to include situations in which banks capitalise themselves to comply with CRD IV requirements.</p>		
<b>Responses to questions in Consultation Paper EBA/CP/2013/43</b>			
Q1: How do you assess the suggested limits of 125% under Article 7b(1)(a) and 105% under Article 7b(1)(b) for joint stock companies (or non-joint stock companies, where applicable)?	One respondent agreed with the limits. Other respondents developed the following points:		
	Several respondents were of the opinion that while the (CP) delivers criteria to determine when multiple distributions constitute a drag on own funds, it does not explain whether they do constitute a drag on own funds. More specifically they do not believe that it explains	The EBA believes its reasoning is explained in the background information section of the final RTS. The limits restrict the drag on capital for any single own funds instrument and for the CET1 instruments overall.	No change.

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	<p>in enough detail why instruments not complying with the two limits suggested would constitute a drag on own funds.</p>		
<b>Limits are excessively restrictive</b>	<p>Several respondents deemed the proposed limits to be overly restrictive and believed that the EBA had not given any reasoning why those limits are chosen. The respondents suggested that larger distributions than those permitted under the CP would still not constitute a disproportionate drag on capital.</p> <p>The focus of those respondents varied, with some considering that only the condition laid down in Article 7b(1)(b) should be retained – and the percentage changed from 105% to 110%.</p> <p>Others suggested that the principle of the limit in Article 7b(1)(a) could be retained but that the 125% coefficient should be replaced by a higher one.</p> <p>Others considered that both limits were too restrictive.</p>	<p>The EBA based the limits on existing instruments. Respondents did not provide other benchmarks. The EBA considers the limits to be adequate and no additional flexibility seems needed.</p>	No change.
<b>Flexibility in the application</b>	<p>Some respondents urged the EBA to consider a certain measure of flexibility in the application of the limits. One suggestion was that the EBA should consider the use of the proposed quantitative limits only when the</p>	<p>The EBA based the limits on existing instruments. Respondents did not provide other benchmarks. The EBA considers the limits to be adequate and no additional flexibility seems needed.</p>	

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	<p>distributions are above a certain threshold.</p> <p>Others suggested removing hard limits and applying the rules on the disproportionate drag on own funds on the basis of the proportionality principle.</p>		
<b>Calculation base</b>	<p>Some respondents were unclear on which basis the calculation of the thresholds (Article 7b(1)(a),(b)) for multiple dividends should be carried out: on the nominal amount or on the number of shares. They understood that the nominal amount should be taken into consideration, but suggested the drafting should be clarified. In their view, the proposed calculation method focusing on the number of instruments leads to 'overwhelming outcomes'. Clarification is needed as to whether the nominal value or the purchase price at issuance is the basis for calculation, as the number of voting and non-voting instruments would differ because of different nominal values or purchase prices at issuance.</p>	<p>The EBA discussed the calculation basis at a technical level. The proposal by respondents solves some problems but creates others. The EBA has changed the calculation basis in a way that is deemed to address all those problems.</p>	<p>Change in the formulas.</p>
<p>Q2: How do you assess the proposal to disqualify all dividend multiple instruments when the 105% limit is breached, for joint stock companies or non-joint stock companies,</p>	<p>Two respondents agreed with the proposal. One respondent added that they would have no examples where this limit would be breached without the institution being able to prevent it.</p>		

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
<p>where applicable? In which circumstances would this limit not work or be breached without the institution being able to prevent this breach?</p>	<p>Three respondents considered that there is no reason to disqualify from CET1 all outstanding CET1 instruments with a dividend multiple if the conditions of paragraphs 1 and 2 of Article 7b are not met.</p> <p>The proposal to disqualify all dividend instruments when the limit is breached is unreasonably severe. Examined in more detail, it seems that the punitive character of this proposal actually undermines the aim of preventing a disproportionate drag on capital.</p> <p>It is therefore suggested that only the amount of instruments correspondingly exceeding the determined percentage should be disqualified from CET1. In addition, the disqualified instrument could be included as eligible AT1.</p>	<p>The EBA took into account the suggestion by respondents.</p>	<p>Only the amount exceeding the 105% limit is to be disqualified.</p>
	<p>Two respondents suggested that some legal impediments might emerge as a result of national company law, e.g. if the Annual General Meeting decided to pay distributions on non-voting instruments but not on voting</p>	<p>In this situation the non-voting instruments would be considered to have preferential distributions unless Article 7c (e) applies.</p>	<p>No change</p>

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	instruments.	This issue is beyond the scope of the RTS. This will be further investigated by the EBA in co-operation with the Commission (Level 1 issue).	
	Furthermore, there could also be the case that provisions on non-voting instruments are already changed with the aim of reaching full CRR eligibility. If there are higher multiples than proposed within the EBA RTS these instruments would be completely disqualified in accordance with this draft and also not fall under the transitional provisions of the CRR. They proposed that these instruments have to fall within the transitional provisions in accordance with Article 484 of the CRR.		
	Those respondents urged the EBA to consider that many cooperatives distribute dividends almost entirely on the non-voting shares held by members who are already subscribers of voting shares. While this condition is necessary to qualify for the alternative approach (Article 7b(5)(a)), it is not sufficient. In cases where this condition is fulfilled and the distributions are performed on non-voting instruments but where the quantitative limits are still applicable, the 105% threshold would be breached naturally: the calculation of percentage distributions of non-voting shares on voting instruments would in fact lead to	Under the draft CP, this situation could only arise if the distributions and payout ratio were too high. This means that the institution would always be able to avoid a situation like this by distributing profits more conservatively.	No change

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	misleading comparisons.		
Q3: Is the application of the different tests clear? How do you assess the approach retained for non-joint stock companies?	<p>Most respondents did not comment on question 3. One respondent agreed that the application of the different tests was clear. One respondent welcomed the differentiation between joint stock and non-joint stock.</p>		
	<p>Two respondents considered the regulatory content of the tests to be clear but considered them difficult to apply to institutions under public law.</p> <p>They suggested that test 2 and the last three of the conditions named cannot be applied to institutions under public law. Usually, voting rights do not exist there, so it is not possible to perform the requested proportionality assessment between voting and non-voting instruments.</p> <p>Moreover, they cannot understand why the distributions on voting instruments have to be low in proportion to comparable instruments. They believe that the standard does not provide a reason for this. Due to the lack of voting instruments, this condition also cannot be met by institutions organised under public law.</p>	<p>If an institution under public law has only one CET1 instrument, the RTS do not apply.</p> <p>Since all CET1 instruments have the same voting rights, the distributions should be equal.</p>	
	Two respondents considered that it was	The relevant provisions have been clarified in	Changes in the

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	<p>unclear whether the decision tree would be fully reflected in the text of the RTS.</p> <p>While the tests identify three distinct cases for cooperatives to be eligible for the alternative approach (a multiple that is set contractually or in the statutes of the institution; the ownership of non-voting instruments limited to holders of voting instruments and the principle of ‘one person, one vote’; the presence of a legal cap on voting instruments), only two paragraphs specify these provisions: Article 7b(5) and (6). Moreover, the alternative scenarios under Article 7b(5) and (6) should be easier to distinguish.</p> <p>Article 7b(5)(e) should be positively formulated.</p> <p>Article 7b(5)(e) stipulates that the multiple of the distribution should not be set contractually or in the statutes of the institution, which does not necessarily make clear under what circumstances a multiple would be allowed. At first sight, it seems that the way in which a multiple is set may be decisive. We suggest that positive wording is found or simply that ‘or not otherwise predetermined’ is added. Otherwise, the question could arise as to how a distribution</p>	the legal text.	Article.

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	<p>should be set.</p>		
	<p>One respondent had the following suggestions on substance:</p> <p>Article 7b(5)(b) does not list all possible cases. In accordance with Article 7b(5)(b), limitations on voting rights are addressed as an issue of the ‘one person, one vote’ principle or as a limitation on the number of voting rights any holder may hold. We see several cases not reflected. There are cases, indeed, where there is no limit to the ability to hold voting shares but the voting right itself is limited (for example, five voting instruments may represent one voting right). Alternative wording should be considered.</p> <p>Article 7b(5)(c) – Guidance on low distributions.</p> <p>The draft RTS do not provide guidance in assessing how distributions shall be deemed to be low (Article 7b(5)(c)) in relation to other comparable instruments. Recital 7 of the draft RTS suggests that the distributions on CET1 ‘instruments issued by comparable institutions, notably when they are</p>	<p>Agreed, the relevant provisions have been generalised.</p> <p>Agreed. EBA deleted the reference in the recital. It is up to institutions to demonstrate to their competent authorities that the reference used is adequate.</p>	

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	<p>established in the same Member State, may be taken into account, in particular regarding the distributions on those instruments when issued by institutions qualifying as a cooperative society, savings institution, mutual or similar' or alternatively that 'the level of distributions on subordinated instruments included in Tier 2 issued by the institution could be used as a benchmark as those instruments are senior to CET1 instruments'. However, in our view, this approach does not take into account market conditions and may foster a competition towards lower distributions among cooperative banks.</p>		
	<p>Article 7b(5)(e)</p> <p>We understand that the EBA aims to avoid a direct relationship between the distributions on voting instruments and the multiple distributions on instruments with fewer or no voting rights. However, it is common practice for cooperatives to set the multiple for dividends contractually or in the statutes of the institution, and establishing the value of multiple distributions each year during the general assembly may turn out to be burdensome.</p>	<p>If that is the case, then the limits devised for joint stock companies should apply.</p>	

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	<p>In addition, the provision according to which the ‘multiple of the distribution on the voting instrument’ should not be ‘set contractually or in the statutes of the institution’ (Article 7b(5)(e)) would create difficulties for these companies which already envisage these features in their statutes.</p> <p>Article 7b(6)</p> <p>In some jurisdictions it is not common that legal caps are set externally by applicable national law. However, it is possible to have a cap which is normally set contractually or in the statutes of the institution. Article 29(3) of the CRR does not differentiate between legal and statutory caps. In these cases we believe that statutory or contractual caps should be acknowledged. Capped distributions on voting instruments are only possible in some Member States. However, even when the reference for the multiple dividend instruments is represented by capped distributions on voting instruments (Article 7b(6)), the institutions would have to comply with further criteria and demonstrate that distributions are low in relation to comparable instruments and in terms of the payout ratio. We believe that this provision is</p>	<p>Those cases were considered and the reference was restricted to applicable national law on purpose. Caps in the statutes can be changed easily and therefore are not so restrictive as to make an exception necessary.</p>	

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	<p>redundant.</p> <p>Article 7b(9),(10)</p> <p>Article 7b(9) introduces assessment and information requirements when distributions are decided. This would result in a huge burden for both banks and supervisors. Moreover, Article 7b(10) introduces some exemptions in recapitalisation cases. These cases should also include other capitalisation events. Especially under the current situation, where banks have to capitalise themselves to comply with CRD IV buffer requirements.</p> <p>All in all, we believe that the approach retained for non-joint stock companies is too strict and burdensome and foresees many criteria that would actually restrict its applicability.</p>	<p>Under the CRD, transitional arrangements already exist for buffers. It is unclear why additional specific provisions for buffers are needed in the RTS. Restoration plans in the case of a breach will have to be discussed with competent authorities. Emergency situations cover cases where capital is urgently needed, which is already a large scope of application.</p> <p>The EBA has clarified the provisions relating to the emergency recapitalisations.</p>	
<p>Q4: How do you assess the applicability of the conditions in paragraph 2?</p>	<p>One respondent agreed about the applicability of the conditions.</p> <p>Two respondents suggested that a corridor between 100% and limits on multiples up to 200% should be possible because of different market expectations at the date of issuance, .</p>		

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
Q5: Is the chosen approach applicable to all instruments that may be issued by non-joint stock institutions?	Two respondents insisted the approach was not applicable to any instruments issued by mutuals, cooperative societies, savings institutions or similar institutions because those instruments should be excluded from the scope of the RTS.	The provisions relative to preferential distributions are applicable to non-joint stock institutions.	
Q6: How do you assess the proposed levels of 30% for the payout ratio in paragraph 5(d) of Article 7b?	Two respondents argued that the reference of the 30% limit for the payout ratio is not clear, in particular whether it should be intended as an average payout on all instrument classes, or as global payments on all instruments. It should be intended as a global limit on all instruments, and the provision should be drafted more clearly.	Disagree. The definition given for the payout ratio in the RTS is clear.	
	Several respondents considered the 30% threshold for payouts to be too conservative. They claimed that for non-joint stock, there is no need to retain 70% of their earnings, especially considering that cooperatives already retain a large part of their earnings before allowing distributions. Moreover, this could turn into a punitive measure in years of low profits, while this limit is not envisaged for joint stock companies, even if over a five-year period the effect of declining profits should be amortised. The threshold should be higher.	It has been clarified that the consequences of a breach of this limit are only to disqualify the excess and not the entirety of the non-voting instruments. The instruments disqualified can be reinstated in CET1 in the short term if the payout ratio rule is complied with. It shall be noted that the calculation of the payout ratio takes into account the last five years (but with a deferred applicability) in order not to penalise banks on the basis of one single year of high payouts.	
	Moreover, a payout ratio level of 30% is also		

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	<p>very low when compared to distribution policies of comparable joint stock companies. Finally, if distributions are limited without considering the solvency profile of institutions, highly capitalised banks will become overly capitalised, while, on the other hand, distribution limitations do not give room for capitalisation in banks in need of it.</p> <p>Two respondents suggested that average payout ratios were significantly higher than 30% in non-joint stock companies, at least in one jurisdiction.</p>		
	<p>According to two respondents, it should also be kept in mind that, usually, the national generally accepted accounting principles (GAAP) are used to define the basis for distributions. The focus on profits seems to be too narrow as due to national definitions of profits these items could differ within the income statement. In some jurisdictions profits often only reflect the intended distributions as parts of the year earnings are booked to specific reserves. The definition of the payout ratio in accordance with to Article 7b(7) should instead be calculated on the basis of distributable items in accordance with Article 4(1)(128) of the CRR.</p>	<p>A calculation on the basis of distributable items would be completely different as it would include reserves. The rule would be substantially changed.</p> <p>Instead, the calculation should stay based on profits but those will be defined more precisely for the RTS by referring to the FINREP framework.</p>	
	<p>Two respondents saw a problem with using</p>	<p>Agreed. The comment has been taken into</p>	<p>New Article 7e.</p>

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	<p>the historical average to calculate the payout ratio and suggested that transitional provisions were needed.</p> <p>It was suggested that the five-year average rule be implemented gradually: in 2014, the payout ratio would be calculated on the 2013 profits; in 2015, it would be calculated on the two preceding years; and this would increase each year until five years was reached in 2018.</p>	account.	
<p>Q7: Please provide data on the distributions as well as possible references to be used as benchmarks for the distributions on voting instruments issued by non-joint stock companies. How would you assess that distributions on voting instruments issued by non-joint stock companies are low? Can you suggest a methodology?</p>	<p>One respondent [LP] provided figures regarding Danish non-joint companies. Notably, those figures showed that over the 2008-2012 period, average payouts were 65%. In 2007-2011 and 2006-2010, the figures were 48% and 36% respectively.</p>	The EBA has taken these data into consideration.	