Commission Delegated Regulation (EU) 2015/850 of 30 January 2015 amending Delegated Regulation (EU) No 241/2014 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 (Text with EEA relevance)

COMMISSION DELEGATED REGULATION (EU) 2015/850

of 30 January 2015

amending Delegated Regulation (EU) No 241/2014 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

(Text with EEA relevance)

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[(1)], and in particular the 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 of that Regulation 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(1)(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 referred to in Article 27 of Regulation (EU) No 575/2013 (‘non-joint stock companies’) where justified by specific features of voting instruments and non-voting instruments.

Where 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. 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 on some of these institutions, a phasing-in of the rules on the calculation of the level of the pay-out ratio should be provided, where necessary. The introduction of the limits on the payout ratio can be phased-in during the first five years, with a gradual application until end 2017, while the rule should be fully implemented by all institutions in 2018.

(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, 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. Further, 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 575/2013, 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 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 of the European Parliament and of the Council[(2)].

(12) Commission Delegated Regulation (EU) No 241/2014[(3)] should therefore be amended accordingly,

HAS ADOPTED THIS REGULATION:

Article 1

Delegated Regulation (EU) No 241/2014 is amended as follows:

(1) the following Article 7a is inserted:

Article 7a

Multiple distributions constituting 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 where 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.

Changes to legislation: *There are currently no known outstanding effects for the Commission Delegated Regulation (EU) 2015/850. (See end of Document for details)*

In formulaic form this shall 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 shall 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.

The formula shall be applied on a one-year basis.

2 Where the condition of point (f) of paragraph 1 is not met, only the amount of the instruments with a dividend multiple that exceeds the threshold defined therein shall be deemed to cause a disproportionate drag on capital.

3 Where any of the conditions of points (a) to (e) of paragraph 1 are not met, all outstanding instruments with a dividend multiple shall be deemed to cause a disproportionate drag on capital.;

(2) the following Article 7b is inserted:

Article 7b

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 the conditions of Article 7a of this Regulation 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, 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 where 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 shall 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 shall 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;

The formula shall be applied on a one-year basis.

3 Where the condition of paragraph 2 point (f) is not met, only the amount of the instruments with a dividend multiple that exceeds the threshold defined therein shall be disqualified from Common Equity Tier 1.

4 Where any of the conditions of points (a) to (e) 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 purposes of paragraph 2, where the distributions of Common Equity Tier 1 instruments are expressed, for the voting or the non-voting instruments, 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.