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Proposal for a

**DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**amending Directive 2013/36/EU as regards exempted entities, financial holding companies, mixed financial holding companies, remuneration, supervisory measures and powers and capital conservation measures**

(Text with EEA relevance)

{SWD(2016) 377}

{SWD(2016) 378}

## EXPLANATORY MEMORANDUM

### 1. CONTEXT OF THE PROPOSAL

#### • Reasons for and objectives of the proposal

The proposed amendment to Directive 2013/36/EU (the Capital Requirements Directive or CRD) is part of a legislative package that includes also amendments to Regulation (EU) No 575/2013 (the Capital Requirements Regulation or CRR), to Directive 2014/59/EU (the Bank Recovery and Resolution Directive or BRRD), and to Regulation (EU) No 806/2014 (the Single Resolution Mechanism Regulation or SRMR).

Over the past years the EU implemented a substantial reform of the financial services regulatory framework to enhance the resilience of institutions (i.e. credit institutions and investment firms) operating in the EU financial sector, largely based on global standards agreed with the EU's international partners. In particular, the reform package included Regulation (EU) No 575/2013 (the Capital Requirements Regulation or CRR) and Directive 2013/36/EU (the Capital Requirements Directive or CRD), on prudential requirements for and supervision of institutions, Directive 2014/59/EU (the Bank Recovery and Resolution Directive or BRRD), on recovery and resolution of institutions and Regulation (EU) No 806/2014 on the Single Resolution Mechanism (SRM).

These measures were taken in response to the financial crisis that unfolded in 2007-2008 and reflect internationally agreed standards. While the reforms have rendered the financial system more stable and resilient against many types of possible future shocks and crises, they do not yet comprehensively address all identified problems. The present proposals therefore aim to complete the reform agenda by tackling remaining weaknesses and implementing some outstanding elements of the reform that are essential to ensure the institutions' resilience but have only recently been finalised by global standard setters (i.e. the Basel Committee on Banking Supervision (BCBS) and the Financial Stability Board (FSB)):

- a binding leverage ratio which will prevent institutions from excessively increasing leverage, e.g. to compensate for low profitability;
- a binding net stable funding ratio (NSFR) which will build on institutions' improved funding profiles and establish a harmonised standard for how much stable, long-term sources of funding an institution needs to weather periods of market and funding stress;
- more risk sensitive own funds (i.e. capital) requirements for institutions that trade to an important extent in securities and derivatives which will prevent too much divergence in those requirements that is not based on the institutions' risk profiles;
- last but not least, new standards on the total loss-absorbing capacity (TLAC) of global systemically important institutions (G-SIIs) which will require those institutions to have more loss-absorbing and recapitalisation capacity, tackle interconnections in the global financial markets and further strengthen the EU's ability to resolve failing G-SIIs while minimising risks for taxpayers.

The Commission recognised the need for further risk reduction in its Communication of 24 November 2015 and committed to bring forward a legislative proposal that builds on the international agreements listed above. Such risk reduction measures will not only further strengthen the resilience of the European banking system and the markets' confidence in it, but will also provide the basis for further progress in completing the Banking Union. The

need for further concrete legislative steps to be taken in terms of reducing risks in the financial sector has been recognised also by the Ecofin Council Conclusions from 17 June 2016. The European Parliament resolution of 10 March 2016 on the Banking Union – Annual Report 2015 also indicates some areas in the current regulatory framework that could be further addressed.

At the same time, the Commission needed to take account of the existing regulatory framework and the new regulatory developments at international level and respond to challenges affecting the EU economy, especially the need to promote growth and jobs at times of uncertain economic outlook. Various major policy initiatives, such as the Investment Plan for Europe (EFSI) and the Capital Markets Union have been launched in order to strengthen the economy of the Union. The ability of institutions to contribute to financing the economy needs to be enhanced without impinging on the stability of the regulatory framework. In order to ensure that recent reforms in the financial sector interact smoothly with each other and with new policy initiatives, but also with broader recent reforms in the financial sector, the Commission carried out, on the basis of a call for evidence, a thorough holistic assessment of the existing financial services framework (including the CRR, CRD, BRRD and SRMR). The upcoming review of global standards was also assessed from a wider economic impact perspective.

Amendments based on international developments represent a faithful implementation of international standards into Union law, subject to targeted adjustments in order to reflect EU specificities and broader policy considerations. For instance, the predominant reliance on bank financing by EU small- and medium-sized enterprises (SMEs) or for infrastructure projects prompts specific regulatory adjustments that ensure institutions remain capable of funding them as they constitute the backbone of the single market. A smooth interaction with existing requirements, such as for central clearing and collateralisation of derivatives exposures, or a gradual transition to some of the new requirements are necessary. Such adjustments, limited in terms of scope or time, do therefore not impinge on the overall soundness of the proposals, which are aligned with the basic level of ambition of the international standards.

Moreover, based on the call for evidence, the proposals aim at improving existing rules. The analysis of the Commission showed that the present framework can be applied in a more proportionate way, taking into account in particular the situation of smaller and less complex institutions where some of the current disclosure, reporting and complex trading book-related requirements appear not to be justified by prudential considerations. Furthermore, the Commission has considered the risk attached to loans to SMEs and for funding infrastructure projects and found that for some of those loans, it would be justified to apply lower own funds requirements than are applied at present. Accordingly, the present proposals will bring corrections to these requirements and will enhance the proportionality of the prudential framework for institutions. Thereby, the ability of institutions to finance the economy will be enhanced without impinging on the stability of the regulatory framework.

Finally, the Commission, in close cooperation with the Expert Group on Banking, Payments and Insurance has assessed the application of options and discretions set out in the CRD and the CRR. Based on this analysis, the present proposal is intending to eliminate some options and discretions concerning the provisions on the leverage ratio, on large exposures and on own funds. It is proposed to end to the possibility to create new State guaranteed deferred tax assets not relying on future profitability that would be exempted from deduction from regulatory capital.

- **Consistency with existing policy provisions in the policy area**

Several elements of the CRD and CRR proposals follows inherent reviews, whilst other adaptations of the financial regulatory framework have become necessary in light of subsequent developments, such as the adoption of the BRRD, the establishment of the Single Supervisory Mechanism and the work undertaken by the European Banking Authority (EBA) and on international level.

The proposal introduces amendments to the existing legislation and renders it fully consistent with the existing policy provisions in the field of prudential requirements for institutions, their supervision and recovery and resolution framework.

- **Consistency with other Union policies**

Four years after the European Heads of State and Governments agreed to create a Banking Union, two pillars of the Banking Union – single supervision and resolution – are in place, resting on the solid foundation of a single rulebook for all EU institutions. While important progress has been made, further steps are needed to complete the Banking Union, including the creation of a single deposit guarantee scheme.

The review of the CRR and the CRD is part of risk reducing measures that are needed to further strengthen resilience of the banking sector and that are parallel to the staged introduction of the European Deposit Insurance Scheme (EDIS). The review aims at the same time to ensure a continued single rulebook for all EU institutions, whether inside or outside the Banking Union. The overall objectives of this initiative, as described above, are fully consistent and coherent with the EU's fundamental goals of promoting financial stability, reducing the likelihood and the extent of taxpayers' support in case an institution is resolved as well as contributing to a harmonious and sustainable financing of economic activity, which is conducive to a high level of competitiveness and consumer protection.

These overall objectives are also in line with the objectives set by other major EU initiatives, as described above.

## **2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY**

- **Legal basis**

The proposed amendments are built on the same legal basis as the legislative acts that are being amended, i.e. Article 114 TFEU for the proposal for a regulation amending CRR and Article 53(1) TFEU for the proposal for a directive amending CRD IV.

- **Subsidiarity (for non-exclusive competence)**

The objectives pursued by the proposed measures aim at supplementing already existing EU legislation and can therefore best be achieved at EU level rather than by different national initiatives. National measures aimed at, for example, reducing institutions' leverage, strengthening their stable funding and trading book capital requirements would not be as effective in ensuring financial stability as EU rules, given the freedom of institutions to establish and provide services in other Member States and the resulting degree of cross-border service provision, capital flows and market integration. On the contrary, national measures could distort competition and affect capital flows. Moreover, adopting national measures would be legally challenging, given that the CRR already regulates banking matters, including leverage requirements (reporting), liquidity (specifically the liquidity coverage ratio or LCR) and trading book requirements.

The amendment of the CRR and CRD is thus considered to be the best option. It strikes the right balance between harmonising rules and maintaining national flexibility where essential, without hampering the single rulebook. The amendments would further promote a uniform application of prudential requirements, the convergence of supervisory practices and ensure a level playing field throughout the single market for banking services. These objectives cannot be sufficiently achieved by Member States alone. This is particularly important in the banking sector where many credit institutions operate across the EU single market. Full cooperation and trust within the single supervisory mechanism (SSM) and within the colleges of supervisors and competent authorities outside the SSM is essential for credit institutions to be effectively supervised on a consolidated basis. National rules would not achieve these objectives.

- **Proportionality**

Proportionality has been an integral part of the impact assessment accompanying the proposal. Not only have all the proposed options in different regulatory fields been individually assessed against the proportionality objective, but also the lack of proportionality of the existing rules has been presented as a separate problem and specific options have been analysed aiming at reducing administrative and compliance costs for smaller institutions (see sections 2.9 and 4.9 of the impact assessment).

- **Choice of the instrument**

The measures are proposed to be implemented by amending the CRR and the CRD through a Regulation and a Directive, respectively. The proposed measures indeed refer to or develop further already existing provisions inbuilt in those legal instruments (liquidity, leverage, remuneration, proportionality).

As regards the new FSB agreed standard on TLAC, it is suggested to incorporate the bulk of the standard into the CRR, as only a regulation can achieve the necessary uniform application, much in the same way as the existing risk-based own funds requirements. Shaping prudential requirements in the form of an amendment to the CRR would ensure that those requirements will in fact be directly applicable to G-SIIs. This would prevent Member States from implementing diverging national requirements in an area where full harmonisation is desirable in order to prevent an un-level playing field. Fine-tuning of the current legal provisions within the BRRD will however be necessary to make sure that the TLAC requirement and the minimum requirement on own funds and eligible liabilities (MREL) are fully coherent and consistent with each other.

Some of the proposed CRD amendments affecting proportionality would leave Member States with a certain degree of flexibility to maintain different rules at the stage of their transposition into national law. It would give Member States the option of imposing stricter rules on certain matters such as remuneration and reporting.

### **3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS**

- **Stakeholder consultations**

The Commission carried out various initiatives in order to assess whether the existing prudential framework and the upcoming reviews of global standards were the most adequate instruments to ensure prudential objectives for EU institutions and also whether they would continue to provide the necessary funding to the EU economy.

In July 2015 the Commission launched a public consultation on the possible impact of the CRR and the CRD on bank financing of the EU economy with a particular focus on the financing of SMEs and of infrastructure and in September 2015 a Call for Evidence (CfE)<sup>1</sup> covering EU financial legislation as a whole. The two initiatives sought empirical evidence and concrete feedback on i) rules affecting the ability of the economy to finance itself and growth, ii) unnecessary regulatory burdens, iii) interactions, inconsistencies and gaps in the rules, and iv) rules giving rise to unintended consequences. In addition, the Commission gathered stakeholders' views in the framework of specific analyses carried out on provisions regulating remuneration<sup>2</sup> and on the proportionality of the rules contained in the CRR and the CRD. Finally, a public consultation was launched in the context of the study contracted out by the Commission to assess the impact of the CRR on the bank financing of the economy<sup>3</sup>.

All the initiatives mentioned above have provided clear evidence of the need to update and complete the current rules in order i) to reduce further the risks in the banking sector and thereby reduce the reliance on State aid and taxpayers' money in case of a crisis, and ii) to enhance the ability of institutions to channel adequate funding to the economy.

Annexes 1 and 2 of the impact assessment provide a summary of the consultations, reviews and reports.

- **Impact assessment**

The impact assessment<sup>4</sup> was discussed with the Regulatory Scrutiny Board and rejected on 7 September 2016. Following the rejection, the impact assessment was strengthened by adding i) a better explanation on the policy context of the proposal (i.e. its relation to both international and EU policy developments), ii) more details on stakeholders' views and iii) further evidence on the impacts (both in terms of benefits and costs) of the various policy options that are explored in the impact assessment. The Regulatory Scrutiny Board issued a positive opinion<sup>5</sup> on 27 September 2016 on the resubmitted impact assessment. The proposal is accompanied by the impact assessment. The proposal remains consistent with the impact assessment.

As shown by the simulation analysis and macroeconomic modelling developed in the impact assessment, there are limited costs to be expected from the introduction of the new requirements, in particular the new Basel standards such as the leverage ratio and the trading book. The estimated long-term impact on gross domestic product (GDP) ranges between -0.03% and -0.06% while the increase in funding costs for the banking sector is estimated to be under 3 basis points in the most extreme scenario. On the benefits side, the simulation exercise has shown that public resources required to support the banking system in case of a

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<sup>1</sup> See [http://ec.europa.eu/finance/consultations/2015/long-term-finance/docs/consultation-document\\_en.pdf](http://ec.europa.eu/finance/consultations/2015/long-term-finance/docs/consultation-document_en.pdf) and [http://ec.europa.eu/finance/consultations/2015/financial-regulatory-framework-review/docs/consultation-document\\_en.pdf](http://ec.europa.eu/finance/consultations/2015/financial-regulatory-framework-review/docs/consultation-document_en.pdf). The Call for Evidence was intended to cover the entire spectrum of the financial services regulation. The impact assessment address issues limited to the areas of banking only. Other issues involving other segments of the EU financial legislation will be dealt with separately.

<sup>2</sup> Commission Report COM(2016)510 Report from the Commission to the European Parliament and the Council of 28 July 2016 – Assessment of the remuneration rules under Directive 2013/36/EU and Regulation (EU) No 575/2013.

<sup>3</sup> The public consultation is available at [http://ec.europa.eu/finance/consultations/2015/long-term-finance/index\\_en.htm](http://ec.europa.eu/finance/consultations/2015/long-term-finance/index_en.htm).

<sup>4</sup> Insert link to impact assessment.

<sup>5</sup> Insert link to opinion.

financial crisis of the size similar to 2007 – 2008 would decrease by 32% – a decline from EUR 51 billion to EUR 34 billion.

- **Regulatory fitness and simplification**

The retention of simplified approaches to calculate own funds requirements are expected to ensure continued proportionality of the rules for smaller institutions. Furthermore, the additional measures to increase proportionality of some of the requirements (related to reporting, disclosure and remuneration) should decrease the administrative and compliance burden for those institutions.

As far as SMEs are concerned, the proposed recalibration of the own funds requirements for institutions' exposures to SMEs is expected to have a positive effect on financing of SMEs. This would primarily affect SMEs which currently have exposures beyond EUR 1,5 million as these exposures do not benefit from the SME Supporting Factor under the existing rules.

Other elements of the proposal, particularly those aimed at improving resilience of institutions to future crises, are expected to increase sustainability of lending to SMEs.

Finally, measures aimed at reducing compliance costs for institutions, in particular the smaller and less complex institutions, are expected to reduce borrowing costs for SMEs.

On the third country dimension, the proposal will enhance the stability of EU financial markets thereby reducing the likelihood and costs of potential negative spillovers for global financial markets. Moreover, the proposed amendments will further harmonise the regulatory framework throughout the Union thereby reducing substantially administrative costs for third country institutions operating in the EU.

The proposal is consistent with the Commission's priority for the Digital Single Market.

- **Fundamental rights**

The EU is committed to high standards of protection of fundamental rights and is signatory to a broad set of conventions on human rights. In this context, the proposal is not likely to have a direct impact on these rights, as listed in the main UN conventions on human rights, the Charter of Fundamental Rights of the European Union, which is an integral part of the EU Treaties and the European Convention on Human Rights (ECHR).

#### **4. BUDGETARY IMPLICATIONS**

The proposal does not have implications for the Union budget.

#### **5. OTHER ELEMENTS**

- **Implementation plans and monitoring, evaluation and reporting arrangements**

It is expected that the proposed amendments will start entering into force in 2019 at the earliest. The amendments are tightly inter-linked with other provisions of the CRR and the CRD that are already in force and have been monitored since 2014.

The BCBS and the EBA will continue to collect the necessary data for the monitoring of the leverage ratio and the new liquidity measures in order to allow for the future impact evaluation of the new policy tools. Regular Supervisory Review and Evaluation Process (SREPs) and stress testing exercises will also help monitoring the impact of the new proposed measures upon affected institutions and assessing the adequacy of the flexibility and proportionality provided for to cater for the specificities of smaller institutions. Additionally, the Commission services will continue to participate in the working groups of the BCBS and

the joint task force established by the European Central Bank (ECB) and by EBA, that monitor the dynamics of institutions' own funds and liquidity positions, globally and in the EU, respectively.

The set of indicators to monitor the progress of the results stemming from the implementation of the preferred options consists of the following:

On Net Stable Funding Ratio (NSFR):

<b>Indicator</b>	NSFR for EU institutions
<b>Target</b>	As of the date of application, 99% of institutions taking part to the EBA Basel III monitoring exercise meet the NSFR at 100% (65% of group 1 and 89% of group 2 credit institutions meet the NSFR as of end-of December 2015)
<b>Source of data</b>	Semi-annual the EBA Basel III monitoring reports

On leverage ratio:

<b>Indicator</b>	Leverage ratio for EU institutions
<b>Target</b>	As of the date of application, 99% of group 1 and group 2 credit institutions have a leverage ratio of at least 3% (93,4% of group 1 institutions met the target as of June 2015)
<b>Source of data</b>	Semi-annual EBA Basel III monitoring reports

On SMEs

<b>Indicator</b>	Financing gap to SMEs in the EU, i.e. difference between the need for external funds and the availability of funds
<b>Target</b>	As of two years after the date of application, < 13% (last known figure – 13% as of end 2014)
<b>Source of data</b>	European Commission / European Central Bank SAFE Survey (data coverage limited to the euro area)

On TLAC:

<b>Indicator</b>	TLAC in G-SIIs
<b>Target</b>	All EU Global Systemically Important Banks (G-SIBs) meet the target (>16% of risk weighted assets (RWA)/6% of the Leverage Ratio Exposure Measure (LREM) as of 2019, > 18% Risk Weighted Assets (RWA)/6.75% LREM as of 2022)
<b>Source of data</b>	Semi-annual EBA Basel III monitoring reports

On trading book:

<b>Indicator</b>	RWA for market risks for EU institutions
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	Observed variability of risk-weighted assets of aggregated portfolios applying the internal models approach.
<b>Target</b>	<p>- As of 2023, all EU institutions meet the own funds requirements for market risks under the final calibration adopted in the EU.</p> <p>- As of 2021, unjustifiable variability (i.e. variability not driven by differences in underlying risks) of the outcomes of the internal models across EU institutions is lower than the current variability* of the internal models across EU institutions.</p> <p>—————</p> <p>*Reference values for the "current variability" of value-at-risk (VaR) and incremental risk charge (IRC) requirements should be those estimated by the latest EBA "Report on variability of Risk Weighted Assets for Market Risk Portfolios", calculated for aggregated portfolios, published before the entry into force of the new market risk framework.</p>
<b>Source of data</b>	<p>Semi-annual EBA Basel III monitoring reports</p> <p>EBA Report on variability of Risk Weighted Assets for Market Risk Portfolios. New values should be calculated according to the same methodology.</p>

On remuneration:

<b>Indicator</b>	Use of deferral and pay-out in instruments by institutions
<b>Target</b>	99% of institutions that are not small and non-complex, in line with the CRD requirements, defer at least 40% of variable remuneration over 3 to 5 years and pay out at least 50% of variable remuneration in instruments with respect to their identified staff with material levels of variable remuneration.
<b>Source of data</b>	EBA remuneration benchmarking reports

On proportionality:

<b>Indicator</b>	Reduced burden from supervisory reporting and disclosure
<b>Target</b>	80% of smaller and less complex institutions report reduced burden
<b>Source of data</b>	Survey to be developed and conducted by EBA by 2022 - 2023

The evaluation of the impacts of this proposal will be done five years after the date of application of the proposed measures on the basis of the methodology that will be agreed with EBA soon after adoption. EBA will be mandated to define and gather the data needed for monitoring the above mentioned indicators as well as other indicators needed for the evaluation of the amended CRR and CRD. The methodology could be developed for

individual options or a set of interlinked options depending on the circumstances present before launching the evaluation and depending on the output of monitoring indicators.

Compliance and enforcement will be ensured on an ongoing basis where needed through the Commission launching infringement proceedings for lack of transposition or for incorrect transposition or application of the legislative measures. Reporting of breaches of EU law can be channelled through the European System of Financial Supervision (ESFS), including the national competent authorities and EBA, as well as through the ECB. EBA will also continue publishing its regular reports of the Basel III monitoring exercise on the EU banking system. This exercise monitors the impact of the Basel III requirements (as implemented through the CRR and the CRD) on EU institutions in particular as regards institutions' capital ratios (risk-based and non-risk-based) and liquidity ratios (LCR, NSFR). It is run in parallel with the one conducted by the BCBS.

- **Detailed explanation of the specific provisions of the proposal**

#### **EXEMPTED ENTITIES**

Article 2(5) of the CRD is amended to add institutions in Croatia that were exempted from the application of the CRD and the CRR via the Accession Treaty.

Public development banks and credit unions in certain Member States are already exempted from the CRD-CRR regulatory framework. To ensure a level playing field, all Member States should be able to benefit from the possibility of allowing such types of entities to operate only under national regulatory safeguards commensurate with the risks that they incur. To this end, the Commission has committed in its Action Plan on Building a Capital Markets Union of 30 September 2015, to explore the possibility for all Member States to authorise credit unions that would operate outside the EU's capital requirements framework for banks. In line with such commitments and, at the request of The Netherlands, credit unions in The Netherlands are also included on the list of institutions in Article 2(5) of the CRD. Furthermore, to facilitate the exemption from the CRD-CRR regulatory framework of institutions in other Member States that are similar to the ones already included in the list, Articles 2(5a) and 2(5b) are added to the CRD. These Articles empower the Commission to exempt specific institutions or categories of institutions from the CRD, provided that they comply with clearly defined criteria. Such new exemptions may only be done on a case-by-case basis for public development-type of banks or for the entire credit union sector of a Member State.

Paragraph 2 of Article 9 is amended to better frame the exceptions to the prohibition that persons or undertakings other than credit institutions carry out the business of taking deposits or other repayable funds from the public. It is clarified that the prohibition does not apply to persons or undertakings the taking up and pursuit of business of which is subject to Union law other than the CRD, to the extent that their activities subject to such other Union law may be qualified as taking of deposits or other repayable funds from the public. This should not prevent an entity from being subject to authorisation under both the CRD and such other Union legislation. Furthermore, it is clarified that only entities listed in Article 2(5) of the CRD are exempted from the prohibition in Article 9(1) of the CRD due to the fact that they are covered by specific national legal frameworks, thus removing the ambiguity in the current wording.

#### **PILLAR 2 CAPITAL REQUIREMENTS AND GUIDANCE**

The current wording of rules concerning additional capital requirements set by competent authorities according to Article 104 allows for different interpretations of the cases in which

those requirements may be imposed and the way such requirements position themselves in relation to the minimum capital requirements set out in Article 92 of the Capital Requirement Regulation (CRR) and the combined buffer requirement (Article 128). These diverse interpretations have resulted in substantially different amounts of capital imposed on individual institutions across Member States and in different triggering points for the restrictions on distribution provided for in Article 141. Moreover, the current text is silent on the possibility for competent authorities to communicate their expectations for institutions to have own funds in excess of the minimum capital requirements, additional own funds requirements and the combined buffers requirement. The amended Article 104 lists the possibility to impose additional own funds requirements amongst other competent authorities' powers. A new Article 104a clarifies the conditions for setting additional own funds requirements and emphasises the institution-specific nature of those requirements. A new Article 104b is added to spell out the main features of capital guidance and Article 113 is amended to provide that capital guidance should also be dealt with in the framework of colleges of supervisors. A new Article 141a is inserted to better clarify, for the purposes of restrictions on distributions, the relation between the additional own funds requirements, the minimum own funds requirements, the own funds and eligible liabilities requirement, the MREL and the combined buffers requirement (so called "stacking order"). Finally, Article 141 is amended to reflect the stacking order in the calculation of the maximum distributable amount.

#### **PILLAR 2 REPORTING AND DISCLOSURE**

To reduce administrative burden and provide for a more proportionate Pillar 2 reporting and disclosure regime, the proposal amends Article 104(1) of the CRD to constrain competent authorities' discretion when imposing additional reporting or disclosure obligations on institutions. Competent authorities will only be entitled to use these supervisory powers when the legal grounds defined in the new paragraph (2) of Article 104 are met.

#### **CONFINING THE SUPERVISORY REVIEW AND EVALUATION PROCESS (SREP) AND PILLAR 2 TO MICRO-PRUDENTIAL PURPOSES**

Recent experience has shown that there would be merit in a clearer delineation of the areas of responsibility between competent and designated authorities. This applies notably to the supervisory review and evaluation process (SREP) and the corresponding supervisory requirements. Competent authorities are responsible for the SREP and the imposition of corresponding institution-specific supervisory requirements (so-called Pillar 2 requirements). In this context, they may also evaluate systemic risk stemming from a specific institution and could address such risk by imposing supervisory requirements to this institution. The use of Pillar 2 measures may in this context undermine the effectiveness and efficiency of other macro-prudential instruments. Against this background, the proposal provides that the SREP and corresponding supervisory requirements should be confined to a purely micro-prudential perspective. Articles 97, 98, 99 and 105 are amended accordingly. Article 103 is deleted and a clarification is included in the new Article 104a(1) providing that additional own funds requirements referred to in point (a) of Article 104 shall not be imposed to cover macro-prudential or systemic risk.

#### **INTRODUCING A MODIFIED FRAMEWORK FOR INTEREST RATE RISK**

Following developments at international level on the measurement of interest rate risks, Articles 84 and 98 of this Directive and Article 448 of the CRR are amended in order to

introduce a revised framework for capturing interest rate risks for banking book positions. The amendments include the introduction of a common standardised approach that institutions might use to capture these risks or that competent authorities may require the institution to use when the systems developed by the institution to capture these risks are not satisfactory, improved outlier test and disclosure requirements. In addition, the EBA is mandated, in Article 84 of the CRD, to elaborate the details of the standardised methodology with regard to the criteria and conditions that institutions should follow to identify, evaluate, manage and mitigate interest rate risks. The EBA is also mandated, in Article 98 of the CRD, to define the six supervisory shock scenarios applied to interest rates and the common assumption that institutions have to implement for the outlier test.

#### **FINANCIAL HOLDING COMPANIES, MIXED FINANCIAL HOLDING COMPANIES**

New provisions are introduced and adjustments are made to several Articles in the CRD-CRR in order to bring financial holding companies and mixed financial holding companies directly in the scope of the EU prudential framework. An authorisation requirement is introduced along with direct supervisory powers over financial holding companies and mixed financial holding companies (Article 21a of the CRD). Article 11 of the CRR is amended to clarify that - where requirements are applied on a consolidated basis at the level of such holding companies- it will be the holding company which is directly responsible for compliance, not the institutions that are subsidiaries of such holdings. Articles 13 and 18 of the CRR are adjusted to reflect direct responsibility of the financial holding companies or mixed financial holding companies.

#### **INTERMEDIATE EU PARENT UNDERTAKING**

In order to facilitate the implementation of the internationally agreed standards on internal loss-absorbing capacity for non-EU G-SIIs in Union law and, more broadly, to simplify and strengthen the resolution process of third-country groups with significant activities in the EU, Article 21b of the CRD introduces a new requirement for establishing an intermediate EU parent undertaking where two or more institutions established in the EU have the same ultimate parent undertaking in a third country. The intermediate EU parent undertaking can be either a holding company subject to the requirements of the CRR and the CRD, or an EU institution. The requirement will apply only to third-country groups that are identified as non-EU G-SIIs or that have entities on the EU territory with total assets of at least EUR 30 billion (the assets of both subsidiaries and branches of those third-country groups will be taken into account in the calculation).

#### **REMUNERATION**

As required under Article 161(2) of the CRD, the Commission has reviewed the efficiency, implementation and enforcement of the CRD remuneration rules. The findings of this review, reflected in the Commission Report COM(2016) 510, were overall positive.

The review however showed that some of the rules, namely the rules on deferral and pay-out in instruments, are not workable for the smallest and least complex institutions and for staff with low variable remuneration. The review also showed that proportionality with regard to the smallest and least complex institutions as reflected in Article 92(2) of the CRD has been interpreted in different ways, leading to an uneven implementation of the rules in the Member States. A targeted amendment is therefore proposed to cater for the problems encountered in the application of the rules on deferral and pay-out in instruments in small and non-complex

institutions and towards staff members with low variable remuneration. To this end, Article 94 is amended to clarify that the rules apply to all institutions and their identified staff, except for those that are below the thresholds set for derogations. At the same time, some flexibility is offered to competent authorities to adopt a stricter approach.

The amendments concerning provisions on remuneration also aim to address another need for more proportional rules identified by the Commission's review by allowing listed institutions to use share-linked instruments for meeting the CRD requirements.

Proposal for a

**DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**amending Directive 2013/36/EU as regards exempted entities, financial holding companies, mixed financial holding companies, remuneration, supervisory measures and powers and capital conservation measures**

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,  
Having regard to the Treaty on the Functioning of the European Union, and in particular Article 53(1) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Central Bank<sup>6</sup>

Having regard to the opinion of the Committee of the Regions<sup>7</sup>,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) Directive 2013/36/EU of the European Parliament and of the Council<sup>8</sup> and Regulation (EU) No 575/2013 of the European Parliament and of the Council<sup>9</sup> have been adopted in response to the financial crises that unfolded in 2007-2008. These legislative measures have substantially contributed to strengthening the financial system in the Union and rendered institutions more resilient to possible future shocks. Although extremely comprehensive, these measures did not address all identified weaknesses affecting institutions. Also, some of the initially proposed measures have been subjected to review clauses or have not been sufficiently specified to allow for their smooth implementation.
- (2) This Directive aims to address issues raised in relation to provisions that proved not to be sufficiently clear and have therefore been subject to divergent interpretations or that have been found to be overly burdensome for certain institutions. It also contains adjustments to Directive 2013/36/EU that are necessary following either the adoption

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<sup>6</sup> OJ C [...], [...], p. [...].

<sup>7</sup> OJ C , , p. .

<sup>8</sup> 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).

<sup>9</sup> 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 (OJ L 176, 27.6.2013, p. 1).

of other relevant Union legislation, such as Directive 2014/59/EU of the European Parliament and of the Council<sup>10</sup> or the changes proposed in parallel to Regulation (EU) No 575/2013. Finally, the amendments proposed better align the current regulatory framework to international developments in order to promote consistency and comparability among jurisdictions.

- (3) Financial holding companies and mixed financial holding companies could be parent undertakings of banking groups and the application of prudential requirements is envisaged on the basis of the consolidated situation of such holding companies. As the institution controlled by such holding companies may not always comply with the requirements on a consolidated basis, it is consistent with the scope of consolidation that financial holding companies and mixed financial holding companies are brought under the direct scope of Directive 2013/36/EU and of Regulation (EU) No 575/2013. A specific authorisation procedure for financial holding companies and mixed financial holding companies is therefore necessary, as well as supervision by the competent authorities. This would ensure that consolidated prudential requirements are complied with directly by the holding company, which will not be subject to prudential requirements applied on a solo level.
- (4) The consolidating supervisor is entrusted with the main responsibilities as regards supervision on a consolidated basis. Therefore it is necessary that the prudential authorisation and supervision of the financial holding companies and mixed financial holding companies should also be given to the consolidating supervisor. The European Central Bank, when performing its task to carry out supervision on a consolidated basis over credit institutions' parents pursuant to Article 4(1)(g) of Council Regulation (EU) No 1024/2013<sup>11</sup> should also be responsible for the authorisation and supervision of financial holding companies and mixed financial holding companies.
- (5) Commission report COM(2016) 510 of 28 July 2016 showed that, when applied to small and non-complex institutions, some of the principles, namely the requirements on deferral and pay-out in instruments set out in points (l) and (m) of Article 94(1) of Directive 2013/36/EU, are too burdensome and not commensurate with their prudential benefits. Similarly, it was found that the cost of applying these requirements exceeds their prudential benefits in the case of staff with low levels of variable remuneration, since such levels of variable remuneration produce little or no incentive for staff to take excessive risk. Consequently, while all institutions should in general be required to apply all the principles towards all of their staff whose professional activities have a material impact on their risk profile, it is necessary to exempt in the Directive small and non-complex institutions and staff with low levels of variable remuneration from the principles on deferral and pay-out in instruments.
- (6) Clear, consistent and harmonised criteria for identifying small and non-complex institutions as well as low levels of variable remuneration are necessary to ensure supervisory convergence and to foster a level-playing field for institutions and an

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<sup>10</sup> 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).

<sup>11</sup> 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 (OJ L 287, 29.10.2013, p. 63).

adequate protection of depositors, investors and consumers across the Union. At the same time, it is appropriate to offer some flexibility to competent authorities to adopt a stricter approach where they consider this necessary.

- (7) Directive 2013/36/EU requires that a substantial portion, and in any event at least 50%, of any variable remuneration, consist of a balance of shares or equivalent ownership interests, subject to the legal structure of the institution concerned, or share-linked instruments or equivalent non-cash instruments, in the case of a non-listed institution; and, where possible, of alternative tier 1 or tier 2 instruments which meet certain conditions. This principle limits the use of share-linked instruments to non-listed institutions and requires listed institutions to use shares. Commission report COM(2016) 510 of 28 July 2016 found that the use of shares can lead to considerable administrative burdens and costs for listed institutions. At the same time, equivalent prudential benefits can be achieved by allowing listed institutions to use share-linked instruments that track the value of shares. The possibility of using share-linked instruments should therefore be extended to listed institutions.
- (8) Own funds add-ons imposed by competent authorities are an important driver of an institution's overall level of own funds and are relevant for market participants since the level of additional own funds imposed impacts the trigger point for restrictions on dividend payments, bonus pay-outs and the payments on Additional Tier 1 instruments. A clear definition of the conditions under which capital add-ons should be imposed should be provided to ensure that rules are consistently applied across Member States and to ensure the proper functioning of the market.
- (9) Own funds add-ons imposed by competent authorities should be set in relation to the specific situation of an institution and should be duly justified. These requirements should not be used to address macroprudential risks and should be positioned, in the stacking order of own funds requirements, above the minimum own funds requirements and below the combined buffer requirement.
- (10) The leverage ratio requirement is a parallel requirement to the risk-based own funds requirements. Therefore, any own funds add-ons imposed by competent authorities to address the risk of excessive leverage should be added to the minimum leverage ratio requirement and not to the minimum risk-based own funds requirement. Furthermore, any CET1 capital that institutions use to meet their leverage-related requirements can be used to meet their risk-based own funds requirements as well, including the combined buffer requirements.
- (11) Competent authorities should have the possibility to communicate to an institution any further adjustment to the amount of capital in excess of minimum own funds requirements, additional own funds requirements and the combined buffers requirement that they expect such institution to hold in order to cope with forward looking and remote situations. Since this guidance constitutes a capital target, it should be thought of as being positioned above the own funds requirements and combined buffer requirement in the sense that the failure to meet such target does not trigger the restrictions on distributions provided for in Article 141 of this Directive and this Directive and Regulation (EU) No 575/2013 should not set out mandatory disclosure obligations for the guidance. Where an institution repeatedly fails to meet the capital target, the competent authority should be entitled to take supervisory measures and, where appropriate, to impose additional own funds requirements.
- (12) Respondents to the Commission's Call for Evidence on the EU regulatory framework for financial services pointed out that reporting burden is increased by systematic

reporting required by competent authorities over and above the requirements set out in Regulation (EU) No 575/2013. The Commission should prepare a report identifying those additional systematic reporting requirements and assess whether they are in line with the single rulebook on supervisory reporting.

- (13) The provisions of this Directive 2013/36/EU on interest rate risk arising from non-trading book activities are linked to the relevant provisions in [Regulation XX amending Regulation (EU) No 575/2013, which require a longer implementation period for institutions. In order to align the application of rules on interest rate risk arising from non-trading book activities, the provisions necessary to comply with the relevant provisions of this Directive should apply from the same date as the relevant provisions in Regulation (EU) No [XX].
- (14) In order to harmonise the calculation of the interest rate risk of non-trading book activities when the institutions' internal systems for measuring this risk are not satisfactory, the Commission should be empowered to adopt regulatory technical standards in respect of developing the details of a standardised approach via the regulatory technical standards set out in Article 84(4) of this Directive by means of delegated acts pursuant to Article 290 TFEU and in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010.
- (15) In order to improve the competent authorities' identification of those institutions which may be subject to excessive losses in their non-trading book activities as a result of potential changes in interest rates, the Commission should be empowered to adopt regulatory technical standards in respect of specifying the six supervisory shock scenarios that all institutions have to apply in order to calculate changes in the economic value of equity as referred to in Article 98(5), the common assumptions that institutions have to implement in their internal systems for the purpose of the same calculation and in respect of determining the potential need for specific criteria to identify the institutions for which supervisory measures may be warranted following a decrease in the net interest income attributed to changes in interest rates by means of delegated acts pursuant to Article 290 TFEU and in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010
- (16) In order to guide competent authorities in identifying situations where institution-specific capital add-ons should be imposed, the Commission should be empowered to adopt regulatory technical standards in respect of how risks or elements of risks not covered or not sufficiently covered by the own funds requirements set out in Regulation (EU) No 575/2013 should be measured by means of delegated acts pursuant to Article 290 TFEU and in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010.
- (17) Public development banks and credit unions in certain Member States have been historically exempted from Union legislation on credit institutions. In order to ensure a level playing field, it should be possible to allow also other public development banks and credit unions to be exempted from Union legislation on credit institutions and to operate only under national regulatory safeguards commensurate with the risks that they incur. To provide for legal certainty it is necessary to set out clear criteria for such additional exemptions and to delegate to the Commission the power to adopt acts in accordance with Article 290 TFEU in respect of identifying whether specific institutions or categories of institutions fulfil those defined criteria.
- (18) Before the adoption of acts in accordance with Article 290 TFEU, it is of particular importance that the Commission carry out appropriate consultations during its

preparatory work, including at expert level, and that those consultations be conducted in accordance with the principles laid down in the Interinstitutional Agreement on Better Law-Making of 13 April 2016. In particular, to ensure equal participation in the preparation of delegated acts, the European Parliament and the Council receive all documents at the same time as Member States' experts, and their experts systematically have access to meetings of Commission expert groups dealing with the preparation of delegated acts.

- (19) Since the objectives of this Directive, namely to reinforce and refine already existing Union legislation ensuring uniform prudential requirements that apply to credit institutions and investment firms throughout the Union, cannot be sufficiently achieved by the Member States but can rather, by reason of their scale and effects, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.
- (20) In accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents, Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified.
- (21) Directive 2013/36/EU should therefore be amended accordingly,

HAVE ADOPTED THIS DIRECTIVE:

*Article 1*  
*Amendments to Directive 2013/36/EU*

Directive 2013/36/EU is amended as follows:

- (1) Article 2 is amended as follows:
- (a) paragraph 5 is amended as follows:
- (1) point (16) is replaced by the following:
- "(16) in the Netherlands, the 'Nederlandse Investeringsbank voor Ontwikkelingslanden NV', the 'NV Noordelijke Ontwikkelingsmaatschappij', the 'NV Industriebank Limburgs Instituut voor Ontwikkeling en Financiering', the 'Overijsselse Ontwikkelingsmaatschappij NV' and kredietunies;"
- (2) the following point (24) is added:
- " (24) in Croatia, the “kreditne unije” and the “Hrvatska banka za obnovu i razvitak”,’
- (b) the following paragraphs 5a and 5b are inserted:
- "5a. This Directive shall not apply to an institution where the Commission establishes in a delegated act adopted pursuant to Article 148, on the basis of information available to it that the institution fulfils all of the following conditions, without prejudice to the application of state aid rules:

- (a) it has been established under public law by a Member State's central government, regional government or local authority;
- (b) laws and provisions governing the institution confirm that its activity is limited to advancing specified objectives of financial, social or economic public policy in accordance with the laws and provisions governing that institution, on a non-competitive, not for profit basis. For these purposes, public policy objectives may include the provision of financing for promotional or development purposes to specific economic activities, or geographical areas of the relevant Member State;
- (c) it is subject to adequate and effective prudential requirements, including minimum own funds requirements, and to an adequate supervisory framework which has similar effect as the framework established under Union law;
- (d) the central government, regional government or local authority, as applicable, has an obligation to protect the institution's viability or directly or indirectly guarantees at least 90% of the institution's own funds requirements, funding requirements or exposures;
- (e) it is precluded from accepting covered deposits as defined in point (5) of Article 2(1) of Directive 2014/49/EU of the European Parliament and of the Council<sup>12</sup>;
- (f) its activities are confined to the Member State where its head office is situated;
- (g) the total value of the institution's assets is below EUR 30 billion;
- (h) the ratio of the institution's total assets over the GDP of the Member State concerned is less than 20%;
- (i) the institution is not of significant relevance with regard to the domestic economy of the Member State concerned.

The Commission shall regularly review whether an institution subject to a delegated act adopted pursuant to Article 148 continues to fulfil the conditions set out in the first subparagraph.

5b. This Directive shall not apply to categories of institutions in a Member State, where the Commission establishes in a delegated act adopted pursuant to Article 148, on the basis of information available to it, that the institutions falling under that category qualify as credit unions under the national law of a Member State and meet all of the following conditions:

- (a) they are financial institutions of a cooperative nature;
- (b) their membership is restricted to a set of members sharing certain pre-defined common personal features or interests;
- (c) they are only permitted to provide credit and financial services to their members;

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<sup>12</sup> Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes (recast) (OJ L 173, 12.6.2014, p. 149)

- (d) they are only permitted to accept deposits or repayable funds from their members and such deposits qualify as covered deposits under point 5 of Article 2(1) of Directive 2014/49/EU;
- (e) they are only permitted to perform the activities listed in points 1 to 6 and 15 of Annex I to this Directive;
- (f) they are subject to adequate and effective prudential requirements, including minimum capital requirements, and a supervisory framework which has similar effect as the framework established under Union law;
- (g) the aggregate value of the assets of this category of institutions does not exceed 3% of the GDP of the Member State concerned and the total value of assets of individual institutions does not exceed EUR 100 million;
- (h) their activities are confined to the Member State where their head office is situated.

The Commission shall regularly review whether a category of institutions subject to a delegated act adopted pursuant to Article 148 continues to fulfil the conditions set out in the first subparagraph."

(c) paragraph 6 is replaced by the following:

"6. The entities referred to in point (1) and points (3) to (24) of paragraph 5 and in the delegated acts adopted in accordance with paragraphs 5a and 5b of this Article shall be treated as financial institutions for the purposes of Article 34 and Title VII, Chapter 3."

(d) the following paragraph 7 is added:

" By [5 years after entry into force], the Commission shall review the list set out in Article 2(5) by considering whether the reasons that led to the inclusion of entities in the list are still valid, the national legal framework and supervision applicable to the entities in the list, the type and quality of deposit coverage of the entities in the list and, for entities of the type specified in paragraphs 2(5a) and 2(5b) taking into account also the criteria described therein."

(2) Article 3 is amended as follows:

(a) in paragraph 1, the following points are added:

"(60) 'resolution authority' means a resolution authority as defined in point (18) of Article 2(1) of Directive 2014/59/EU;

(61) "global systemically important institution" (G-SII) means a G-SII as defined in point (132) of Article 4(1) of Regulation (EU) No 575/2013;

(62) "non-EU global systemically important institution" (non-EU G-SII) means a non-EU G-SII as defined in point (133) of Article 4(1) of Regulation (EU) No 575/2013

(63) "group" means a group as defined in point (137) of Article 4(1) of Regulation (EU) No 575/2013.

(64) "third country group" means a group of which the parent undertaking is established in a third country.

(b) the following paragraph 3 is added:

"3. For the purposes of applying the requirements of this Directive and of Regulation (EU) No 575/2013 on a consolidated basis and for the purposes of exercising supervision on a consolidated basis in accordance with this Directive and Regulation (EU) 575/2013, the terms "institution", "parent institution in a Member State", "EU parent institution" and "parent undertaking" shall also apply to financial holding companies and mixed financial holding companies that are subject to requirements laid down in this Directive and in Regulation 575/2013 on a consolidated basis and are authorised in accordance with Article 21a."

(3) In Article 4, paragraph 8 is replaced by the following:

"8. Member States shall ensure that where authorities other than the competent authorities have the power of resolution, those other authorities cooperate closely and consult the competent authorities with regard to the preparation of resolution plans and in all other instances where this is required in this Directive, Directive 2014/59/EU of the European Parliament and of the Council<sup>13</sup> or in Regulation (EU) No 575/2013."

(4) Article 8(2) is amended as follows:

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

"(a) the information to be provided to the competent authorities in the application for the authorisation of credit institutions, including the programme of operations provided for in Article 10 and the information necessary for the requirements for authorisation laid down by Member States and notified to EBA in accordance with paragraph 1";

(b) point (b) is replaced by the following:

"(b) the requirements applicable to shareholders and members with qualifying holdings, or, where there are no qualifying holdings, of the 20 largest shareholders or members, pursuant to Article 14; and"

(5) In Article 9, paragraph 2 is replaced by the following:

"2. Paragraph 1 shall not apply to the taking of deposits or other repayable funds by any of the following:

(a) a Member State;

(b) a Member State's regional or local authority;

(c) public international bodies of which one or more Member States are members;

(d) persons or undertakings the taking up and pursuit of the business of which is explicitly covered by Union law, other than this Directive and Regulation (EU) No 575/2013;

(e) entities referred to in Article 2(5), the activity of which is governed by national law."

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<sup>13</sup> 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).

- (6) Article 10 is replaced by the following:

*"Article 10  
Programme of operations and structural organisation*

Member States shall require applications for authorisation to be accompanied by a programme of operations setting out the types of business envisaged and the structural organisation of the credit institution, including indication of the parent undertakings, financial holding companies and mixed financial holding companies within the group."

- (7) In Article 14, paragraph 2 is replaced by the following:

"2. The competent authorities shall refuse authorisation to commence the activity of a credit institution if, taking into account the need to ensure the sound and prudent management of a credit institution, they are not satisfied as to the suitability of the shareholders or members in accordance with the criteria set out in Article 23(1), Article 23(2) and (3) and Article 24 shall apply."

- (8) In Article 18, point (d) is replaced by the following:

"(d) no longer meets the prudential requirements set out in Parts Three, Four or Six, except for the requirements laid down in Articles 92a and 92b, of Regulation (EU) No 575/2013 or imposed under Article 104(1)(a) or Article 105 of this Directive or can no longer be relied on to fulfil its obligations towards its creditors, and, in particular, no longer provides security for the assets entrusted to it by its depositors."

- (9) The following Articles 21a and 21b are inserted:

*"Article 21a  
Authorisation of financial holding companies and mixed financial holding companies*

1. Member States shall require financial holding companies and mixed financial holding companies to obtain authorisation from the consolidating supervisor determined in accordance with Article 111.

Where the consolidating supervisor is different than the competent authority in the Member State where the financial holding company or the mixed financial holding company was set-up, the consolidating supervisor shall consult the competent authority.

2. The application for authorisation referred to in paragraph 1 shall contain information concerning the following:

- (a) the structural organisation of the group of which the financial holding company or the mixed financial holding company is part, clearly indicating the subsidiaries and, where applicable, parent undertakings;
- (b) compliance with effective direction of the business and place of the head office requirements set out in Article 13;
- (c) compliance with shareholder and member requirements set out in Article 14.

3. The consolidating supervisor may only grant an authorisation where it is satisfied that all of the following conditions are fulfilled:

- (a) the financial holding company or mixed financial holding company that is subject to requirements laid down in this Directive and in Regulation (EU) No 575/2013 is capable of ensuring compliance with those requirements;

- (b) the financial holding company or mixed financial holding company does not obstruct the effective supervision of the subsidiary institutions or parent institutions.
4. Consolidating supervisors shall require financial holding companies and mixed financial holding companies to provide them with the information they require to monitor the structural organisation of the group and compliance with the authorisation requirements referred to in this Article.
  5. The consolidating supervisors may only withdraw the authorisation granted to a financial holding company or mixed financial holding company where such a financial holding company or mixed financial holding company:
    - (a) does not make use of the authorisation within 12 months, expressly renounces the authorisation or has sold all its subsidiaries that are institutions;
    - (b) has obtained the authorisation through false statements or any other irregular means;
    - (c) no longer fulfils the conditions under which authorisation was granted;
    - (d) is subject to requirements laid down in this Directive and in Regulation (EU) No. 575/2013 on a consolidated basis and no longer meets the prudential requirements set out in Parts Three, Four or Six of Regulation (EU) No 575/2013 or imposed under Article 104(1)(a) or Article 105 of this Directive or can no longer be relied on to fulfil its obligations towards its creditors;
    - (e) falls within one of the other cases where national law provides for withdrawal of authorisation; or
    - (f) commits one of the breaches referred to in Article 67(1).

#### *Article 21b*

##### *Intermediate EU parent undertaking*

1. Member States shall require that two or more institutions in the Union, which are part of the same third country group, have an intermediate EU parent undertaking that is established in the Union.
2. Member States shall require an intermediate EU parent undertaking in the Union to obtain authorisation as an institution in accordance with Article 8, or as a financial holding company or mixed financial holding company in accordance with Article 21a.
3. Paragraphs 1 and 2 shall not apply where the total value of assets in the Union of the third country group is lower than EUR 30 billion, unless the third country group is a non-EU G-SII.
4. For the purposes of this Article, the total value of assets in the Union of the third country group shall include the following:
  - (a) the total assets of each institution in the Union of the third country group, as resulting from their consolidated balance sheet; and
  - (b) the total assets of each branch of the third country group authorised in the Union.
5. Competent authorities shall notify to the EBA every authorisation granted pursuant to paragraph 2.

6. EBA shall publish on its website the list of all intermediate EU parent undertakings that have been granted authorisation in the Union.

Competent authorities shall ensure that there is a single intermediate EU parent undertaking for all institutions that are part of the same third country group."

- (10) In Article 23(1), point (b) is replaced by the following:

"(b) the reputation, knowledge, skills and experience, as set out in Article 91(1), of any member of the management body who will direct the business of the credit institution as a result of the proposed acquisition;"

- (11) In Article 47, paragraph 2 is replaced by the following:

"2. The competent authorities shall notify the EBA of the following:

- (a) all authorisations for branches granted to credit institutions having their head office in a third country;
- (b) total assets and liabilities of the authorised branches of credit institutions having their head office in a third country, as periodically reported.

EBA shall publish on its website the list of all third country branches authorised to operate in the Member States, indicating the Member State and the total assets of each branch."

- (12) In Article 75, paragraph 1 is replaced by the following:

"1. Competent authorities shall collect the information disclosed in accordance with the criteria for disclosure established in points (g), (h), (i) and (k) of Article 450(1) of Regulation (EU) No 575/2013 and shall use it to benchmark remuneration trends and practices. The competent authorities shall provide EBA with that information."

- (13) Article 84 is replaced by the following:

#### *"Article 84*

##### *Interest risk arising from non-trading book activities*

1. Competent authorities shall ensure that institutions implement internal systems or use the standardised methodology to identify, evaluate, manage and mitigate the risks arising from potential changes in interest rates that affect both the economic value of equity and the net interest income of an institution's non-trading book activities.
2. Competent authorities shall ensure that institutions implement systems to assess and monitor the risks arising from potential changes in credit spreads that affect both the economic value of equity and the net interest income of an institution's non-trading book activities.
3. Competent authorities may require institutions to use the standardised methodology referred to in paragraph 1 where the internal systems implemented by the institutions for the purposes of evaluating the risks referred to in paragraph 1 are not satisfactory.
4. EBA shall develop draft regulatory technical standards to specify, for the purposes of this Article, the details of a standardised methodology that institutions may use for the purpose of evaluating the risks referred to in paragraph 1.

EBA shall submit those draft regulatory technical standards to the Commission by [one year after entry into force].

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010.

5. EBA shall issue guidelines to specify:
- (a) the criteria for the evaluation by an institution's internal system of the risks referred to in paragraph 1;
  - (b) the criteria for the identification, management and mitigation by institutions of the risks referred to in paragraph 1;
  - (c) the criteria for the assessment and monitoring by institutions of the risks referred to in paragraph 2;
  - (d) the criteria for determining which the internal systems implemented by the institutions for the purposes of paragraph 1 are not satisfactory as referred to in paragraph 3;

EBA shall issue those guidelines by [one year after entry into force]."

- (14) In Article 85, paragraph (1) is replaced by the following:

"1. Competent authorities shall ensure that institutions implement policies and processes to evaluate and manage the exposure to operational risk, including model risk and risks resulting from outsourcing, and to cover low-frequency high-severity events. Institutions shall articulate what constitutes operational risk for the purposes of those policies and procedures."

- (15) Article 92 is amended as follows:

- (a) paragraph 1 is deleted.
- (b) in paragraph 2, the introductory phrase is replaced by the following:

"Competent authorities shall ensure that, when establishing and applying the total remuneration policies, inclusive of salaries and discretionary pension benefits, for categories of staff including senior management, risk takers, staff engaged in control functions and any employee receiving total remuneration that takes them into the same remuneration bracket as senior management and risk takers, whose professional activities have a material impact on their risk profile, institutions comply with the following principles in a manner that is appropriate to their size, internal organisation and the nature, scope and complexity of their activities."

- (16) Article 94 is amended as follows:

- (a) in paragraph 1(l), point (i) is replaced by the following:

"(i) shares or, subject to the legal structure of the institution concerned, equivalent ownership interests; or share-linked instruments or, subject to the legal structure of the institution concerned, equivalent non-cash instruments;"

- (b) the following paragraphs are added:

"3. By way of derogation from paragraph 1, the principles set out in points (l), (m) and in the second subparagraph of point (o) shall not apply to:

- (a) an institution the value of the assets of which is on average equal to or less than EUR 5 billion over the four-year period immediately preceding the current financial year;

- (b) a staff member whose annual variable remuneration does not exceed EUR 50.000 and does not represent more than one fourth of the staff member's annual total remuneration.

By way of derogation from point (a), a competent authority may decide that institutions whose total asset value is below the threshold referred to in point (a) are not subject to the derogation because of the nature and scope of their activities, their internal organisation or, if applicable, the characteristics of the group to which they belong.

By way of derogation from point (b), a competent authority may decide that staff members whose annual variable remuneration is below the threshold and share referred to in point (b) are not subject to the derogation because of national market specificities in terms of remuneration practices or because of the nature of the responsibilities and job profile of those staff members.

4. By [four years after entry into force of this Directive], the Commission, in close cooperation with EBA, shall review and report on the application of paragraph 3 and shall submit that report to the European Parliament and to the Council together with a legislative proposal if appropriate.

5. EBA shall adopt guidelines facilitating the implementation of paragraph 3 and ensuring its consistent application."

(17) In Article 97(1) point (b) is deleted.

(18) Article 98 is amended as follows:

(a) in paragraph (1), point (j) is deleted;

(b) paragraph 5 is replaced by the following:

"5. The review and evaluation performed by competent authorities shall include the exposure of institutions to the interest rate risk arising from non-trading book activities. Supervisory measures shall be required at least in the case of institutions whose economic value of equity referred to in Article 84(1) declines by more than 15 % of their Tier 1 capital as a result of a sudden and unexpected change in interest rates as set out in any of six supervisory shock scenarios applied to interest rates."

(c) the following paragraph 5a is inserted:

"5a. EBA shall develop draft regulatory technical standards to specify for the purpose of paragraph 5:

(a) six supervisory shock scenarios to be applied to interest rates for every currency;

(b) common modelling and parametric assumptions that institutions shall reflect in their calculation of the economic value of equity under paragraph 5;

(c) whether supervisory measures shall also be required in the case of a decline in the institutions' net interest income referred to in Article 84(1) as a result of potential changes in interest rates.

EBA shall submit those draft regulatory technical standards to the Commission by [one year after entry into force].

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010."

(19) In Article 99(2), point (b) is deleted.

(20) Article 103 is deleted.

(21) Article 104 is amended as follows:

(a) paragraphs 1 and 2 are replaced by the following:

"1. For the purposes of Article 97, Article 98(4), Article 101(4) and Article 102 and the application of Regulation (EU) No 575/2013, competent authorities shall have at least the following powers:

- (a) to require institutions to have additional own funds in excess of the requirements set out in Regulation (EU) No 575/2013, under the conditions laid down in Article 104a;
- (b) to require the reinforcement of the arrangements, processes, mechanisms and strategies implemented in accordance with Articles 73 and 74;
- (c) to require institutions to present a plan to restore compliance with supervisory requirements pursuant to this Directive and to Regulation (EU) No 575/2013 and set a deadline for its implementation, including improvements to that plan regarding scope and deadline;
- (d) to require institutions to apply a specific provisioning policy or treatment of assets in terms of own funds requirements;
- (e) to restrict or limit the business, operations or network of institutions or to request the divestment of activities that pose excessive risks to the soundness of an institution;
- (f) to require the reduction of the risk inherent in the activities, products and systems of institutions, including outsourced activities;
- (g) to require institutions to limit variable remuneration as a percentage of net revenues where it is inconsistent with the maintenance of a sound capital base;
- (h) to require institutions to use net profits to strengthen own funds;
- (i) to restrict or prohibit distributions or interest payments by an institution to shareholders, members or holders of Additional Tier 1 instruments where the prohibition does not constitute an event of default of the institution;
- (j) to impose additional or more frequent reporting requirements, including reporting on capital and liquidity positions;
- (k) to impose specific liquidity requirements, including restrictions on maturity mismatches between assets and liabilities;
- (l) to require additional disclosures on an ad hoc basis only

2. For the purposes of paragraph 1(j), competent authorities may only impose additional or more frequent reporting requirements on institutions where the information to be reported is not duplicative and one of the following conditions is met:

- (a) either of the conditions referred to in points (a) and (b) of Article 102(1) has been met;

- (b) the competent authority deems reasonable to impose those requirements to gather the evidence referred in Article 102(1)(b):
- (c) the additional information is required for the duration of the institution's supervisory examination programme in accordance with Article 99.

Information that may be required from institutions shall be deemed as duplicative as referred to in the first subparagraph where the same or substantially the same information is already available to the competent authority, may be produced by the competent authority or obtained through other means than a requirement on the institution to report it. Where information is available to the competent authority in a different format or level of granularity than the additional information to be reported, the competent authority shall not require the additional information where that different format or granularity does not prevent it from producing substantially similar information.";

(b) paragraph 3 is deleted.

(22) The following Articles 104a, 104b and 104c are inserted:

*"Article 104a  
Additional own funds requirement*

1. Competent authorities shall impose the additional own funds requirement referred to in Article 104(1)(a) only where, on the basis of the reviews carried out in accordance with Articles 97 and 101, they ascertain any of the following situations for an individual institution:
  - (a) the institution is exposed to risks or elements of risks that are not covered or not sufficiently covered by the own funds requirements set out in Parts Three, Four, Five and Seven of Regulation (EU) No 575/2013 as specified in paragraph 2;
  - (b) the institution does not meet the requirements set out in Articles 73 and 74 of this Directive or in Article 393 of Regulation (EU) No 575/2013 and the sole application of other administrative measures is unlikely to sufficiently improve the arrangements, processes, mechanisms and strategies within an appropriate timeframe;
  - (c) the adjustments referred to in Article 98(4) are deemed to be insufficient to enable the institution to sell or hedge out its positions within a short period without incurring material losses under normal market conditions;
  - (d) the evaluation carried out in accordance to Article 101(4) reveals that the non-compliance with the requirements for the application of the permitted approach will likely lead to inadequate own funds requirements;
  - (e) the institution repeatedly fails to establish or maintain an adequate level of additional own funds as set out in Article 104b(1).

The competent authorities shall not impose the additional own funds requirement referred to in Article 104(1)(a) to cover macroprudential or systemic risks.

2. For the purposes of paragraph 1(a), risks or elements of risk shall only be considered as not covered or not sufficiently covered by the own funds requirements set out in Parts Three, Four, Five and Seven of Regulation (EU) No 575/2013 where the amounts, types and distribution of capital considered adequate by the competent

authority following the supervisory review of the assessment carried out by institutions in accordance with the first paragraph of Article 73, are higher than the institution's own funds requirements set out in Parts Three, Four, Five and Seven of Regulation (EU) No 575/2013.

For the purposes of the first subparagraph, the capital considered adequate shall cover all material risks or elements of such risks that are not subject to a specific own funds requirement. This may include risks or elements of risks that are explicitly excluded from the own funds requirements set out in Parts Three, Four, Five and Seven of Regulation (EU) No 575/2013.

Interest rate risk arising from non-trading positions shall only be considered material when the economic value of equity declines by more than 15 % of the institution Tier 1 capital as a result of any of the six supervisory shock scenarios referred to in Article 98(5) that are applied to interest rates or any other case identified by EBA pursuant to Article 98(5)(c).

The risks referred to in paragraph 1(a) shall not include risks for which this Directive or Regulation (EU) No 575/2013 provide a transitional treatment, or risks which are subject to grandfathering provisions.

3. Competent authorities shall determine the level of the additional own funds required under Article 104(1)(a) as the difference between the capital considered adequate pursuant to paragraph 2 and the own funds requirements set out in Parts Three, Four, Five and Seven of Regulation (EU) No 575/2013.
4. The institution shall meet the additional own funds requirement referred to in Article 104(1)(a) with own funds instruments subject to the following conditions:
  - (a) at least three quarters of the additional own funds requirement shall be met with Tier 1 capital;
  - (b) at least three quarters of the Tier 1 capital shall be composed of CET 1 capital.

Own funds used to meet the additional own funds requirement referred to in Article 104(1)(a) shall not be used towards meeting any of the own funds requirements set out in points (a), (b) and (c) of Article 92(1) of Regulation (EU) No 575/2013 or the combined buffer requirement defined in Article 128(6) of this Directive.

By way of derogation from the second subparagraph, own funds used to meet the additional own funds requirement referred to in Article 104(1)(a) imposed by competent authorities to address risks or elements of risks not sufficiently covered by Article 92(1)(d) of Regulation (EU) No 575/2013 may be used to meet the combined buffer requirement referred to in Article 128(6) of this Directive.

5. The competent authority shall duly justify in writing to each institution the decision to impose an additional own funds requirement under Article 104(1)(a), at least by giving a clear account of the full assessment of the elements referred to in paragraphs 1 to 4. This includes, in the case set out in paragraph 1(d), a specific statement of the reasons for which the imposition of capital guidance is no longer considered sufficient.
6. EBA shall develop draft regulatory technical standards specifying how the risks and elements of risks referred to in paragraph 2 shall be measured.

EBA shall ensure that the draft regulatory technical standards are proportionate in light of:

- (a) the implementation burden on institutions and competent authorities; and
- (b) the possibility that the general higher level of capital requirements that apply where institutions do not use internal models may justify the imposition of lower capital requirements when assessing risks and elements of risks in accordance with paragraph 2.

EBA shall submit those draft regulatory technical standards to the Commission by [one year after entry into force].

Power is conferred on the Commission to adopt the regulatory technical standards referred to in paragraph 6 in accordance with Articles 10-14 of Regulation (EU) No 1093/2010.

*Article 104b*  
*Guidance on additional own funds*

1. Pursuant to the strategies and processes referred to in Article 73 and after consulting the competent authority, institutions shall establish an adequate level of own funds that is sufficiently above the requirements set out in Parts Three, Four, Five and Seven of Regulation (EU) No 575/2013 and in this Directive, including the additional own funds requirements imposed by the competent authorities in accordance with Article 104(1)(a), in order to ensure that:
  - (a) cyclical economic fluctuations do not lead to a breach of those requirements; and
  - (b) the institution's own funds can absorb, without breaching the own funds requirements set out in Parts Three, Four, Five and Seven of Regulation (EU) No 575/2013 and the additional own funds requirements imposed by the competent authorities in accordance with Article 104(1)(a), potential losses identified pursuant to the supervisory stress test referred to in Article 100.
2. Competent authorities shall regularly review the level of own funds set by each institution in accordance with paragraph 1 taking into account the outcome of the reviews and evaluations carried out in accordance with Articles 97 and 101, including the results of stress tests referred to in Article 100.
3. Competent authorities shall communicate to institutions the outcome of the review provided for in paragraph 2. Where appropriate, competent authorities may communicate to institutions any expectation for adjustments to the level of own funds established in accordance with paragraph 1.
4. Competent authorities shall not communicate to institutions any expectation for the adjustments to the level of own funds pursuant to paragraph 3 in cases where additional own funds requirement shall be imposed pursuant to Article 104a.
5. An institution that fails to meet the expectations set out in paragraph 3 shall not be subject to the restrictions referred to in Article 141.

*Article 104c*  
*Cooperation with resolution authorities*

1. Competent authorities shall consult resolution authorities prior to determining any additional own funds requirement referred to in Article 104(1)(a) and prior to communicating to institutions any expectation for adjustments to the level of own

funds in accordance with Article 104b. For these purposes, competent authorities shall provide resolution authorities with all available information.

2. Competent authorities shall inform the relevant resolution authorities about the additional own funds requirement imposed on institutions pursuant to Article 104(1)(a) and about any expectation for adjustments to the level of own funds communicated to institutions in accordance with Article 104b."

(23) In Article 105, point (d) is deleted.

(24) In Article 108, paragraph 3 is deleted.

(25) In Article 109, paragraphs 2 and 3 are replaced by the following

"2. Competent authorities shall require the parent undertakings and subsidiaries subject to this Directive to meet the obligations set out in Section II of this Chapter on a consolidated or sub-consolidated basis, to ensure that the arrangements, processes and mechanisms required by Section II of this Chapter are consistent and well-integrated and that any data and information relevant to the purpose of supervision can be produced. In particular, they shall ensure that parent undertakings and subsidiaries subject to this Directive implement these arrangements, processes and mechanisms in their subsidiaries not subject to this Directive, including those established in offshore financial centres. Those arrangements, processes and mechanisms shall also be consistent and well-integrated and those subsidiaries shall also be able to produce any data and information relevant to the purpose of supervision.

3. Obligations resulting from Section II of this Chapter concerning subsidiary undertakings, not themselves subject to this Directive, shall not apply if the EU parent institution can demonstrate to the competent authorities that the application of Section II is unlawful under the laws of the third country where the subsidiary is established."

(26) Article 113 is replaced by the following:

*"Article 113*

*Joint decisions on institution-specific prudential requirements*

1. The consolidating supervisor and the competent authorities responsible for the supervision of subsidiaries of an EU parent institution or an EU parent financial holding company or EU parent mixed financial holding company in a Member State shall do everything within their power to reach a joint decision:

(a) on the application of Articles 73 and 97 to determine the adequacy of the consolidated level of own funds held by the group of institutions with respect to its financial situation and risk profile and the required level of own funds for the application of Article 104(1)(a) to each entity within the group of institutions and on a consolidated basis;

(b) on measures to address any significant matters and material findings relating to liquidity supervision including relating to the adequacy of the organisation and the treatment of risks as required pursuant to Article 86 and relating to the need for institution-specific liquidity requirements in accordance with Article 105 of this Directive;

(c) on any expectation for adjustments to the consolidated level of own funds in accordance with Article 104b(3).

2. The joint decisions referred to in paragraph 1 shall be reached:

(a) for the purposes of paragraph 1(a), within four months after submission by the consolidating supervisor of a report containing the risk assessment of the group of institutions in accordance with Article 104a to the other relevant competent authorities;

(b) for the purposes of paragraph 1(b), within four months after submission by the consolidating supervisor of a report containing the assessment of the liquidity risk profile of the group of institutions in accordance with Articles 86 and 105;

(c) for the purposes of paragraph 1(c), within four months after submission by the consolidating supervisor of a report containing the risk assessment of the group of institutions in accordance with Article 104b.

The joint decisions shall also duly consider the risk assessment of subsidiaries performed by relevant competent authorities in accordance with Articles 73, 97, 104a and 104b.

The joint decisions referred to in points (a) and (b) of paragraph 1 shall be set out in documents containing full reasons which shall be provided to the EU parent institution by the consolidating supervisor. In the event of disagreement, the consolidating supervisor shall at the request of any of the other competent authorities concerned consult EBA. The consolidating supervisor may consult EBA on its own initiative.

3. In the absence of such a joint decision between the competent authorities within the time periods referred to in paragraph 2, a decision on the application of Articles 73, 86 and 97, Article 104(1)(a), Article 104b and Article 105 shall be taken on a consolidated basis by the consolidating supervisor after duly considering the risk assessment of subsidiaries performed by relevant competent authorities. If, at the end of the time periods referred to in paragraph 2, any of the competent authorities concerned has referred the matter to EBA in accordance with Article 19 of Regulation (EU) No 1093/2010, the consolidating supervisor shall defer its decision and await any decision that EBA may take in accordance with Article 19(3) of that Regulation, and shall take its decision in conformity with the decision of EBA. The time periods referred to in paragraph 2 shall be deemed the conciliation periods within the meaning of Regulation (EU) No 1093/2010. EBA shall take its decision within 1 month. The matter shall not be referred to EBA after the end of the four month period or after a joint decision has been reached.

The decision on the application of Articles 73, 86 and 97, Article 104(1)(a), Article 104b and Article 105 shall be taken by the respective competent authorities responsible for supervision of subsidiaries of an EU parent credit institution or a EU parent financial holding company or EU parent mixed financial holding company on an individual or sub-consolidated basis after duly considering the views and reservations expressed by the consolidating supervisor. If, at the end of any of the time periods referred to in paragraph 2, any of the competent authorities concerned has referred the matter to EBA in accordance with Article 19 of Regulation (EU) No 1093/2010, the competent authorities shall defer their decision and await any decision that EBA shall take in accordance with Article 19(3) of that Regulation, and shall take their decision in conformity with the decision of EBA. The time periods

referred to in paragraph 2 shall be deemed the conciliation periods within the meaning of that Regulation. EBA shall take its decision within 1 month. The matter shall not be referred to EBA after the end of the four-month or after a joint decision has been reached.

The decisions shall be set out in a document containing full reasons and shall take into account the risk assessment, views and reservations of the other competent authorities expressed during the time periods referred to in paragraph 2. The document shall be provided by the consolidating supervisor to all competent authorities concerned and to the EU parent institution.

Where EBA has been consulted, all the competent authorities shall consider its advice, and explain any significant deviation therefrom.

4. The joint decisions referred to in paragraph 1 and the decisions taken by the competent authorities in the absence of a joint decision referred to in paragraph 3 shall be recognised as determinative and applied by the competent authorities in the Member States concerned.

The joint decisions referred to in the paragraph 1 and any decision taken in the absence of a joint decision in accordance with paragraph 3, shall be updated on an annual basis or, in exceptional circumstances, where a competent authority responsible for the supervision of subsidiaries of an EU parent institution or, an EU parent financial holding company or EU parent mixed financial holding company makes a written and fully reasoned request to the consolidating supervisor to update the decision on the application of Article 104(1)(a), Article 104b and Article 105. In the latter case, the update may be addressed on a bilateral basis between the consolidating supervisor and the competent authority making the request.

5. EBA shall develop draft implementing technical standards to ensure uniform conditions of application of the joint decision process referred to in this Article, with regard to the application of Articles 73, 86 and 97, Article 104(1)(a), Article 104b and Article 105 with a view to facilitating joint decisions.

EBA shall submit those draft implementing technical standards to the Commission by 1 July 2014.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1093/2010."

- (27) In the first subparagraph of Article 116, the following sentence is added:

"Colleges of supervisors shall also be established where all subsidiaries of an EU parent institution, an EU parent financial holding company or EU parent mixed financial holding company are located in a third country."

- (28) In Article 119, paragraph 1 is replaced by the following:

"1. Subject to Article 21a, Member States shall adopt any measures necessary to include financial holding companies and mixed financial holding companies in consolidated supervision."

- (29) In Article 120, paragraph 2 is replaced by the following:

"2. Where a mixed financial holding company is subject to equivalent provisions under this Directive and under Directive 2009/138/EC, in particular in terms of risk-based supervision, the consolidating supervisor may, in agreement with the group

supervisor in the insurance sector, apply to that mixed financial holding company only the provisions of the Directive relating to the most significant financial sector as defined in Article 3(2) of Directive 2002/87/EC."

(30) In Article 131, paragraph 1 is replaced by the following

"1. Member States shall designate the authority in charge of identifying, on a consolidated basis, global systemically important institutions (G-SIIs), and, on an individual, sub-consolidated or consolidated basis, as applicable, other systemically important institutions (O-SIIs), which have been authorised within their jurisdiction. That authority shall be the competent authority or the designated authority. Member States may designate more than one authority.

G-SIIs shall be any of the following:

- (a) a group headed by an EU parent institution, an EU parent financial holding company, or an EU parent mixed financial holding company; or
- (b) an institution that is not a subsidiary of an EU parent institution, of an EU parent financial holding company or of an EU parent mixed financial holding company.

O-SIIs can either be a group headed by an EU parent institution, an EU parent financial holding company, or an EU parent mixed financial holding company or an institution."

(31) In Article 141 paragraphs 1 to 6 are replaced by the following:

"1. An institution that meets the combined buffer requirement shall not make a distribution in connection with Common Equity Tier 1 capital to an extent that would decrease its Common Equity Tier 1 capital to a level where the combined buffer requirement is no longer met.

2. An institution that fails to meet the combined buffer requirement shall calculate the Maximum Distributable Amount ('MDA') in accordance with paragraph 4 and shall notify the competent authority of that MDA.

Where the first subparagraph applies, the institution shall not undertake any of the following actions before it has calculated the MDA:

- (a) make a distribution in connection with Common Equity Tier 1 capital;
- (b) create an obligation to pay variable remuneration or discretionary pension benefits or pay variable remuneration if the obligation to pay was created at a time when the institution failed to meet the combined buffer requirements;
- (c) make payments on Additional Tier 1 instruments.

3. Where an institution fails to meet or exceed its combined buffer requirement, it shall not distribute more than the MDA calculated in accordance with paragraph 4 through any action referred to in points (a), (b) and (c) of the second subparagraph of paragraph 2. An institution shall not take any of the action referred to in points (a) or (b) of the second subparagraph of paragraph 2 before having made the payments due on Additional Tier 1 instruments.

4. Institutions shall calculate the MDA by multiplying the sum calculated in accordance with paragraph 5 by the factor determined in accordance with paragraph 6. The MDA shall be reduced by any of the actions referred to in point (a), (b) or (c) of the second subparagraph of paragraph 2.

5. The sum to be multiplied in accordance with paragraph 4 shall consist of:

- (a) interim profits not included in Common Equity Tier 1 capital pursuant to Article 26(2) of Regulation (EU) No 575/2013 that have been generated since the most recent decision on the distribution of profits or any of the actions referred to in point (a), (b) or (c) of the second subparagraph of paragraph 2 of this Article;

plus

- (a) year-end profits not included in Common Equity Tier 1 capital pursuant to Article 26(2) of Regulation (EU) No 575/2013 that have been generated since the most recent decision on the distribution of profits or any of the actions referred to in point (a), (b) or (c) of the second subparagraph of paragraph 2 of this Article;

minus

- (b) (amounts which would be payable by tax if the items specified in points (a) and (b) of this paragraph were to be retained.

6. The factor shall be determined as follows:

- (a) where the Common Equity Tier 1 capital maintained by the institution which is not used to meet any of the own funds requirements under Article 92a and points (a), (b) and (c) of Article 92(1) of Regulation (EU) No 575/2013, under Articles 45c and 45d of Directive 2014/59/EU and under Article 104(1)(a) of this Directive expressed as a percentage of the total risk exposure amount calculated in accordance with Article 92(3) of Regulation (EU) No 575/2013, is within the first (that is, the lowest) quartile of the combined buffer requirement, the factor shall be 0;
- (b) where the Common Equity Tier 1 capital maintained by the institution which is not used to meet any of the own funds requirements under Article 92a and points (a), (b) and (c) of Article 92(1) of Regulation (EU) No 575/2013, under Articles 45c and 45d of Directive 2014/59/EU and under Article 104(1)(a) of this Directive, expressed as a percentage of the total risk exposure amount calculated in accordance with Article 92(3) of Regulation (EU) No 575/2013, is within the second quartile of the combined buffer requirement, the factor shall be 0,2;
- (c) where the Common Equity Tier 1 capital maintained by the institution which is not used to meet the own funds requirements under Article 92a and points (a), (b) and (c) of Article 92(1) of Regulation (EU) No 575/2013, under Articles 45c and 45d of Directive 2014/59/EU and under Article 104(1)(a) of this Directive, expressed as a percentage of the total risk exposure amount calculated in accordance with Article 92(3) of Regulation (EU) No 575/2013, is within the third quartile of the combined buffer requirement, the factor shall be 0,4;
- (d) where the Common Equity Tier 1 capital maintained by the institution which is not used to meet the own funds requirements under Article 92a and points (a), (b) and (c) of Article 92(1) of Regulation (EU) No 575/2013, under Articles 45c and 45d of Directive 2014/59/EU and under Article 104(1)(a) of this Directive, expressed as a percentage of the total risk exposure amount calculated in accordance with Article 92(3) of Regulation (EU) No 575/2013,

is within the fourth (that is, the highest) quartile of the combined buffer requirement, the factor shall be 0,6;

The lower and upper bounds of each quartile of the combined buffer requirement shall be calculated as follows:

$$\text{Lower bound of quartile} = \frac{\text{Combined buffer requirement}}{4} \times (Q_n - 1)$$

$$\text{Upper bound of quartile} = \frac{\text{Combined buffer requirement}}{4} \times Q_n$$

"Q<sub>n</sub>" indicates the ordinal number of the quartile concerned."

(32) The following Article 141a is inserted:

*"Article 141a  
Failure to meet the combined buffer requirement*

1. An institution shall be considered as failing to meet the combined buffer requirement for the purposes of Article 141 where it does not have own funds and eligible liabilities in an amount and of the quality needed to meet at the same time the requirement defined in Article 128(6) and each of the following requirements in:
  - (a) Article 92(1)(a) of Regulation (EU) No 575/2013 and the requirement in Article 104(1)(a) of this Directive;
  - (b) Article 92(1)(b) of Regulation (EU) No 575/2013 and the requirement in Article 104(1)(a) of this Directive;
  - (c) Article 92(1)(c) of Regulation (EU) No 575/2013 and the requirement in Article 104(1)(a) of this Directive;
  - (d) Article 92a of Regulation (EU) No 575/2013 and in Articles 45c and 45d of Directive 2014/59/EU.
2. By way of derogation from paragraph 1, an institution shall not be considered as failing to meet the combined buffer requirement for the purposes of Article 141 where all the following conditions are met:
  - (a) the institution meets the combined buffer requirement defined in Article 128(6) and each of the requirements referred to in points (a), (b) and (c) of paragraph 1;
  - (b) the failure to meet the requirements referred to in point (d) of paragraph 1 is exclusively due to the inability of the institution to replace liabilities that no longer meet the eligibility or maturity criteria laid down in Articles 72b and 72c of Regulation (EU) No 575/2013;
  - (c) the failure to meet the requirements referred to in point (d) of paragraph 1 does not last longer than 6 months."

(33) In Article 145, the following points (j) and (k) are added:

"(j) supplementing Articles 2(5a) and 2(5b) by establishing, on the basis of the information available to it

- (i) whether institutions or categories of institutions, meet the conditions set out in those Articles; or
  - (ii) whether institutions or categories of institutions, have ceased to meet the conditions laid down in those;
- (k) amendments to the list set out in Article 2(5):
- (i) by deleting institutions or categories of institutions, where the relevant institution or category of institutions has ceased to exist;
  - (ii) by making the necessary changes where the name of the relevant institution or category of institutions has changed."
- (34) In Article 146, point (a) is deleted.
- (35) In Article 161, the following paragraph 10 is added:
- "10. By 31 December 2023, the Commission shall review and report on the implementation and application of the supervisory powers referred to in points (j) and (l) of Article 104(1) and submit a report to the European Parliament and to the Council. "

## *Article 2*

### *Transposition*

1. Member States shall adopt and publish, by [one year after entry into force of this Directive] at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions.  
  
They shall apply those provisions from [one year + 1 day after entry into force of this Directive]. However, the provisions necessary to comply with the amendments set out in points (13) and (18) of Article 1 containing amendments to Articles 84 and 98 of Directive 2013/36/EU shall apply from [two years after entry into force of this Directive].  
  
When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.
2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

## *Article 3*

### *Entry into force*

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

*Article 4*  
*Addressees*

This Directive is addressed to the Member States.

Done at Strasbourg,

*For the European Parliament*  
*The President*

*For the Council*  
*The President*