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Commission Delegated Regulation (EU) 2016/1450 of 23 May 2016 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the criteria relating to the methodology for setting the minimum requirement for own funds and eligible liabilities (Text with EEA relevance)

COMMISSION DELEGATED REGULATION (EU) 2016/1450

of 23 May 2016

supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the criteria relating to the methodology for setting the minimum requirement for own funds and eligible liabilities

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

Having regard to Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms[(1)], and in particular Article 45(2) thereof,

Whereas:

(1) Effective resolution can only be feasible and credible if adequate internal financial resources are available to an institution to absorb losses and for recapitalisation purposes without affecting certain liabilities, in particular those excluded from bail-in. Directive 2014/59/EU provides that institutions should meet a minimum requirement for own funds and eligible liabilities ('MREL') to avoid that institutions excessively rely on forms of funding that are excluded from bail-in, since failure to meet MREL would impact negatively institutions' loss absorption and recapitalisation capacity and, ultimately, the overall effectiveness of resolution.

(2) When determining MREL in accordance with points (a) and (b) of Article 45(6) of Directive 2014/59/EU, the resolution authority should consider the need, in case of application of the bail-in tool, to ensure that the institution is capable of absorbing an adequate amount of losses and being recapitalised by an amount sufficient to restore its Common Equity Tier 1 ratio to a level sufficient to maintain the capital requirements for authorisation and at the same time to sustain sufficient market confidence. This close relationship with supervisory decisions requires that such assessments are made by the resolution authority in close consultation with the competent authority consistently with the framework set out in Article 45(6) of Directive 2014/59/EU, and that accordingly the resolution authority should, in the framework of the obligation of the resolution authority to consult the competent authority under Article 45(6) of Directive 2014/59/EU, take account of the assessments made by the competent authority on the business

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model, funding model, and risk profile of the institution for the purposes of setting prudential requirements.

(3) In particular, the assessment of the necessary capacity to absorb losses should be closely linked to the institution's current capital requirements, and the assessment of the necessary capacity to restore capital should be closely linked to likely capital requirements after the application of the resolution strategy, unless there are clear reasons why losses in resolution should be assessed differently than in going concern. A similar assessment is necessary to ensure the MREL is sufficient to ensure resolvability of an institution when resolution tools other than bail-in are to be applied.

(4) Point (c) of Article 45(6) of Directive 2014/59/EU also requires that resolution authorities consider the possibility that certain classes of liabilities, identified in resolution plans and in the resolvability assessment, might be excluded from bail-in. Liabilities of that kind should not be relied on for purposes of meeting the MREL. Resolution authorities should also ensure that, when significant amounts of any insolvency class of liabilities are excluded from bail-in on either a mandatory or discretionary basis, that exclusion would not result in liabilities of the same or a more senior class bearing greater losses than they would in insolvency, as this would be an impediment to resolvability.

(5) Resolution authorities may require part of the MREL referred to in Article 45(1) of Directive 2014/59/EU to be met by subordinated contractual bail-in instruments, or by setting a higher minimum requirement, or by alternative measures to address impediments to resolution. If the risk of a breach of the 'no creditor worse off' safeguard is sufficiently low, no adjustment to the MREL is necessary.

(6) Certain institutions subject to Directive 2014/59/EU, in particular financial market infrastructures which are also authorised as credit institutions, have highly specialised business models and are subject to additional regulations, which should be taken into account when setting MREL.

(7) In order to ensure consistency with prudential supervision, the resolution authority's assessment of the size, business model, funding model, and risk profile of the institution should take into account outcomes of the supervisory review and evaluation process carried out by the competent authority pursuant to Article 97 of Directive 2013/36/EU of the European Parliament and of the Council[(2)] unless there are clear reasons why losses in resolution should be assessed differently than in going concern. When conducting the supervisory review and evaluation process and subject to Article 16 of Regulation (EU) No 1093/2010 of the European Parliament and of the Council[(3)], the competent authority should take into account the guidelines on common procedures and methodologies for the supervisory review and evaluation process (EBA/GL/2014/13) issued by the EBA pursuant to Article 107(3) of that Directive by making every effort to comply with those guidelines in line with Article 16(3) of Regulation (EU) No 1093/2010.

(8) Resolution plans may provide for arrangements for loss absorption and recapitalisation within group structures, including through capital instruments or eligible liabilities issued by institutions to other institutions or entities within the same group. Resolution

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authorities should set MREL consistently with those arrangements where they are integral to the institution or group's preferred resolution strategy.

(9) To ensure that resolvability does not depend on the provision of public financial support and that the Union system of resolution financing arrangements fulfils its purpose of contributing to ensuring financial stability, resolution authorities, when setting MREL, should take account of the conditions provided in Article 101(2) of Directive 2014/59/EU for use of resolution financing arrangements in ways which indirectly result in part of the losses of an institution or entity being passed on to the resolution financing arrangement.

(10) In accordance with point (f) of Article 45(6) of Directive 2014/59/EU, resolution authorities should also consider the potential adverse impact of an institution's failure on financial stability. Resolution authorities should pay particular attention to ensuring that effective resolution of a systemically important institution is not prevented by the exhaustion of its effective loss absorption and recapitalisation capacity as provided for in Article 44 of Directive 2014/59/EU. This should not, however, result in any reduction or replacement of the need to ensure sufficient loss absorption and recapitalisation capacity through write down and conversion of eligible liabilities, or imply that the resolution financing arrangement should be used for these purposes other than in accordance with the principles governing the use of the resolution financing arrangement set out in Article 44 of Directive 2014/59/EU and in any case exclusively to the extent strictly necessary.

(11) In accordance with point (e) of Article 45(6) of Directive 2014/59/EU, resolution authorities should assess the potential size of contributions to the cost of resolution from the deposit guarantee scheme by estimating the amount the deposit guarantee scheme could feasibly and credibly contribute in lieu of covered deposits, had they been included in the scope of bail in. When making this assessment, resolution authorities should ensure that they and the institution have taken all reasonable and necessary measures that are consistent with its funding model to minimise the requirement for a contribution from the deposit guarantee scheme. Should this assessment conclude that such a contribution is likely, resolution authorities may choose to set a lower MREL. Any such assumed contribution should respect the limits on such contributions set out in Directive 2014/59/EU and are therefore likely to be most relevant for institutions funded primarily by covered deposits.

(12) In order to provide institutions or entities to which resolution tools have been applied with sufficient time to reach MREL, it is appropriate to set a transitional period.

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

(14) 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:

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Article 1

Determining the amount necessary to ensure loss absorption

1 Resolution authorities shall determine the loss absorption amount which the institution or group should be capable of absorbing.

2 For the purpose of determining the loss absorption amount in accordance with this Article and of any contribution of the deposit guarantee scheme to the resolution costs pursuant to Article 6, the resolution authority shall, consistently with Article 45(6) of Directive 2014/59/EU, request from the competent authority a summary of the capital requirements currently applicable to an institution or group, and in particular the following:

a own funds requirements pursuant to Articles 92 and 458 of Regulation (EU) No 575/2013 of the European Parliament and of the Council[(4)], which include:

(i) CET1 capital ratio of 4,5 % of the total risk exposure amount;

(ii) a Tier 1 capital ratio of 6 % of the total risk exposure amount;

(iii) a total capital ratio of 8 % of the total risk exposure amount;

b any requirement to hold additional own funds in excess of these requirements, in particular pursuant to point (a) of Article 104(1), of Directive 2013/36/EU;

c combined buffer requirements as defined in Article 128(6) of Directive 2013/36/EU;

d the Basel I floor according to Article 500 of Regulation (EU) No 575/2013;

e any applicable leverage ratio requirement.

3 For the purposes of this Regulation, capital requirements shall be interpreted in accordance with the competent authority's application of transitional provisions laid down in Chapters 1, 2 and 4 of Title I of Part Ten of Regulation (EU) No 575/2013 and in the provisions of national legislation exercising the options granted to the competent authorities by that Regulation.

4 The loss absorption amount to be determined by the resolution authority shall be the sum of the requirements referred to in points (a) (b), and (c) of paragraph 2, or any higher amount necessary to comply with the requirements referred to in points (d) or (e) of paragraph 2.

5 The resolution authority may set a loss absorption amount using either of the following methods:

a a loss absorption amount equal to the default loss absorption amount determined in accordance with paragraph 4;

b a loss absorption amount, which may be either:

(i) higher than the default loss absorption amount determined pursuant to paragraph (4) where:

— the need to absorb losses in resolution is not fully reflected in the default loss absorption amount, taking into account information requested from the competent authority relating to the institution's business model, funding model, and risk profile pursuant to Article 4, or

— it is necessary to reduce or remove an impediment to resolvability or absorb losses on holdings of MREL instruments issued by other group entities;

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(ii) lower than the default loss absorption amount determined pursuant to paragraph (4) to the extent that, taking into account information received from the competent authority relating to the institution's business model, funding model, and risk profile pursuant to Article 4:

— additional own funds requirements referred to in paragraph 2(b), which have been determined on the basis of the outcome of stress tests or to cover macroprudential risks, are assessed not to be relevant to the need to ensure losses can be absorbed in resolution, or

— part of the combined buffer requirement referred to in paragraph 2(c) is assessed by the resolution authority not to be relevant to the need to ensure losses can be absorbed in resolution.

6 Where the option in paragraph 5(b) is applied, the resolution authority shall provide the competent authority with a reasoned explanation of the loss absorption amount that has been set, in the framework of the obligation of the resolution authority to consult the competent authority under Article 45(6) of Directive 2014/59/EU.

Article 2

Determination of the amount necessary to continue to comply with conditions for authorisation and to carry out activities and sustain market confidence in the institution

1 Resolution authorities shall determine an amount of recapitalisation which would be necessary to implement the preferred resolution strategy, as identified in the resolution planning process.

2 Where the resolvability assessment concludes that liquidation of the institution under normal insolvency proceedings is feasible and credible, the recapitalisation amount shall be zero, unless the resolution authority determines that a positive amount is necessary on the grounds that liquidation would not achieve the resolution objectives to the same extent as an alternative resolution strategy.

3 When estimating the institution's regulatory capital needs after implementation of the preferred resolution strategy, the resolution authority shall use the most recent reported values for the relevant total risk exposure amount or leverage ratio denominator, as applicable, unless all the following factors apply:

a the resolution plan identifies, explains, and quantifies any change in regulatory capital needs immediately as a result of resolution action;

b the change referred to in point (a) is considered in the resolvability assessment to be both feasible and credible without adversely affecting the provision of critical functions by the institution, and without recourse to extraordinary financial support other than contributions from resolution financing arrangements, consistently with Article 101(2) of Directive 2014/59/EU and the principles governing their use set out in paragraphs 5 and 8 of Article 44 of that Directive.

4 Where the changes referred to in paragraph 3 are dependent on the actions of a purchaser of assets or business lines of the institution under resolution, or of third parties, the resolution authority shall prepare a reasoned explanation to the competent authority regarding the feasibility and credibility of that change.

5 The recapitalisation amount shall be at least equal to the amount necessary to satisfy applicable capital requirements necessary to comply with the conditions for authorisation after the implementation of the preferred resolution strategy.