

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 (Text with EEA relevance)

TITLE VII

PRUDENTIAL SUPERVISION

CHAPTER 4

Capital Buffers

Section I

Buffers

Article 128

Definitions

For the purpose of this Chapter, the following definitions shall apply:

- (1) 'capital conservation buffer' means the own funds that an institution is required to maintain in accordance with Article 129;
- (2) 'institution-specific countercyclical capital buffer' means the own funds that an institution is required to maintain in accordance with Article 130;
- (3) 'G-SII buffer' means the own funds that are required to be maintained in accordance with Article 131(4);
- (4) 'O-SII buffer' means the own funds that may be required to be maintained in accordance with Article 131(5);
- (5) 'systemic risk buffer' means the own funds that an institution is or may be required to maintain in accordance with Article 133;
- (6) 'combined buffer requirement' means the total Common Equity Tier 1 capital required to meet the requirement for the capital conservation buffer extended by the following, as applicable:
 - (a) an institution-specific countercyclical capital buffer;
 - (b) a G-SII buffer;
 - (c) an O-SII buffer;
 - (d) a systemic risk buffer;

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- (7) 'countercyclical buffer rate' means the rate that institutions must apply in order to calculate their institution-specific countercyclical capital buffer, and that is set in accordance with Article 136, Article 137 or by a relevant third-country authority, as the case may be;
- (8) 'domestically authorised institution' means an institution that has been authorised in the Member State for which a particular designated authority is responsible for setting the countercyclical buffer rate;
- (9) 'buffer guide' means a benchmark buffer rate calculated in accordance with Article 135(1).

This Chapter shall not apply to investment firms that are not authorised to provide the investment services listed in points 3 and 6 of Section A of Annex I to Directive 2004/39/EC.

Article 129

Requirement to maintain a capital conservation buffer

1 Member States shall require institutions to maintain in addition to the Common Equity Tier 1 capital maintained to meet the own funds requirement imposed by Article 92 of Regulation (EU) No 575/2013, a capital conservation buffer of Common Equity Tier 1 capital equal to 2,5 % of their total risk exposure amount calculated in accordance with Article 92(3) of that Regulation on an individual and consolidated basis, as applicable in accordance with Part One, Title II of that Regulation.

2 By way of derogation from paragraph 1, a Member State may exempt small and medium-sized investment firms from the requirements set out in that paragraph if such an exemption does not threaten the stability of the financial system of that Member State.

The decision on the application of such an exemption shall be fully reasoned, shall include an explanation as to why the exemption does not threaten the stability of the financial system of the Member State and shall contain the exact definition of the small and medium-sized investment firms which are exempt.

Member States which decide to apply such an exemption shall notify the Commission, the ESRB, EBA and the competent authorities of the Member States concerned accordingly.

3 For the purpose of paragraph 2, the Member State shall designate the authority in charge of the application of this Article. That authority shall be the competent authority or the designated authority.

4 For the purpose of paragraph 2, investment firms shall be categorised as small or medium-sized in accordance with Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises⁽¹⁾.

5 Institutions shall not use Common Equity Tier 1 capital that is maintained to meet the requirement under paragraph 1 of this Article to meet any requirements imposed under Article 104.

6 Where an institution fails to meet fully the requirement under paragraph 1 of this Article, it shall be subject to the restrictions on distributions set out in Article 141(2) and (3).

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Article 130

Requirement to maintain an institution-specific countercyclical capital buffer

1 Member States shall require institutions to maintain an institution-specific countercyclical capital buffer equivalent to their total risk exposure amount calculated in accordance with Article 92(3) of Regulation (EU) No 575/2013 multiplied by the weighted average of the countercyclical buffer rates calculated in accordance with Article 140 of this Directive on an individual and consolidated basis, as applicable in accordance with Part One, Title II of that Regulation.

2 By way of derogation from paragraph 1, a Member State may exempt small and medium-sized investment firms from the requirements set out in that paragraph if such an exemption does not threaten the stability of the financial system of that Member State.

The decision on the application of such an exemption shall be fully reasoned, shall include an explanation as to why the exemption does not threaten the stability of the financial system of the Member State and shall contain the exact definition of small and medium-sized investment firms which are exempt.

Member States which decide to apply such an exemption shall notify the Commission, the ESRB, EBA and the competent authorities of the Member States concerned accordingly.

3 For the purpose of paragraph 2, the Member State shall designate the authority in charge of the application of this Article. That authority shall be the competent authority or the designated authority.

4 For the purpose of paragraph 2, investment firms shall be categorised as small and medium-sized in accordance with Recommendation 2003/361/EC.

5 Institutions shall meet the requirement imposed by paragraph 1 with Common Equity Tier 1 capital, which shall be additional to any Common Equity Tier 1 capital maintained to meet the own funds requirement imposed by Article 92 of Regulation (EU) No 575/2013, the requirement to maintain a capital conservation buffer under Article 129 of this Directive and any requirement imposed under Article 104 of this Directive.

6 Where an institution fails to meet fully the requirement under paragraph 1 of this Article, it shall be subject to the restrictions on distributions set out in Article 141(2) and (3).

Article 131

Global and other systemically important institutions

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 an EU parent institution, an EU parent financial holding company, an EU parent mixed financial holding company or an institution. G-SIIs shall not be an institution that is 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 an EU parent institution, an

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EU parent financial holding company, an EU parent mixed financial holding company or an institution.

- 2 The identification methodology for G-SIIs shall be based on the following categories:
- a size of the group;
 - b interconnectedness of the group with the financial system;
 - c substitutability of the services or of the financial infrastructure provided by the group;
 - d complexity of the group;
 - e cross-border activity of the group, including cross border activity between Member States and between a Member State and a third country.

Each category shall receive an equal weighting and shall consist of quantifiable indicators.

The methodology shall produce an overall score for each entity as referred to in paragraph 1 assessed, which allows G-SIIs to be identified and allocated into a sub-category as described in paragraph 9.

- 3 O-SIIs shall be identified in accordance with paragraph 1. Systemic importance shall be assessed on the basis of at least any of the following criteria:
- a size;
 - b importance for the economy of the Union or of the relevant Member State;
 - c significance of cross-border activities;
 - d interconnectedness of the institution or group with the financial system.

EBA, after consulting the ESRB, shall publish guidelines by 1 January 2015 on the criteria to determine the conditions of application of this paragraph in relation to the assessment of O-SIIs. Those guidelines shall take into account international frameworks for domestic systemically important institutions and Union and national specificities.

4 Each G-SII shall, on a consolidated basis, maintain a G-SII buffer which shall correspond to the sub-category to which the G-SII is allocated. That buffer shall consist of and shall be supplementary to Common Equity Tier 1 capital.

5 The competent authority or designated authority may require each O-SII, on a consolidated or sub-consolidated or individual basis, as applicable, to maintain an O-SII buffer of up to 2 % of the total risk exposure amount calculated in accordance with Article 92(3) of Regulation (EU) No 575/2013, taking into account the criteria for the identification of the O-SII. That buffer shall consist of and shall be supplementary to Common Equity Tier 1 capital.

- 6 When requiring an O-SII buffer to be maintained the competent authority or the designated authority shall comply with the following:
- a the O-SII buffer must not entail disproportionate adverse effects on the whole or parts of the financial system of other Member States or of the Union as a whole forming or creating an obstacle to the functioning of the internal market;
 - b the O-SII buffer must be reviewed by the competent authority or the designated authority at least annually.

7 Before setting or resetting an O-SII buffer, the competent authority or the designated authority shall notify the Commission, the ESRB, EBA, and the competent and designated authorities of the Member States concerned one month before the publication of the decision referred to in paragraph 5. That notification shall describe in detail:

- a the justification for why the O-SII buffer is considered likely to be effective and proportionate to mitigate the risk;

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- b an assessment of the likely positive or negative impact of the O-SII buffer on the internal market, based on information which is available to the Member State;
- c the O-SII buffer rate that the Member State wishes to set.

8 Without prejudice to Article 133 and paragraph 5 of this Article, where an O-SII is a subsidiary of either a G-SII or an O-SII which is an EU parent institution and subject to an O-SII buffer on a consolidated basis, the buffer that applies at individual or sub-consolidated level for the O-SII shall not exceed the higher of:

- a 1 % of the total risk exposure amount calculated in accordance with Article 92(3) of Regulation (EU) No 575/2013; and
- b the G-SII or O-SII buffer rate applicable to the group at consolidated level.

9 There shall be at least five subcategories of G-SIIs. The lowest boundary and the boundaries between each subcategory shall be determined by the scores under the identification methodology. The cut-off scores between adjacent sub-categories shall be defined clearly and shall adhere to the principle that there is a constant linear increase of systemic significance, between each sub-category resulting in a linear increase in the requirement of additional Common Equity Tier 1 capital, with the exception of the highest sub-category. For the purposes of this paragraph, systemic significance is the expected impact exerted by the G-SII's distress on the global financial market. The lowest sub-category shall be assigned a G-SII buffer of 1 % of the total risk exposure amount calculated in accordance with Article 92(3) of Regulation (EU) No 575/2013 and the buffer assigned to each sub-category shall increase in gradients of 0,5 % of the total risk exposure amount calculated in accordance with Article 92(3) of Regulation (EU) No 575/2013 up to and including the fourth sub-category. The highest sub-category of the G-SII buffer shall be subject to a buffer of 3,5 % of the total risk exposure amount calculated in accordance with Article 92(3) of Regulation (EU) No 575/2013.

10 Without prejudice to paragraphs 1 and 9, the competent authority or the designated authority may, in the exercise of sound supervisory judgment:

- a re-allocate a G-SII from a lower sub-category to a higher sub-category;
- b allocate an entity as referred to in paragraph 1 that has an overall score that is lower than the cut-off score of the lowest sub-category to that sub-category or to a higher sub-category, thereby designating it as a G-SII.

11 Where the competent authority or the designated authority takes a decision in accordance with paragraph 10(b), it shall notify EBA accordingly, providing reasons.

12 The competent authority or the designated authority shall notify the names of the G-SIIs and O-SIIs and the respective sub-category to which each G-SII is allocated, to the Commission, the ESRB and EBA, and shall disclose their names to the public. The competent authorities or designated authorities shall disclose to the public the sub-category to which each G-SII is allocated.

The competent authority or the designated authority shall review annually the identification of G-SIIs and O-SIIs and the G-SII allocation into the respective sub-categories and report the result to the systemically important institution concerned, to the Commission, the ESRB and EBA and disclose the updated list of identified systemically important institutions to the public and shall disclose to the public the sub-category into which each identified G-SII is allocated.

13 Systemically important institutions shall not use Common Equity Tier 1 capital that is maintained to meet the requirements under paragraphs 4 and 5 to meet any requirements imposed under Article 92 of Regulation (EU) No 575/2013 and Articles 129 and 130 of this Directive and any requirements imposed under Articles 102 and 104 of this Directive.

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14 Where a group, on a consolidated basis, is subject to the following, the higher buffer shall apply in each case:

- a a G-SII buffer and an O-SII buffer;
- b a G-SII buffer, an O-SII buffer and a systemic risk buffer in accordance with Article 133.

Where an institution, on an individual or sub-consolidated basis is subject to an O-SII buffer and a systemic risk buffer in accordance with Article 133, the higher of the two shall apply.

15 Notwithstanding paragraph 14, where the systemic risk buffer applies to all exposures located in the Member State that sets that buffer to address the macroprudential risk of that Member State, but does not apply to exposures outside the Member State, that systemic risk buffer shall be cumulative with the O-SII or G-SII buffer that is applied in accordance with this Article.

16 Where paragraph 14 applies and an institution is part of a group or a sub-group to which a G-SII or an O-SII belongs, this shall never imply that that institution is, on an individual basis, subject to a combined buffer requirement that is lower than the sum of the capital conservation buffer, the countercyclical capital buffer, and the higher of the O-SII buffer and systemic risk buffer applicable to it on an individual basis.

17 Where paragraph 15 applies and an institution is part of a group or a sub-group to which a G-SII or an O-SII belongs, this shall never imply that that institution is, on an individual basis, subject to a combined buffer requirement that is lower than the sum of the capital conservation buffer, the countercyclical capital buffer, and the sum of the O-SII buffer and systemic risk buffer applicable to it on an individual basis.

18 EBA shall develop draft regulatory technical standards to specify, for the purposes of this Article, the methodology in accordance with which the competent authority or the designated authority shall identify an EU parent institution or EU parent financial holding company or EU parent mixed financial holding company as a G-SII and to specify the methodology for the definition of the sub-categories and the allocation of G-SIIs in sub-categories based on their systemic significance, taking into account any internationally agreed standards.

EBA shall submit those draft regulatory technical standards to the Commission by 30 June 2014.

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

Article 132

Reporting

1 The Commission shall, by 31 December 2015, submit a report to the European Parliament and to the Council on the basis of international developments and EBA opinion on the possibility of extending the framework for G-SIIs to additional types of systemically important institutions within the Union, accompanied by a legislative proposal where appropriate.

2 The Commission shall, by 31 December 2016, after consulting the ESRB and EBA, submit a report to the European Parliament and to the Council on whether the provisions relating to G-SIIs as set out in Article 131 should be amended, accompanied by a legislative proposal

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where appropriate. Any such proposal shall take due account of international regulatory developments and shall review, where appropriate, the process of allocating institution-specific O-SII buffers within a group taking into consideration any possible undue impact on the implementation of structural separation within Member States.

Article 133

Requirement to maintain a systemic risk buffer

1 Each Member State may introduce a systemic risk buffer of Common Equity Tier 1 capital for the financial sector or one or more subsets of that sector, in order to prevent and mitigate long term non-cyclical systemic or macroprudential risks not covered by Regulation (EU) No 575/2013, in the meaning of a risk of disruption in the financial system with the potential to have serious negative consequences to the financial system and the real economy in a specific Member State.

2 For the purpose of paragraph 1, the Member State shall designate the authority in charge of setting the systemic risk buffer and of identifying the sets of institutions to which it applies. This authority shall be the competent authority or the designated authority.

3 For the purpose of paragraph 1, institutions may be required to maintain, in addition to the Common Equity Tier 1 capital maintained to meet the own funds requirement imposed by Article 92 of Regulation (EU) No 575/2013, a systemic risk buffer of Common Equity Tier 1 capital of at least 1 % based on the exposures to which the systemic risk buffer applies in accordance with paragraph 8 of this Article, on an individual, consolidated, or sub-consolidated basis, as applicable in accordance with Part One, Title II of that Regulation. The relevant competent or designated authority may require institutions to maintain the systemic risk buffer on an individual and on a consolidated level.

4 Institutions shall not use Common Equity Tier 1 capital that is maintained to meet the requirement under paragraph 3 to meet any requirements imposed under Article 92 of Regulation (EU) No 575/2013 and Articles 129 and 130 of this Directive and any requirements imposed under Articles 102 and 104 of this Directive. Where a group which has been identified as a systemically important institution which is subject to a G-SII buffer or an O-SII buffer on a consolidated basis in accordance with Article 131 is also subject to a systemic risk buffer on a consolidated basis in accordance with this Article, the higher of the buffers shall apply. Where an institution, on an individual or sub-consolidated basis, is subject to an O-SII buffer in accordance with Article 131 and a systemic risk buffer in accordance with this Article, the higher of the two shall apply.

5 Notwithstanding paragraph 4, where the systemic risk buffer applies to all exposures located in the Member State that sets that buffer to address the macroprudential risk of that Member State, but does not apply to exposures outside the Member State, that systemic risk buffer shall be cumulative with the O-SII or G-SII buffer that is applied in accordance with Article 131.

6 Where paragraph 4 applies and an institution is part of a group or a sub-group to which a G-SII or an O-SII belongs, this shall never imply that that institution is, on an individual basis, subject to a combined buffer requirement that is lower than the sum of the capital conservation buffer, the countercyclical capital buffer, and the higher of the O-SII buffer and systemic risk buffer applicable to it on an individual basis.

7 Where paragraph 5 applies and an institution is part of a group or a sub-group to which a G-SII or an O-SII belongs, this shall never imply that that institution is, on an individual basis,

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subject to a combined buffer requirement that is lower than the sum of the capital conservation buffer, the countercyclical capital buffer and the sum of the O-SII buffer and systemic risk buffer applicable to it on an individual basis.

8 The systemic risk buffer may apply to exposures located in the Member State that sets that buffer and may also apply to exposures in third countries. The systemic risk buffer may also apply to exposures located in other Member States, subject to paragraphs 15 and 18.

9 The systemic risk buffer shall apply to all institutions, or one or more subsets of those institutions, for which the authorities of the Member State concerned are competent in accordance with this Directive and shall be set in gradual or accelerated steps of adjustment of 0,5 percentage point. Different requirements may be introduced for different subsets of the sector.

10 When requiring a systemic risk buffer to be maintained the competent authority or the designated authority shall comply with the following:

- a the systemic risk buffer must not entail disproportionate adverse effects on the whole or parts of the financial system of other Member States or of the Union as a whole forming or creating an obstacle to the functioning of the internal market;
- b the systemic risk buffer must be reviewed by the competent authority or the designated authority at least every second year.

11 Before setting or resetting a systemic risk buffer rate of up to 3 %, the competent authority or the designated authority shall notify the Commission, the ESRB, EBA and the competent and designated authorities of the Member States concerned one month before the publication of the decision referred to in paragraph 16. If the buffer applies to exposures located in third countries the competent authority or the designated authority shall also notify the supervisory authorities of those third-countries. That notification shall describe in detail:

- a the systemic or macroprudential risk in the Member State;
- b the reasons why the dimension of the systemic or macroprudential risks threatens the stability of the financial system at national level justifying the systemic risk buffer rate;
- c the justification for why the systemic risk buffer is considered likely to be effective and proportionate to mitigate the risk;
- d an assessment of the likely positive or negative impact of the systemic risk buffer on the internal market, based on information which is available to the Member State;
- e the justification for why none of the existing measures in this Directive or in Regulation (EU) No 575/2013, excluding Articles 458 and 459 of that Regulation, alone or in combination, will be sufficient to address the identified macroprudential or systemic risk taking into account the relative effectiveness of those measures;
- f the systemic risk buffer rate that the Member State wishes to require.

12 Before setting or resetting a systemic risk buffer rate of above 3 %, the competent authority or the designated authority shall notify the Commission, the ESRB, EBA and the competent and designated authorities of the Member States concerned. If the buffer applies to exposures located in third-countries the competent authority or the designated authority shall also notify the supervisory authorities of those third-countries. That notification shall describe in detail:

- a the systemic or macroprudential risk in the Member State;
- b the reasons why the dimension of the systemic or macroprudential risks threatens the stability of the financial system at national level justifying the systemic risk buffer rate;
- c the justification for why the systemic risk buffer is considered likely to be effective and proportionate to mitigate the risk;

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- d an assessment of the likely positive or negative impact of the systemic risk buffer on the internal market, based on information which is available to the Member State;
- e the justification for why none of the existing measures in this Directive or in Regulation (EU) No 575/2013, excluding Articles 458 and 459 of that Regulation, alone or in combination, will be sufficient to address the identified macroprudential or systemic risk taking into account the relative effectiveness of those measures;
- f the systemic risk buffer rate that the Member State wishes to require.

13 The competent authority or the designated authority may from 1 January 2015 set or reset a systemic risk buffer rate that applies to exposures located in that Member State and may also apply to exposures in third countries of up to 5 % and follow the procedures set out in paragraph 11. When setting or resetting a systemic risk buffer rate above 5 % the procedures set out in paragraph 12 shall be complied with.

14 Where the systemic risk buffer rate is to be set between 3 % and 5 % in accordance with paragraph 13, the competent authority or the designated authority of the Member State that sets that buffer shall always notify the Commission thereof and shall await the opinion of the Commission before adopting the measures in question.

Where the opinion of the Commission is negative, the competent authority or the designated authority of the Member State that sets that buffer shall comply with that opinion or give reasons for not so doing.

Where one subset of the financial sector is a subsidiary whose parent is established in another Member State, the competent authority or the designated authority shall notify the authorities of that Member State, the Commission and the ESRB. Within one month of the notification, the Commission and the ESRB shall issue a recommendation on the measures taken in accordance with this paragraph. Where the authorities disagree and in the case of a negative recommendation of both the Commission and the ESRB, the competent authority or the designated authority may refer the matter to EBA and request its assistance in accordance with Article 19 of Regulation (EU) No 1093/2010. The decision to set the buffer for those exposures shall be suspended until EBA has taken a decision.

15 Within one month of the notification referred to in paragraph 12, the ESRB shall provide the Commission with an opinion as to whether the systemic risk buffer is deemed appropriate. EBA may also provide the Commission with its opinion on the buffer in accordance with Article 34(1) of Regulation (EU) No 1093/2010.

Within two months of notification, the Commission, taking into account the assessment of the ESRB and EBA, if relevant, and if it is satisfied that the systemic risk buffer does not entail disproportionate adverse effects on the whole or parts of the financial system of other Member States or of the Union as a whole forming or creating an obstacle to the proper functioning of the internal market, shall adopt an implementing act authorising the competent authority or the designated authority to adopt the proposed measure.

16 Each competent authority or designated authority shall announce the setting of the systemic risk buffer by publication on an appropriate website. The announcement shall include at least the following information:

- a the systemic risk buffer rate;
- b the institutions to which the systemic risk buffer applies;
- c a justification for the systemic risk buffer;
- d the date from which the institutions must apply the setting or resetting of the systemic risk buffer; and

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- e the names of the countries where exposures located in those countries are recognised in the systemic risk buffer.

If the publication referred to in point (c) could jeopardise the stability of the financial system, the information under point (c) shall not be included in the announcement.

17 Where an institution fails to meet fully the requirement under paragraph 1 of this Article, it shall be subject to the restrictions on distributions set out in Article 141(2) and (3).

Where the application of those restrictions on distributions leads to an unsatisfactory improvement of the Common Equity Tier 1 capital of the institution in the light of the relevant systemic risk, the competent authorities may take additional measures in accordance with Article 64.

18 Following notification as referred to in paragraph 11, Member States may apply the buffer to all exposures. Where the competent authority or the designated authority decides to set the buffer up to 3 % on the basis of exposures in other Member States, the buffer shall be set equally on all exposures located within the Union.

Article 134

Recognition of a systemic risk buffer rate

1 Other Member States may recognise the systemic risk buffer rate set in accordance with Article 133 and may apply that buffer rate to domestically authorised institutions for the exposures located in the Member State that sets that buffer rate.

2 If Member States recognise the systemic risk buffer rate for domestically authorised institutions they shall notify the Commission, the ESRB, EBA and the Member State that sets that systemic risk buffer rate.

3 When deciding whether to recognise a systemic risk buffer rate, the Member State shall take into consideration the information presented by the Member State that sets that buffer rate in accordance with Article 133(11), (12) or (13).

4 A Member State that sets a systemic risk buffer rate in accordance with Article 133 may ask the ESRB to issue a recommendation as referred to in Article 16 of Regulation (EU) No 1092/2010 to one or more Member States which may recognise the systemic risk buffer rate.

Section II

Setting and calculating countercyclical capital buffers

Article 135

ESRB guidance on setting countercyclical buffer rates

1 The ESRB may give, by way of recommendations in accordance with Article 16 of Regulation (EU) No 1092/2010, guidance to authorities designated by Member States under Article 136(1) on setting countercyclical buffer rates, including the following:

- a principles to guide designated authorities when exercising their judgment as to the appropriate countercyclical buffer rate, ensure that authorities adopt a sound approach

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- to relevant macro-economic cycles and promote sound and consistent decision-making across Member States;
- b general guidance on:
- (i) the measurement and calculation of the deviation from long term trends of ratios of credit to gross domestic product (GDP);
 - (ii) the calculation of buffer guides required by Article 136(2);
- c guidance on variables that indicate the build-up of system-wide risk associated with periods of excessive credit growth in a financial system, in particular the relevant credit-to-GDP ratio and its deviation from the long-term trend, and on other relevant factors, including the treatment of economic developments within individual sectors of the economy, that should inform the decisions of designated authorities on the appropriate countercyclical buffer rate under Article 136;
- d guidance on variables, including qualitative criteria, that indicate that the buffer should be maintained, reduced or fully released.
- 2 Where it issues a recommendation under paragraph 1, the ESRB shall duly take into account the differences between Member States and in particular the specificities of Member States with small and open economies.
- 3 Where it has issued a recommendation under paragraph 1, the ESRB shall keep it under review and update it, where necessary, in the light of experience of setting buffers under this Directive or of developments in internationally agreed practices.

Article 136

Setting countercyclical buffer rates

- 1 Each Member State shall designate a public authority or body (a 'designated authority') that is responsible for setting the countercyclical buffer rate for that Member State.
- 2 Each designated authority shall calculate for every quarter a buffer guide as a reference to guide its exercise of judgment in setting the countercyclical buffer rate in accordance with paragraph 3. The buffer guide shall reflect, in a meaningful way, the credit cycle and the risks due to excess credit growth in the Member State and shall duly take into account specificities of the national economy. It shall be based on the deviation of the ratio of credit-to-GDP from its long-term trend, taking into account, inter alia:
- a an indicator of growth of levels of credit within that jurisdiction and, in particular, an indicator reflective of the changes in the ratio of credit granted in that Member State to GDP;
 - b any current guidance maintained by the ESRB in accordance with Article 135(1)(b).
- 3 Each designated authority shall assess and set the appropriate countercyclical buffer rate for its Member State on a quarterly basis, and in so doing shall take into account:
- a the buffer guide calculated in accordance with paragraph 2;
 - b any current guidance maintained by the ESRB in accordance with Article 135(1)(a), (c) and (d) and any recommendations issued by the ESRB on the setting of a buffer rate;
 - c other variables that the designated authority considers relevant for addressing cyclical systemic risk.
- 4 The countercyclical buffer rate, expressed as a percentage of the total risk exposure amount calculated in accordance with Article 92(3) of Regulation (EU) No 575/2013 of

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institutions that have credit exposures in that Member State, shall be between 0 % and 2,5 %, calibrated in steps of 0,25 percentage points or multiples of 0,25 percentage points. Where justified on the basis of the considerations set out in paragraph 3, a designated authority may set a countercyclical buffer rate in excess of 2,5 % of the total risk exposure amount calculated in accordance with Article 92(3) of Regulation (EU) No 575/2013 for the purpose set out in Article 140(2) of this Directive.

5 Where a designated authority sets the countercyclical buffer rate above zero for the first time, or where, thereafter, a designated authority increases the prevailing countercyclical buffer rate setting, it shall also decide the date from which the institutions must apply that increased buffer for the purposes of calculating their institution-specific countercyclical capital buffer. That date shall be no later than 12 months after the date when the increased buffer setting is announced in accordance with paragraph 7. If the date is less than 12 months after the increased buffer setting is announced, that shorter deadline for application shall be justified on the basis of exceptional circumstances.

6 If a designated authority reduces the existing countercyclical buffer rate, whether or not it is reduced to zero, it shall also decide an indicative period during which no increase in the buffer is expected. However, that indicative period shall not bind the designated authority.

7 Each designated authority shall announce the quarterly setting of the countercyclical buffer rate by publication on its website. The announcement shall include at least the following information:

- a the applicable countercyclical buffer rate;
- b the relevant credit-to-GDP-ratio and its deviation from the long-term trend;
- c the buffer guide calculated in accordance with paragraph 2;
- d a justification for that buffer rate;
- e where the buffer rate is increased, the date from which the institutions must apply that increased buffer rate for the purposes of calculating their institution-specific countercyclical capital buffer;
- f where the date referred to in point (e) is less than 12 months after the date of the announcement under this paragraph, a reference to the exceptional circumstances that justify that shorter deadline for application;
- g where the buffer rate is decreased, the indicative period during which no increase in the buffer rate is expected, together with a justification for that period;

Designated authorities shall take all reasonable steps to coordinate the timing of that announcement.

Designated authorities shall notify each quarterly setting of the countercyclical buffer rate and the information specified in points (a) to (g) to the ESRB. The ESRB shall publish on its website all such notified buffer rates and related information.

Article 137

Recognition of countercyclical buffer rates in excess of 2,5 %

1 Where a designated authority, in accordance with Article 136(4), or a relevant third-country authority has set a countercyclical buffer rate in excess of 2,5 % of the total risk exposure amount calculated in accordance with Article 92(3) of Regulation (EU) No 575/2013, the other designated authorities may recognise that buffer rate for the purposes of the calculation by domestically authorised institutions of their institution-specific countercyclical capital buffers.

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2 Where a designated authority in accordance with paragraph 1 of this Article recognises a buffer rate in excess of 2,5 % of the total risk exposure amount calculated in accordance with Article 92(3) of Regulation (EU) No 575/2013, it shall announce that recognition by publication on its website. The announcement shall include at least the following information:

- a the applicable countercyclical buffer rate;
- b the Member State or third countries to which it applies;
- c where the buffer rate is increased, the date from which the institutions authorised in the Member State of the designated authority must apply that increased buffer rate for the purposes of calculating their institution-specific countercyclical capital buffer;
- d where the date referred to in point (c) is less than 12 months after the date of the announcement under this paragraph, a reference to the exceptional circumstances that justify that shorter deadline for application.

Article 138

ESRB recommendation on third country countercyclical buffer rates

The ESRB may, in accordance with Article 16 of Regulation (EU) No 1092/2010, issue a recommendation to designated authorities on the appropriate countercyclical buffer rate for exposures to that third country where:

- (a) a countercyclical buffer rate has not been set and published by the relevant third-country authority for a third country ('relevant third-country authority') to which one or more Union institutions have credit exposures;
- (b) the ESRB considers that a countercyclical buffer rate which has been set and published by the relevant third-country authority for a third country is not sufficient to protect Union institutions appropriately from the risks of excessive credit growth in that country, or a designated authority notifies the ESRB that it considers that buffer rate to be insufficient for that purpose.

Article 139

Decision by designated authorities on third country countercyclical buffer rates

1 This Article applies irrespective of whether the ESRB has issued a recommendation to designated authorities as referred to in Article 138.

2 In the circumstances referred to in point (a) of Article 138, designated authorities may set the countercyclical buffer rate that domestically authorised institutions must apply for the purposes of the calculation of their institution-specific countercyclical capital buffer.

3 Where a countercyclical buffer rate has been set and published by the relevant third-country authority for a third country, a designated authority may set a different buffer rate for that third country for the purposes of the calculation by domestically authorised institutions of their institution-specific countercyclical capital buffer if they reasonably consider that the buffer rate set by the relevant third-country authority is not sufficient to protect those institutions appropriately from the risks of excessive credit growth in that country.

When exercising the power under the first subparagraph, a designated authority shall not set a countercyclical buffer rate below the level set by the relevant third-country authority unless that buffer rate exceeds 2,5 %, expressed as a percentage of the total

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risk exposure amount calculated in accordance with Article 92(3) of Regulation (EU) No 575/2013 of institutions that have credit exposures in that third country.

In order to achieve coherence for the buffer settings for third countries the ESRB may give recommendations for such settings.

4 Where a designated authority sets a countercyclical buffer rate for a third country pursuant to paragraph 2 or 3 which increases the existing applicable countercyclical buffer rate, the designated authority shall decide the date from which domestically authorised institutions must apply that buffer rate for the purposes of calculating their institution-specific countercyclical capital buffer. That date shall be no later than 12 months from the date when the buffer rate is announced in accordance with paragraph 5. If that date is less than 12 months after the setting is announced, that shorter deadline for application shall be justified on the basis of exceptional circumstances.

5 Designated authorities shall publish any setting of a countercyclical buffer rate for a third country pursuant to paragraph 2 or 3 on their websites, and shall include the following information:

- a the countercyclical buffer rate and the third country to which it applies;
- b a justification for that buffer rate;
- c where the buffer rate is set above zero for the first time or is increased, the date from which the institutions must apply that increased buffer rate for the purposes of calculating their institution-specific countercyclical capital buffer;
- d where the date referred to in point (c) is less than 12 months after the date of the publication of the setting under this paragraph, a reference to the exceptional circumstances that justify that shorter deadline for application.

Article 140

Calculation of institution-specific countercyclical capital buffer rates

1 The institution-specific countercyclical capital buffer rate shall consist of the weighted average of the countercyclical buffer rates that apply in the jurisdictions where the relevant credit exposures of the institution are located or are applied for the purposes of this Article by virtue of Article 139(2) or (3).

Member States shall require institutions, in order to calculate the weighted average referred to in the first subparagraph, to apply to each applicable countercyclical buffer rate its total own funds requirements for credit risk, determined in accordance with Part Three, Titles II and IV of Regulation (EU) No 575/2013, that relates to the relevant credit exposures in the territory in question, divided by its total own funds requirements for credit risk that relates to all of its relevant credit exposures.

2 If, in accordance with Article 136(4), a designated authority sets a countercyclical buffer rate in excess of 2,5 % of total risk exposure amount calculated in accordance with Article 92(3) of Regulation (EU) No 575/2013, Member States shall ensure that the following buffer rates apply to relevant credit exposures located in the Member State of that designated authority ('Member State A') for the purposes of the calculation required under paragraph 1 including, where relevant, for the purposes of the calculation of the element of consolidated capital that relates to the institution in question:

- a domestically authorised institutions shall apply that buffer rate in excess of 2,5 % of total risk exposure amount;

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- b institutions that are authorised in another Member State shall apply a countercyclical buffer rate of 2,5 % of total risk exposure amount if the designated authority in the Member State in which they have been authorised has not recognised the buffer rate in excess of 2,5 % in accordance with Article 137(1);
- c institutions that are authorised in another Member State shall apply the countercyclical buffer rate set by the designated authority of Member State A if the designated authority in the Member State in which they have been authorised has recognised the buffer rate in accordance with Article 137.

3 If the countercyclical buffer rate set by the relevant third-country authority for a third country exceeds 2,5 % of total risk exposure amount calculated in accordance with Article 92(3) of Regulation (EU) No 575/2013, Member States shall ensure that the following buffer rates apply to relevant credit exposures located in that third country for the purposes of the calculation required under paragraph 1 including, where relevant, for the purposes of the calculation of the element of consolidated capital that relates to the institution in question:

- a institutions shall apply a countercyclical buffer rate of 2,5 % of total risk exposure amount if the designated authority in the Member State in which they have been authorised has not recognised the buffer rate in excess of 2,5 % in accordance with Article 137(1);
- b institutions shall apply the countercyclical buffer rate set by the relevant third-country authority if the designated authority in the Member State in which they have been authorised has recognised the buffer rate in accordance with Article 137.

4 Relevant credit exposures shall include all those exposure classes, other than those referred to in points (a) to (f) of Article 112 of Regulation (EU) No 575/2013, that are subject to:

- a the own funds requirements for credit risk under Part Three, Title II of that Regulation;
- b where the exposure is held in the trading book, own funds requirements for specific risk under Part Three, Title IV, Chapter 2 of that Regulation or incremental default and migration risk under Part Three, Title IV, Chapter 5 of that Regulation;
- c where the exposure is a securitisation, the own funds requirements under Part Three, Title II, Chapter 5 of that Regulation.

5 Institutions shall identify the geographical location of a relevant credit exposure in accordance with regulatory technical standards adopted in accordance with paragraph 7.

6 For the purposes of the calculation required under paragraph 1:

- a a countercyclical buffer rate for a Member State shall apply from the date specified in the information published in accordance with Article 136(7)(e) or Article 137(2)(c) if the effect of that decision is to increase the buffer rate;
- b subject to point (c), a countercyclical buffer rate for a third country shall apply 12 months after the date on which a change in the buffer rate was announced by the relevant third-country authority, irrespective of whether that authority requires institutions incorporated in that third country to apply the change within a shorter period, if the effect of that decision is to increase the buffer rate;
- c where the designated authority of the home Member State of the institution sets the countercyclical buffer rate for a third country pursuant to Article 139(2) or (3), or recognises the countercyclical buffer rate for a third country pursuant to Article 137, that buffer rate shall apply from the date specified in the information published in accordance with Article 139(5)(c) or Article 137(2)(c), if the effect of that decision is to increase the buffer rate;
- d a countercyclical buffer rate shall apply immediately if the effect of that decision is to reduce the buffer rate.

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For the purposes of point (b), a change in the countercyclical buffer rate for a third country shall be considered to be announced on the date that it is published by the relevant third-country authority in accordance with the applicable national rules.

7 EBA shall develop draft regulatory technical standards to specify the method for the identification of the geographical location of the relevant credit exposures referred to in paragraph 5.

EBA shall submit those draft regulatory standards to the Commission by 1 January 2014.

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.

Section III

Capital conservation measures

Article 141

Restrictions on distributions

1 Member States shall prohibit any institution that meets the combined buffer requirement from making 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 Member States shall require institutions that fail to meet the combined buffer requirement to calculate the Maximum Distributable Amount ('MDA') in accordance with paragraph 4 and to notify the competent authority of that MDA.

Where the first subparagraph applies, Member States shall prohibit any such institution from undertaking 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 While an institution fails to meet or exceed its combined buffer requirement, Member States shall prohibit it from distributing more than the MDA calculated in accordance with paragraph 4 through any action referred to in points (a), (b) and (c) of paragraph 2.

4 Member States shall require institutions to 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;

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- plus
- b 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
- c 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 the own funds requirement under Article 92(1)(c) of Regulation (EU) No 575/2013, expressed as a percentage of the total risk exposure amount calculated in accordance with Article 92(3) of that Regulation, 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 the own funds requirement under Article 92(1)(c) of Regulation (EU) No 575/2013, expressed as a percentage of the total risk exposure amount calculated in accordance with Article 92(3) of that Regulation, 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 requirement under Article 92(1)(c) of Regulation (EU) No 575/2013, expressed as a percentage of the total risk exposure amount calculated in accordance with Article 92(3) of that Regulation, 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 requirement under Article 92(1)(c) of Regulation (EU) No 575/2013, expressed as a percentage of the total risk exposure amount calculated in accordance with Article 92(3) of that Regulation, 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_n" indicates the ordinal number of the quartile concerned.

7 The restrictions imposed by this Article shall only apply to payments that result in a reduction of Common Equity Tier 1 capital or in a reduction of profits, and where a suspension of payment or failure to pay does not constitute an event of default or a condition for the commencement of proceedings under the insolvency regime applicable to the institution.

8 Where an institution fails to meet the combined buffer requirement and intends to distribute any of its distributable profits or undertake an action referred to in points (a), (b) and (c) of the second subparagraph of paragraph 2, it shall notify the competent authority and provide the following information:

- a the amount of capital maintained by the institution, subdivided as follows:
 - (i) Common Equity Tier 1 capital,
 - (ii) Additional Tier 1 capital,

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- (iii) Tier 2 capital;
- b the amount of its interim and year-end profits;
- c the MDA calculated in accordance with paragraph 4;
- d the amount of distributable profits it intends to allocate between the following:
 - (i) dividend payments,
 - (ii) share buybacks,
 - (iii) payments on Additional Tier 1 instruments,
 - (iv) the payment of variable remuneration or discretionary pension benefits, whether by creation of a new obligation to pay, or payment pursuant to an obligation to pay created at a time when the institution failed to meet its combined buffer requirements.

9 Institutions shall maintain arrangements to ensure that the amount of distributable profits and the MDA are calculated accurately, and shall be able to demonstrate that accuracy to the competent authority on request.

10 For the purposes of paragraphs 1 and 2, a distribution in connection with Common Equity Tier 1 capital shall include the following:

- a a payment of cash dividends;
- b a distribution of fully or partly paid bonus shares or other capital instruments referred to in Article 26(1)(a) of Regulation (EU) No 575/2013;
- c a redemption or purchase by an institution of its own shares or other capital instruments referred to in Article 26(1)(a) of that Regulation;
- d a repayment of amounts paid up in connection with capital instruments referred to in Article 26(1)(a) of that Regulation;
- e a distribution of items referred to in points (b) to (e) of Article 26(1) of that Regulation.

Article 142

Capital Conservation Plan

1 Where an institution fails to meet its combined buffer requirement, it shall prepare a capital conservation plan and submit it to the competent authority no later than five working days after it identified that it was failing to meet that requirement, unless the competent authority authorises a longer delay up to 10 days.

Competent authorities shall grant such authorisations only on the basis of the individual situation of a credit institution and taking into account the scale and complexity of the institution's activities.

- 2 The capital conservation plan shall include the following:
- a estimates of income and expenditure and a forecast balance sheet;
 - b measures to increase the capital ratios of the institution;
 - c a plan and timeframe for the increase of own funds with the objective of meeting fully the combined buffer requirement;
 - d any other information that the competent authority considers to be necessary to carry out the assessment required by paragraph 3.

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3 The competent authority shall assess the capital conservation plan, and shall approve the plan only if it considers that the plan, if implemented, would be reasonably likely to conserve or raise sufficient capital to enable the institution to meet its combined buffer requirements within a period which the competent authority considers appropriate.

4 If the competent authority does not approve the capital conservation plan in accordance with paragraph 3, it shall impose one or both of the following:

- a require the institution to increase own funds to specified levels within specified periods;
- b exercise its powers under Article 102 to impose more stringent restrictions on distributions than those required by Article 141.

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- (1) [OJ L 124, 20.5.2003, p. 36.](#)