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 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 subparapgraph of paragraph 2 of this Article;

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 subparapgraph 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,

(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) **[**[X1]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 requirement.**]**

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.

Editorial Information

X1 Substituted by Corrigendum to 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 (Official Journal of the European Union L 176 of 27 June 2013).

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.

[X2 Competent authorities shall grant such authorisations only on the basis of the individual situation of an 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.

[X1 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 requirement 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.

Editorial Information

X1 Substituted by Corrigendum to 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 (Official Journal of the European Union L 176 of 27 June 2013).

X2 Substituted by Corrigendum to 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 (Official Journal of the European Union L 176 of 27 June 2013).