

▼B**DECISION (EU) 2018/546 OF THE EUROPEAN CENTRAL BANK****of 15 March 2018****on delegation of the power to adopt own funds decisions (ECB/2018/10)***Article 1***Definitions**

For the purposes of this Decision, the following definitions shall apply:

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- (1) ‘own funds decision’ means any of the following decisions: (a) a decision of the ECB on permission to classify an instrument as a Common Equity Tier 1; (b) a decision of the ECB on permission to classify an instrument as Additional Tier 1 or Tier 2 instrument; (c) a decision of the ECB on permission to include interim or year-end profits; and (d) a decision of the ECB on permission for an own funds reduction. For the purposes of this Decision, an own funds decision also includes the approval of the ECB’s response to a consultation request from a resolution authority on the reduction of eligible liabilities instruments;

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- (2) ‘own funds reduction’ means any action referred to in Article 77 of Regulation (EU) No 575/2013;
- (3) ‘reductions with replacement’ means own funds reductions as referred to in Article 78(1)(a) of Regulation (EU) No 575/2013;
- (4) ‘reductions without replacement’ means own funds reductions as referred to in Article 78(1)(b) of Regulation (EU) No 575/2013;
- (5) ‘EBA list’ means a list established, maintained and published⁽¹⁾ by the EBA pursuant to the third subparagraph of Article 26(3) of Regulation (EU) No 575/2013, containing all the forms of capital instruments in each Member State that qualify as Common Equity Tier 1 instruments on the basis of information from each competent authority;
- (6) ‘Common Equity Tier 1 instrument’, ‘Additional Tier 1 instrument’ and ‘Tier 2 instrument’ mean a capital instrument which qualifies as Common Equity Tier 1 instrument, Additional Tier 1 instrument or Tier 2 instrument, respectively, under Regulation (EU) No 575/2013;
- (7) ‘replacing instrument’ means the capital instrument which replaces the capital instrument to be reduced, repurchased, called or redeemed within the meaning of Article 78(1)(a) of Regulation (EU) No 575/2013;
- (8) ‘replaced instrument’ means the capital instrument to be subject to an action referred to in Article 77 of Regulation (EU) No 575/2013 and replaced by a replacing instrument in a reduction with replacement pursuant to Article 78(1)(a) of Regulation (EU) No 575/2013;

⁽¹⁾ Published on the EBA's website at www.eba.europa.eu

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- (9) ‘Common Equity Tier 1 capital ratio’, ‘Tier 1 capital ratio’ and ‘total capital ratio’ mean Common Equity Tier 1 capital ratio, Tier 1 capital ratio and total capital ratio, respectively, as referred to in Article 92(2) of Regulation (EU) No 575/2013;
- (10) ‘SREP decision’ means the decision adopted by the ECB on the basis of Article 16 of Regulation (EU) No 1024/2013 following the annual supervisory review and evaluation process within the meaning of Article 97 of Directive 2013/36/EU of the European Parliament and of the Council ⁽¹⁾ and which establishes prudential requirements;
- (11) ‘delegation decision’ and ‘delegated decision’ have the same meaning as in point (2) and point (4) of Article 3 of Decision (EU) 2017/933 (ECB/2016/40), respectively;
- (12) ‘heads of work units’ means the heads of work units of the ECB to whom the power to adopt own funds decisions is delegated;
- (13) ‘non-objection procedure’ means the procedure set out in Article 26(8) of Regulation (EU) No 1024/2013 and further specified in Article 13g of Decision ECB/2004/2;
- (14) ‘negative decision’ means a decision that does not or does not fully grant the permission as requested by the significant supervised entity. A decision with ancillary provisions such as conditions or obligations shall be considered as a negative decision unless such ancillary provisions (a) ensure that the supervised entity fulfils the requirements of relevant Union law referred to in Articles 3(4), 4(3) and 5(6) and have been agreed in writing or (b) merely restate one or more of the existing requirements that the institution has to comply with pursuant to provisions referred to in Articles 3(4), 4(3) and 5(6) or require information on the fulfilment of one or more of such requirements;
- (15) ‘significant supervised entity’ means a significant supervised entity as defined in point (16) of Article 2 of Regulation (EU) No 468/2014 of the European Central Bank (ECB/2014/17) ⁽²⁾;

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- (16) ‘significant supervised group’ means a significant supervised group as defined in point (22) of Article 2 of Regulation (EU) No 468/2014 of the European Central Bank (ECB/2014/17) ⁽³⁾;
- (17) ‘general prior permission’ means a general permission to take any of the actions set out in Article 77(1) of Regulation (EU) No 575/2013 to reduce own funds which is granted in accordance with the second subparagraph of Article 78(1) of that Regulation;

⁽¹⁾ Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338).

⁽²⁾ Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) (ECB/2014/17) (OJ L 141, 14.5.2014, p. 1).

⁽³⁾ Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) (ECB/2014/17) (OJ L 141, 14.5.2014, p. 1).

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- (18) ‘sensitivity’ means a characteristic or factor that may have a negative impact on the ECB’s reputation and/or on the effective and consistent functioning of the Single Supervisory Mechanism, including but not limited to any of the following: (a) the relevant supervised entity has previously been, or is currently, subject to severe supervisory measures such as early intervention measures; (b) the draft decision once adopted will set a new precedent that could bind the ECB in the future; (c) the draft decision once adopted may attract negative media or public attention; or (d) a national competent authority that has entered into close cooperation with the ECB communicates its disagreement with the proposed draft decision to the ECB.

▼ B*Article 2***Delegation of own funds decisions****▼ M1**

1. In accordance with Article 4 of Decision (EU) 2017/933 (ECB/2016/40), the Governing Council hereby delegates to the heads of work units nominated by the Executive Board in accordance with Article 5 of that Decision the adoption of the following own funds decisions:

- (a) on permission for the classification of capital instruments as Common Equity Tier 1 instruments, as provided for in Article 26(3) of Regulation (EU) No 575/2013;
- (b) on permission for the classification of capital instruments as Additional Tier 1 or Tier 2 instruments, where required by national law;
- (c) on permission in relation to own funds reductions, as provided for in Article 77(1) of Regulation (EU) No 575/2013;
- (d) on permission for the inclusion by an institution of interim or year-end profits in Common Equity Tier 1 capital before the institution has taken a formal decision confirming the final profit or loss of the institution for the year, as provided for in Article 26(2) of Regulation (EU) No 575/2013;
- (e) on responses to consultation requests from a resolution authority under Article 78a of Regulation (EU) No 575/2013, including the agreement on the proposed margin by which, following the action referred to in Article 77(2) of Regulation (EU) No 575/2013, the resolution authority considers necessary that the own funds and eligible liabilities of the institution must exceed its requirements.

2. The own funds decisions referred to in paragraph 1 shall be adopted by means of a delegated decision if the criteria for the adoption of delegated decisions, as set out in Articles 3, 4, 5, 5a and 5b, are fulfilled.

3. Own funds decisions shall not be adopted by means of a delegated decision if the complexity of the assessment or sensitivity of the matter require that they are adopted under the non-objection procedure.

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4. Heads of work units shall submit an own funds decision that fulfils the criteria for the adoption of delegated decisions set out in Articles 3 to 5b to the Supervisory Board and the Governing Council for adoption under the non-objection procedure where the supervisory assessment of that own funds decision has a direct impact on the supervisory assessment of another decision which is to be adopted under the non-objection procedure.

5. The delegation of decision-making powers pursuant to paragraph 1 shall apply to:

- (a) the ECB's adoption of supervisory decisions;
- (b) the ECB's adoption of instructions addressed, pursuant to Article 7 of Regulation (EU) No 1024/2013, to the national competent authorities with which the ECB has established close cooperation;
- (c) the approval of the ECB's response to consultation requests from a resolution authority under Article 78a of Regulation (EU) No 575/2013, including the agreement on the proposed margin by which, following the action referred to in Article 77(2) of Regulation (EU) No 575/2013, the resolution authority considers necessary that the own funds and eligible liabilities of the institution must exceed its requirements.

▼ B*Article 3***▼ M1****Criteria for the adoption of delegated decisions on permission to classify instruments as Common Equity Tier 1 instruments**

1. Decisions on the classification of capital instruments as Common Equity Tier 1 instruments shall be taken by means of a delegated decision if the type of instruments in respect of which permission is sought has been included, at the time the application was received by the ECB, in the EBA list.

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2. Negative decisions and decisions pursuant to Article 31 of Regulation (EU) No 575/2013 shall not be adopted by means of a delegated decision.

3. Where, pursuant to paragraphs 1 and 2, a decision on the classification of capital instruments as Common Equity Tier 1 instruments cannot be adopted by means of a delegated decision, it shall be adopted in accordance with the non-objection procedure.

4. The assessment on the classification of capital instruments as Common Equity Tier 1 instruments shall be carried out in accordance with Articles 27, 28 and 29 of Regulation (EU) No 575/2013 and Articles 4 to 11 of Delegated Regulation (EU) No 241/2014.

▼ B*Article 4***▼ M1****Criteria for the adoption of delegated decisions on permission to classify instruments as Additional Tier 1 or Tier 2 instruments**

1. Where permission is required under national law, decisions on permission to classify capital instruments as Additional Tier 1 or Tier 2 instruments shall be taken by means of a delegated decision.

2. Negative decisions shall not be adopted by means of a delegated decision.

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3. The assessment on the classification of instruments as Additional Tier 1 or Tier 2 instruments shall be carried out in accordance with Articles 52 to 54 and 63 of Regulation (EU) No 575/2013 and Articles 8, 9 and 20 to 24a of Delegated Regulation (EU) No 241/2014.

*Article 5***▼ M1****Criteria for the adoption of delegated decisions on permission for own funds reductions**

1. Decisions on permission for own funds reductions shall be taken by means of a delegated decision in accordance with the provisions of paragraphs 2, 3, 3a, 4 and 4a.

2. For reductions with replacement, decisions shall be taken by means of a delegated decision if:

- (a) the replacing instrument is a Common Equity Tier 1 instrument with a nominal amount at least equal to the nominal amount of the replaced instrument; or
- (b) the replacing instrument is an Additional Tier 1 instrument with a nominal amount at least equal to the nominal amount of the replaced instrument, if the replaced instrument is an Additional Tier 1 instrument; or
- (c) the replacing instrument is an Additional Tier 1 or Tier 2 instrument with a nominal amount at least equal to the nominal amount of the replaced instrument, if the replaced instrument is a Tier 2 instrument.

Where a replacing instrument or a replaced instrument referred to in points (a) to (c) does not have a nominal amount, the amount referred to shall instead be the notional amount of that instrument.

Where the nominal amount (or, in the circumstance referred to in the previous subparagraph, the notional amount) of a replaced instrument is higher than the amount of that instrument that qualifies as own funds, the amount referred to shall instead be the amount that qualifies as own funds.

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3. For reductions without replacement, decisions shall be taken by means of a delegated decision if:

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- (a) following the reduction, the own funds exceed and are estimated to continue exceeding, for at least three financial years after the date of the application, the requirements laid down in Article 92(1)(a), (b) and (c) of Regulation (EU) No 575/2013, the own funds required to be held in accordance with Article 16(2)(a) of Regulation (EU) No 1024/2013, the combined buffer requirement as defined in point (6) of Article 128 of Directive 2013/36/EU and the Pillar 2 capital guidance as set out in the last available SREP decision; and
- (b) the impact of the reduction on the Common Equity Tier 1 capital ratio, the Tier 1 capital ratio and the total capital ratio is below 100 basis points on a consolidated level of a significant supervised group or on an individual level of a significant supervised entity, if such significant supervised entity is not part of a significant supervised group. If the purpose of the reduction is to cover existing losses or negative reserves and such reduction has no impact on the level of own funds this 100 basis point threshold criterion shall be deemed to be fulfilled.

3a. Decisions on general prior permission pursuant to the second subparagraph of Article 78(1) of Regulation (EU) No 575/2013 and decisions on permission for a certain predetermined amount pursuant to Article 32(2) of Commission Delegated Regulation (EU) No 241/2014 ⁽¹⁾ shall be taken by means of a delegated decision if the conditions set out in paragraph 3 are met or if the decision is a renewal of an existing decision and is granted for the same or a lower predetermined amount.

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4. Negative decisions shall not be adopted by means of a delegated decision.

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4a. Decisions on permission for own funds reductions may be revoked by means of a delegated decision where the revocation is requested by the addressee of the decision.

5. Where, pursuant to paragraphs 1 to 4a, a decision on an own funds reduction cannot be adopted by means of a delegated decision, it shall be adopted in accordance with the non-objection procedure.

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6. The assessment on an own funds reduction shall be carried out in accordance with Article 78 of Regulation (EU) No 575/2013 and Section 2 of Chapter IV of Delegated Regulation (EU) No 241/2014.

⁽¹⁾ Commission Delegated Regulation (EU) No 241/2014 of 7 January 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 (OJ L 74, 14.3.2014, p. 8).

▼ M1*Article 5a***Criteria for the adoption of delegated decisions on permission to include interim and year-end profits in Common Equity Tier 1 capital**

1. Decisions pursuant to Article 26(2) of Regulation (EU) No 575/2013 on permission to include interim or year-end profits in Common Equity Tier 1 capital before the institution has taken a formal decision confirming the final profit or loss of the institution for the year, including those which do not meet the requirement under Article 3(2) of Decision (EU) 2015/656 (ECB/2015/4), shall be taken by means of a delegated decision if the criteria set out below are fulfilled:

- (a) the verification requirement under Article 26(2)(a) of Regulation (EU) No 575/2013 has been complied with in accordance with Article 4 of Decision (EU) 2015/656 (ECB/2015/4);
- (b) the institution has demonstrated that any foreseeable charges or dividends have been deducted from the amount of profits in accordance with paragraphs 1, 2, and 5 of Article 5 of Decision (EU) 2015/656 (ECB/2015/4) and point (c), as applicable;
- (c) the amount of foreseeable dividends to be deducted by the institution from the interim or year-end profits is determined in accordance with paragraphs 2, 4, 5, and 6 of Article 2 of Delegated Regulation (EU) No 241/2014 or, in the circumstances specified in Article 5(3) of Decision (EU) 2015/656 (ECB/2015/4), a higher amount calculated in accordance with that Article is deducted.

2. Negative decisions shall not be adopted by means of a delegated decision.

*Article 5b***Criteria for the approval of responses to consultation requests from a resolution authority on the reduction of eligible liabilities instruments**

1. Where the ECB is consulted or its agreement is sought by a resolution authority under Article 78a(1) of Regulation (EU) No 575/2013, the decision on the approval of the ECB's response to such consultation request shall be taken by means of delegation, unless the conditions of paragraph 2 are met.

2. Where the ECB disagrees or partially disagrees with the resolution authority concerning the matter in respect of which the ECB has been consulted or its agreement has been sought under Article 78a(1) of Regulation (EU) No 575/2013, the decision on the approval of the ECB's response shall not be taken by means of a delegated decision.

▼ B*Article 6***Transitional provision**

This Decision shall not apply in cases where the application was submitted to the ECB prior to the entry into force of this Decision.

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Article 7

Entry into force

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