

DECISION (EU) 2021/1439 OF THE EUROPEAN CENTRAL BANK**of 3 August 2021****amending Decision (EU) 2018/546 on delegation of the power to adopt own funds decisions (ECB/2021/35)**

THE GOVERNING COUNCIL OF THE EUROPEAN CENTRAL BANK,

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 amending Regulation (EU) No 648/2012 ⁽¹⁾, and in particular Article 26(2), Article 26(3) and Articles 28, 29, 77, 78 and 78a thereof,

Having regard to Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions ⁽²⁾, and in particular Article 4(1)(d) thereof,

Having regard to Decision (EU) 2017/933 of the European Central Bank of 16 November 2016 on a general framework for delegating decision-making powers for legal instruments related to supervisory tasks (ECB/2016/40) ⁽³⁾, and in particular Article 4 thereof,

Whereas:

- (1) Decision (EU) 2018/546 of the European Central Bank (ECB/2018/10) ⁽⁴⁾ specifies the criteria for the delegation of decision-making powers to heads of work units of the European Central Bank (ECB) for the adoption of own funds decisions. The experience gained in the application of that Decision has shown that certain clarifications and technical amendments are necessary, in particular for reasons of consistency and certainty in the application of those criteria.
- (2) The procedure for delegating decision-making powers should be clarified in respect of own funds decisions where heads of work units have concerns with regard to the interconnectedness of such a decision with one or more other decisions requiring supervisory approval. This may be the case where the outcome of the relevant supervisory assessment directly impacts one or more of those other decisions and therefore the decisions should be considered simultaneously by the same decision-maker in order to prevent conflicting outcomes.
- (3) On 24 June 2020, the Governing Council decided to establish close cooperation between the ECB and the Republic of Bulgaria ⁽⁵⁾, and between the ECB and the Republic of Croatia ⁽⁶⁾. Article 7(1) of Regulation (EU) No 1024/2013 provides that to carry out certain tasks in relation to credit institutions established in a Member State whose currency is not the euro where close cooperation has been established in accordance with that Article, the ECB may address instructions to the national competent authority of the relevant Member State. It is therefore appropriate to include such instructions among the acts that the ECB may adopt by means of delegation to heads of work units pursuant to the relevant provisions of Decision (EU) 2018/546 (ECB/2018/10).
- (4) An own funds decision in a case where the complexity of the assessment so requires is not adopted by means of a delegated decision, but is adopted instead under the non-objection procedure. It should be clarified that, in addition, there may be cases in which the sensitivity of the matter – in terms of impact on the ECB's reputation and/or on the functioning of the Single Supervisory Mechanism – may require that an own funds decision should be adopted under the non-objection procedure and not by means of a delegated decision

⁽¹⁾ OJ L 176, 27.6.2013, p. 1.

⁽²⁾ OJ L 287, 29.10.2013, p. 63.

⁽³⁾ OJ L 141, 1.6.2017, p. 14.

⁽⁴⁾ 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) (OJ L 90, 6.4.2018, p. 105).

⁽⁵⁾ Decision (EU) 2020/1015 of the European Central Bank of 24 June 2020 on the establishment of close cooperation between the European Central Bank and Българска народна банка (Bulgarian National Bank) (ECB/2020/30) (OJ L 224I, 13.7.2020, p. 1).

⁽⁶⁾ Decision (EU) 2020/1016 of the European Central Bank of 24 June 2020 on the establishment of close cooperation between the European Central Bank and Hrvatska Narodna Banka (ECB/2020/31) (OJ L 224I, 13.7.2020, p. 4).

- (5) To facilitate the decision-making process a delegation of decision-making powers is necessary in relation to the adoption of permissions 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, pursuant to Article 26(2) of Regulation (EU) No 575/2013. However, if the requirements in order for Decision (EU) 2015/656 of the European Central Bank (ECB/2015/4) ⁽⁷⁾ to apply are met, then that Decision should apply.
- (6) Furthermore, to facilitate the decision-making process a delegation of decision-making powers is necessary in relation to the ECB's response to a consultation request received from a resolution authority pursuant to Article 78a of Regulation (EU) No 575/2013, concerning the margin by which an institution should exceed the requirements for own funds and eligible liabilities laid down in Regulation (EU) No 575/2013, Directive 2013/36/EU of the European Parliament and of the Council ⁽⁸⁾ and Directive 2014/59/EU of the European Parliament and of the Council ⁽⁹⁾ following an action by the institution as referred to in Article 77(2) of Regulation (EU) No 575/2013.
- (7) Therefore, Decision (EU) 2018/546 (ECB/2018/10) should be amended accordingly,

HAS ADOPTED THIS DECISION:

Article 1

Amendments

Decision (EU) 2018/546 (ECB/2018/10) is amended as follows:

1. Article 1 is amended as follows:

(a) point (1) is replaced by the following:

‘(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;’

(b) the following points (16), (17) and (18) are added:

‘(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) *;’

(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;’

⁽⁷⁾ Decision (EU) 2015/656 of the European Central Bank of 4 February 2015 on the conditions under which credit institutions are permitted to include interim or year-end profits in Common Equity Tier 1 capital in accordance with Article 26(2) of Regulation (EU) No 575/2013 (ECB/2015/4) (OJ L 107, 25.4.2015, p. 76).

⁽⁸⁾ 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, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338).

⁽⁹⁾ 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 and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014, p. 190).

- (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.

* 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).;

2. Article 2 is amended as follows:

- (a) paragraph 1 is replaced by the following:

‘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.’;

- (b) paragraph 2 is replaced by the following:

‘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.’;

- (c) paragraph 3 is replaced by the following:

‘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.’;

- (d) the following paragraphs 4 and 5 are added:

‘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.;
3. the title of Article 3 is replaced by the following:

'Criteria for the adoption of delegated decisions on permission to classify instruments as Common Equity Tier 1 instruments';

4. in Article 3, paragraph 1 is replaced by the following:
- '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.;
5. the title of Article 4 is replaced by the following:

'Criteria for the adoption of delegated decisions on permission to classify instruments as Additional Tier 1 or Tier 2 instruments';

6. in Article 4, paragraph 1 is replaced by the following:
- '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.;
7. in Article 4, paragraph 2 is replaced by the following:
- '2. Negative decisions shall not be adopted by means of a delegated decision.;
8. Article 5 is amended as follows:
- (a) the title is replaced by the following:

'Criteria for the adoption of delegated decisions on permission for own funds reductions';

- (b) paragraph 1 is replaced by the following:

'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.;
- (c) paragraph 2 is replaced by the following:

'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.;

(d) in paragraph 3, point (a) is replaced by the following:

‘(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’;

(e) in paragraph 3, point (b) is replaced by the following:

‘(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.’;

(f) the following paragraph 3a is inserted:

‘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 * 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.

* 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).’;

(g) the following paragraph 4a is inserted:

‘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.’;

(h) paragraph 5 is replaced by the following:

‘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.’;

9. the following Article 5a is inserted:

‘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.’;
10. the following Article 5b is inserted:

‘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.’.

Article 2

Transitional provision

The provisions of Decision (EU) 2018/546 (ECB/2018/10) shall continue to apply, as unamended, in cases where the application requesting approval for any of the operations referred to in Article 2(1) of that Decision, as unamended, was submitted to the ECB prior to the entry into force of this Decision.

Article 3

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*.

Done at Frankfurt am Main, 3 August 2021.

The President of the ECB
Christine LAGARDE
