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2011/0203 (COD)

Proposal for a

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

**on the access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms and amending Directive 2002/87/EC of the European Parliament and of the Council on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate**

(Text with EEA relevance)

{SEC(2011) 953 final}

{SEC(2011) 954 final}

## EXPLANATORY MEMORANDUM

### **1. CONTEXT OF THE PROPOSED ACT**

Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions contains provisions closely related to the coordination of national provisions concerning the access to the activity of credit institutions and their supervisory framework (such as provisions governing the authorisation of the business, the the exercise of the freedom of establishment, the powers of supervisory authorities of home and host Member States in this regard, and the supervisory review of credit institutions). However, that Directive, Directive 2006/49/EC and in particular their annexes also set out prudential rules. In order to approximate further the legislative provisions that result from the transposition of Directives 2006/48/EC and 2006/49/EC into national law and in order to ensure that the same prudential rules directly apply to them, which is essential for the functioning of the internal market, these prudential rules are subject of the proposal for a Regulation [inserted by OP], with which this proposal forms a package.

This proposal contains the following new elements: Provisions on sanctions, effective corporate governance and provisions preventing the overreliance on external credit ratings. This memorandum will therefore deal exclusively with these new elements. The other elements of this Directive repeat existing legislation or are adaptations to the proposed Regulation. For sake of clarity, this proposal also unifies provisions on credit institutions and investment firms, the latter of which are dealt with by Directive 2006/49/EC. This is described in more detail in chapter 5 below. Changes related to the 'Basel III' agreement are dealt with by the proposal for a Regulation except for the provisions on capital buffers that are part of this proposal for a Directive. Therefore, only the objectives and legal elements concerning the capital buffers are part of this explanatory memorandum. The general context of Basel III including the results of impact assessment and public consultations is explained in detail in the proposal for a Regulation.

#### **1.1. Reasons for and objectives of the proposal**

##### *1.1.1. Sanctions*

Effective, proportionate and dissuasive sanctioning regimes are key to ensure compliance with EU banking rules, protect users of banking services and ensure safety, stability and integrity of banking markets.

The analysis of national sanctioning regimes in the areas covered by this Directive and the Regulation has revealed divergences and weaknesses in the legal framework of sanctioning powers and the investigative powers available to national authorities.

Sanctions which are divergent and too weak risk being insufficient to effectively prevent violations of this Directive and the Regulation to ensure effective supervision and the development of a level playing field. The Commission therefore proposes to reinforce and approximate Member States' legal framework concerning administrative sanctions and measures by providing for sufficiently deterrent administrative sanctions applicable to the key violations of this Directive and the Regulation, appropriate personal scope of administrative sanctions, publication of sanctions and mechanisms encouraging the reporting of violations.

### *1.1.2. Corporate Governance*

The collapse of financial markets in autumn 2008 and the credit crunch that followed can be attributed to multiple, often inter-related, factors at both macro- and micro-economic levels, as identified in the Report of the High-Level Group on Financial Supervision in the EU published on 25 February 2009, and in particular to the accumulation of excessive risk in the financial system. This excessive accumulation of risk was in part due to the weaknesses in corporate governance of financial institutions, especially in banks. Whilst not all banks suffered from systemic weaknesses of governance arrangements, the Basel Committee on Banking Supervision (BCBS) referred to "a number of corporate governance failures and lapses".

The need for change in this area has been widely recognised. Firms, competent authorities and international bodies (OECD, Financial Stability Board (FSB) and the BCBS) have reviewed their existing practices and guidelines or are in process of doing so. Strengthening corporate governance is a priority for the Commission, especially in the context of its financial markets reform and crisis prevention programme.

### *1.1.3. Overreliance on external ratings*

Overreliance on external credit ratings occurs when financial institutions and institutional investors rely solely or mechanistically on ratings issued by credit rating agencies while neglecting their own due diligence and internal risk management obligations. Overreliance on credit ratings may lead to herding behaviour of financial actors, e.g. parallel selling-off of debt instruments after that instrument has been downgraded below investment grade, which may affect financial stability – in particular when the few big rating agencies err collectively in their assessments.

### *1.1.4. Pro-cyclicality of institution lending*

Pro-cyclicality effects are defined as those which tend to follow the direction and amplify the economic cycle. One feature of current-risk based capital requirements is that they vary over the economic cycle. Provided that credit institutions could meet them there is no explicit regulatory constraint on the amount of risk they can take on, and then on their leverage.

## **1.2. General context**

### *1.2.1. Sanctions*

In its 2010 Communication "Reinforcing sanctioning regimes in the financial sector"<sup>1</sup> the Commission has envisaged EU legislative action to set minimum common standards on certain key issues of sanctioning regimes, to be adapted to the specifics of the different sectors.

First, sanctions applicable for key violations of the CRD, such as authorisation requirements, prudential obligations and reporting obligations, vary across Member States and do not seem always appropriate to ensure sanctions are sufficiently effective, proportionate and dissuasive.

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<sup>1</sup> COM(2010)716 final.

Second, a certain divergence exists in the level of application of sanctions in different Member States, including those having banking sectors of similar size and in some Member States no sanctions have been applied for more than one year, which could be symptomatic of a weak enforcement of EU rules.

### *1.2.2. Corporate Governance*

In its Communication of 4 March 2009<sup>2</sup>, the European Commission announced that it would (i) examine corporate governance rules and practice within financial institutions in the light of the financial crisis, and (ii) where appropriate, make recommendations, or propose regulatory measures, in order to remedy any weaknesses in the corporate governance system in this important sector of the economy.

In June 2010, the Commission published a Green Paper on corporate governance in financial institutions and remuneration policies<sup>3</sup> and an accompanying staff working document<sup>4</sup> which analysed the deficiencies in corporate governance arrangements in the financial services industry and proposed possible ways forward.

The results of this public consultation demonstrated a broad consensus on the deficiencies identified, receiving support from different public authorities and Member States. The European Parliament has also recognised the importance of strengthening corporate governance standards and practices in financial institutions in its Report on remuneration of directors of listed companies and remuneration policies in the financial services sector<sup>5</sup>. Economic and Social Committee in its opinion on the Green Paper - Corporate governance in financial institutions and remuneration policies<sup>6</sup> welcomes the Commission Green Paper and supports the proposed action.

### *1.2.3. Overreliance on external ratings*

At the international level, the FSB recently issued principles to reduce authorities' and financial institutions' reliance on external ratings<sup>7</sup>. The principles call for removing or replacing references to such ratings in legislation where suitable alternative standards of creditworthiness are available and for requiring banks to make their own credit assessments. The proposed provisions are in line with the FSB principles.

### *1.2.4. Capital buffers:*

Capital conservation and most especially countercyclical buffers are meant to attenuate the risk of pro-cyclicality and the risk of excessive leverage referred to in 1.1.4 above.

## **1.3. Existing Community provisions in this area**

Directive 2006/48/EC relating to the taking up and pursuit of the business of credit institutions requires credit institutions to have robust governance arrangements. However, it did not specify what the governance arrangements should look like in detail.

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<sup>2</sup> COM (2009) 114 final.

<sup>3</sup> COM(2010)284 final.

<sup>4</sup> SEC(2010)669 final.

<sup>5</sup> 2010/2009(INI).

<sup>6</sup> INT/527.

<sup>7</sup> [http://www.financialstabilityboard.org/publications/r\\_101027.pdf](http://www.financialstabilityboard.org/publications/r_101027.pdf).

In order to reduce reliance on external ratings, an obligation for banks to undertake own due diligence regarding the underlying assets of securitisation exposures has been introduced into Directive 2006/48/EC.

#### **1.4. Consistency with other policies**

In the context of the reform of the European supervisory architecture, the enhancement of capital requirements and crisis management and resolution, the proposed reform of corporate governance in credit institutions is an integral part of an overall reform of the financial services sector. Corporate governance reform should also be seen in the context of the recent Commission Communication on reinforcing sanctioning regimes in the financial services sector.

The Commission has launched a horizontal initiative to encourage industry to increase the representation of women on boards, that after one year it will assess whether self-regulatory initiatives have had the desired effect and if not it will consider legislative approaches. Given that the impact assessment shows that this issue is pertinent for the banking sector, the approach taken at this stage is consistent with a bottom up approach. However, if the wider evaluation in one year finds that there is a need to legislate, then the approach taken in this sector will need to be adapted.

## **2. RESULTS OF THE CONSULTATIONS WITH THE INTERESTED PARTIES AND OF THE IMPACT ASSESSMENTS**

### **2.1. Consultation with interested parties**

#### *2.1.1. Sanctions*

The Commission carried out a public consultation ending on 19 February 2011 on the measures envisaged to reinforce and approximate sanctioning regimes in the financial sector<sup>8</sup>, including on the issues relevant in the banking sector, as identified on the basis of a study carried out by the European Committee of Banking Supervisors on national sanctioning regimes in this sector<sup>9</sup>.

The Commission received comments from a variety of respondents, including a significant number of stakeholders in the banking sector (supervisory authorities, central banks, banks and associations of bankers), which provided comments on the need for EU action in this field, the level of harmonisation warranted, the specific actions suggested and their potential benefits or disadvantages.

The actions envisaged to approximate and reinforce sanctioning regimes were also discussed with Member States in the meeting of the Financial Services Committee held on 17 January 2011.

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<sup>8</sup> [http://ec.europa.eu/internal\\_market/consultations/2010/sanctions\\_en.htm](http://ec.europa.eu/internal_market/consultations/2010/sanctions_en.htm)

<sup>9</sup> CEBS: "Mapping of supervisory objectives, including early intervention measures and sanctioning powers", March 2009/47, available on <http://www.c-eps.org/home.aspx>. Information contained in this report has been subsequently updated on the basis of the contributions received from member States.

### 2.1.2. *Corporate Governance*

The initiative and impact assessment is the result of an extensive and continuous dialogue and consultation with all major stakeholders, including securities regulators, market participants (issuers, intermediaries and investors), and consumers.

Questionnaires on their corporate governance practices were sent to a diverse cross-section of 10 major listed banks or insurance companies established in the EU. The questionnaires were augmented by 30 follow-up interviews with Board members, company secretaries, chief financial officers, chief risk officers, internal controllers.

A questionnaire on their views and role regarding corporate governance of financial institutions was also sent to the European banking supervisors. Similarly, a cross-section of major European institutional investors and shareholders' associations received a questionnaire on their practices and expectations regarding corporate governance of financial institutions. A follow-up meeting with about 30 investors was held on 2 February 2010.

The Green Paper finally launched a public consultation from 2 June 2010 to 1<sup>st</sup> September 2010 on the possible ways forward to deal with failures in corporate governance in financial institutions. The responses and their analysis can be consulted on the Commission website<sup>10</sup>.

### 2.1.3. *Overreliance on external ratings*

The Commission conducted a public consultation on issues concerning external ratings which also covered overreliance on them. The consultation closed on 7 January 2011 and attracted 93 responses. Several options were proposed, ranging from incentivising the use of internal models to requiring firms to carry out their own risk management without relying exclusively or mechanistically on external ratings. The responses and their analysis can be consulted on the Commission website<sup>11</sup>.

### 2.1.4. *Capital Buffers*

Capital Buffers are part of the BCBS 2010 agreement and as such they were consulted extensively both within the Basel framework and in the framework of the Commission's specific consultations

## 2.2. **Collection and use of expertise**

### 2.2.1. *Sanctions*

The study carried out by the European Committee of Banking Supervisors in 2008<sup>12</sup> provided information concerning the administrative sanctions laid down in national legislation and the actual use of sanctions by banking supervisors. In 2011, additional information has been

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<sup>10</sup>

[http://ec.europa.eu/internal\\_market/company/modern/corporate\\_governance\\_in\\_financial\\_institutions\\_en.htm#consultation2010](http://ec.europa.eu/internal_market/company/modern/corporate_governance_in_financial_institutions_en.htm#consultation2010)

<sup>11</sup>

[http://circa.europa.eu/Public/irc/markt/markt\\_consultations/library?l=/financial\\_services/credit\\_agencies\\_2011&vm=detailed&sb=Title](http://circa.europa.eu/Public/irc/markt/markt_consultations/library?l=/financial_services/credit_agencies_2011&vm=detailed&sb=Title)

<sup>12</sup>

See reference in footnote 9

collected by the Commission on sanctions provided for in national legislation for key violations of the CRD.

The measures proposed are based on this information and the responses to the public consultation.

#### *2.2.2. Corporate Governance*

As part of the consultation process, and in the course of preparation of the Green Paper, the Commission services also organised on 12 October 2009 a public conference, a number of stakeholders participated. Discussion focused on the role and competence of the Board of directors, governance issues related to internal control and risk management, the respective role of shareholders, supervisors and statutory auditors.

The Green Paper is also based on the analysis and studies that have been performed or are still carried out by public or private organisations, at the international level as well as the European and national levels. In their work, the Commission staff benefited from the advice of the European Corporate Governance Forum (ECGF) and of the ad hoc advisory group on corporate governance composed of some members of the ECGF and other renowned corporate governance specialists.

#### *2.2.3. Overreliance on external ratings*

The Commission is actively participating in the work of the FSB referred to above. Furthermore, it participates in the BCBS that is also undertaking work to reduce reliance on ratings in its Working Groups on Liquidity and on Ratings and Securitisation.

#### *2.2.4. Capital Buffers*

Sub-groups of the Capital Requirements Directive Working Group, whose members are nominated by the European Banking Committee, have also conducted work at a technical level concerning capital buffers.

### **2.3. Impact assessment**

#### *2.3.1. Sanctions*

The Communication on "Reinforcing sanctioning regimes in the financial sector" was accompanied by an impact assessment analysing the main policy options for approximating and strengthening sanctioning regimes for violations of financial services rules including in the banking sector. A second impact assessment accompanies this proposal, examining the specific problems in the capital requirements area in more detail.

The main objective of the measures proposed is to ensure better compliance with EU banking rules by increasing effectiveness and dissuasiveness of national sanctioning regimes. This requires the achievement of the following operational objectives:

- Reinforcement and approximation of the legal framework concerning sanctions by ensuring
  - Appropriate administrative sanctions for the key violations of CRD

- Appropriate personal scope of administrative sanctions
- Publication of sanctions
- Reinforcement and approximation of the mechanisms facilitating detection of violations by ensuring
  - Effective mechanisms encouraging the reporting of misconducts

### 2.3.2. *Corporate Governance*

The overarching goal of this initiative is to ensure that the effectiveness of risk governance in European credit institutions and investment firms is strengthened. The measures envisaged should help avoid excessive risk-taking by individual credit institutions and ultimately the accumulation of excessive risk in the financial system. In order to achieve this goal, this initiative focuses on the following operational objectives:

- increasing the effectiveness of risk oversight by Boards;
- improving the status of the risk management function; and
- ensuring effective monitoring by supervisors of risk governance.

To achieve these objectives, the Commission has chosen to improve the existing legal framework.

The requirements regarding Board composition and selection of Board members will ensure more appropriate behaviours, competencies, time commitment and increased accountability. Well-informed, competent Boards and a strong risk management function will increase the ability of credit institutions to identify and manage emerging risks thereby reducing excessive risk-taking. Disclosure requirements will support increased transparency, leading to a more informed market and improved market discipline.

Opening the Board to more diverse candidates might give opportunity to people who were for the time being absent from Board rooms to become members of the Board. It would enlarge the pool of suitable candidates for board membership and improve expertise. Therefore, any potential negative impact on the pool of suitable candidates of the proposal should not be significant.

More stringent requirements at European level could have a negative impact on the competitiveness of European credit institutions at international level. However, the possible decrease in competitiveness due to more stringent requirements should be mitigated by a positive impact on investors, depositors and other stakeholders. Improved risk governance would contribute to the resilience of the banking sector.

The proposal would neither entail significant costs for credit institutions nor have a significant impact on lending activities.



### 2.3.3. *Overreliance on external ratings*

A general part on overreliance covering the proposed elements will be included in the forthcoming impact Assessment on the new initiative on credit rating agencies (expected beginning of July 2011).

### 2.3.4. *Capital Buffers*

As Capital Buffers are part of the Basel agreement their impact assessment is made together with all the other measures and detailed in the Regulation accompanied this Directive.

## **3. BUDGETARY IMPLICATIONS**

The proposal has no implications for the EU budget.

## **4. LEGAL ELEMENTS OF THE PROPOSAL**

### **4.1. Legal basis**

The legal basis for this proposal is Article 53(1) TFEU. Directives 2006/48/EC and 2006/49/EC, which would be replaced by this Directive and the proposed regulation [inserted by OP], constitute an essential instrument for the achievement of the Internal Market from the point of view of both the freedom of establishment and the freedom to provide financial services, in the field of credit institutions and investment firms. This proposal replaces Directives 2006/48/EC and 2006/49/EC with regard to the coordination of national provisions governing the authorisation of the business, the acquisition of qualifying holdings, the exercise of the freedom of establishment and of the freedom to provide services, the powers of supervisory authorities of home and host Member States in this regard and the provisions governing the initial capital and the supervisory review of credit institutions and investment firms. The main objective and subject-matter of this proposal is to coordinate national provisions concerning the access to the activity of credit institutions and investment firms, the modalities for their governance, and their supervisory framework. The proposal is therefore based on Article 53(1) TFEU.

This proposal is complementary to the proposed regulation [inserted by OP], establishing uniform and directly applicable prudential requirements for credit institutions and investment firms, since such requirements are closely related to the functioning of financial markets in respect of a number of assets held by credit institutions and investment firms, and is based on Article 114 TFEU.

### **4.2. Subsidiarity**

In accordance with the principles of subsidiarity and proportionality set out in Article 5 TFEU, the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore be better achieved by the EU. Its provisions do not go beyond what is necessary to achieve the objectives pursued. Only EU action can ensure that credit institutions and investment firms operating in more than one Member State are subject to the same requirements and thereby ensure a level playing field, reduce regulatory complexity, avoid unwarranted compliance costs for cross-border activities, promote further integration in the

EU market and contribute to the elimination of regulatory arbitrage opportunities. EU action also ensures a high level of financial stability in the EU.

#### **4.3. Compliance with Articles 290 and 291 TFEU**

On 23 September 2009, the Commission adopted proposals for Regulations establishing EBA, EIOPA, and ESMA<sup>13</sup>. In this respect the Commission wishes to recall the Statements in relation to Articles 290 and 291 TFEU it made at the adoption of the Regulations establishing the European Supervisory Authorities according to which: "As regards the process for the adoption of regulatory standards, the Commission emphasises the unique character of the financial services sector, following from the Lamfalussy structure and explicitly recognised in Declaration 39 to the TFEU. However, the Commission has serious doubts whether the restrictions on its role when adopting delegated acts and implementing measures are in line with Articles 290 and 291 TFEU."

### **5. DETAILED EXPLANATION**

#### **5.1. Interaction and consistency between elements of the package**

This Directive forms a package with the proposed Regulation [inserted by OP]. This package would replace Directives 2006/48/EC and 2006/49/EC. This means that both the Directive and the Regulation would each deal with both credit institutions and investment firms. Currently, the latter are merely 'annexed' to Directive 2006/48/EC by Directive 2006/49/EC. A large part of it merely contains references to Directive 2006/48/EC. Joining provisions applicable to both businesses in the package would therefore improve the readability of provisions governing them. Moreover, the extensive annexes of both Directives would be integrated into the enacting terms, hereby further simplifying their application.

Prudential regulations directly applicable to banks and investment firms are set out in the proposal for a Regulation. In the proposal for a Directive remain provisions concerning the authorisation of credit institutions and the exercise of the freedom of establishment and the free movement of services. This would not concern investment firms, as the corresponding rights and obligations are regulated by Directive 2004/39/EC ('MiFiD'). General principles of the supervision of credit institutions and investment firms, which are addressed to Member States and their competent authorities, would also remain in the Directive. This encompasses in particular the exchange of information, the distribution of tasks between home and host country supervisors and the exercise of sanctioning powers (which would be newly introduced). The Directive would still contain the provisions governing the supervisory review of credit institutions and investment firms by the competent authorities of the Member States. These provisions supplement the general prudential requirements set out in the Regulation for credit institutions and investment firms by individual arrangements that are decided by the competent authorities as a result of their ongoing supervisory review of each individual credit institution and investment firm. The range of such supervisory arrangements would be set out in the Directive since the competent authorities should be able to exert their judgment as to which arrangements should be imposed. This includes the internal processes within a credit institution or investment firm notably concerning the management of risks and the corporate governance requirements that are newly introduced.

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<sup>13</sup> COM(2009) 501, COM(2009) 502, COM(2009) 503.

## **5.2. Sanctions**

Member States should provide that appropriate administrative sanctions and measures can be applied to breaches of the banking legislation. To this end, the Directive will require them to comply with the following minimum rules.

First, administrative sanctions and measures should apply to those natural or legal to credit institutions and to individuals responsible for a breach. This would include credit institutions, investment firms and individuals, where appropriate.

Second, in the case of a breach of key provisions of this Directive and the Regulation, a minimum set of administrative sanctions and measures should be available to competent authorities. This includes withdrawal of authorisation, cease and desist orders, public statement, dismissal of management, administrative pecuniary sanctions.

Third, the maximum level of administrative pecuniary sanctions laid down in national legislation should exceed the benefits derived from the violation if they can be determined and, in any case, should not be lower than the level provided for by the Directive (10% of the total annual turnover of the institution concerned in the case of a legal person, 5 millions euros or 10% of the annual income of an individual in the case of a natural person).

Fourth, the criteria taken into account by competent authorities when determining the type and level of the sanction to be applied in a particular case should include at least the criteria set out in the Directive (eg. benefits derived from the violation or losses caused to third parties, cooperative behaviour of the responsible person, etc).

Fifth, sanctions and measures applied should be published, as provided in this Directive.

Finally, appropriate mechanism should be put in place to encourage reporting of breaches within credit institutions and investment firms.

Criminal sanctions are not covered by this proposal.

## **5.3. Corporate Governance**

The management body of a credit institution or investment firm as a whole should at all times commit sufficient time and possess adequate knowledge, skills and experience to be able to understand the business of the credit institution and its main risk exposures. All members of the management body should be of sufficiently good repute and possess individual qualities and independence of mind which enable them to constructively challenge and oversee the decisions of the management. To avoid group think and facilitate critical challenge, management boards of credit institutions should be sufficiently diverse as regards age, gender, geographical provenance, educational and professional background to present a variety of views and experiences. Gender balance is of particular importance to ensure adequate representation of demographical reality.

In order to have an effective risk oversight and control, the management body should be responsible and accountable for the overall risk strategy of the credit institution or investment firm and for the adequacy of the risk management systems, taking into account the credit institution's risk profile. Given the importance of sound risk management in credit institutions, the management body in its supervisory function should set up a separate risk committee to deal specifically with risk issues and prepare management body decisions on risk issues. The

risk committee should assist the management body in its risk oversight role but the management body should remain finally accountable for risk strategy.

In order to provide a complete view on risk to senior management and to the management body, credit institutions and investment firms should have an independent risk management function which should be able to form an effective and holistic view of the whole range of risks in a credit institution. Risk management function should possess sufficient stature and authority to influence strategic risk-management decisions and have direct access to the management body.

#### **5.4. Overreliance on external ratings**

Credit institutions and investment firms are required to have their own sound credit granting criteria and credit decision processes in place. This applies irrespective of whether institutions grant loans to customers or whether they incur securitisation exposures. External credit ratings may be used as one factor among others in this process but shall not prevail. In particular, internal methodologies shall not rely solely or mechanically on external ratings.

For the specific purposes of calculating regulatory bank capital requirements, rating agency assessments are, in certain instances, applied as a basis for differentiating capital requirements according to risks and not for determining the minimum required quantum of capital itself. The CRD framework as a whole provides banks with an incentive to use internal rather than external credit ratings even for purposes of calculating regulatory capital requirements.

The proposed provision would require credit institutions and investment firms with material credit risk exposure or a significant number of counterparties to develop and use internal models rather than the standardized approach which is relying on external ratings.

In addition, it is proposed that EBA publicly discloses, on an annual basis, information on the steps taken by institutions and by supervisory authorities to reduce overreliance on external ratings and reports on the degree of supervisory convergence in this regard.

#### **5.5. Capital buffers**

On the basis of Basel III, this proposal introduces two capital buffers on top of the requirements: a Capital Conservation Buffer and a countercyclical capital buffer.

The Capital Conservation Buffer amounts to 2,5% of risk weighted assets, applies at all times and has to be met with capital of highest quality.

It is aimed at ensuring institutions' capacity to absorb losses in stressed periods that may span a number of years. Institutions would be expected to build up such capital in good economic times. Those credit institutions that fall below the buffer target will face constraints on discretionary distributions of earnings until the target is reached.

The Countercyclical Capital buffer is intended to achieve the broader macro-prudential goal of protecting the banking sector and the real economy from the system-wide risks stemming from the boom-bust evolution in aggregate credit growth and more generally from any other structural variables and from the exposure of the banking sector to any other risk factors related to risks to financial stability. It will be applied by adjusting the size of the buffer range established by the conservation buffer by up to additional 2.5%.

The Countercyclical Capital Buffer is set by national authorities for loans provided to natural and legal persons within their Member State. It can be set between 0% and 2.5% of risk weighted assets and has to be met by capital of highest quality likewise. If justified, authorities can even set a buffer beyond 2.5%. The Countercyclical Capital Buffer will be required during periods of excessive credit growth and released in a downturn. The ESRB could issue recommendations for the buffer settings by national authorities and its monitoring, including instances where the buffer exceeds 2.5%. So long as the Countercyclical Capital Buffer is set below 2.5%, Member States have to mutually recognise and apply the capital charge to banks in their Member State. For parts of the buffer exceeding 2.5%, authorities can choose if they accept the judgement of their peers and apply the higher rate or leave it at 2.5% for institutions authorised in their Member State.

Credit institutions and investment firms whose capital falls below the buffers will be subject to restrictions on the distribution of profits, payments on Additional Tier 1 instruments and the award of variable remuneration and discretionary pension benefits. In addition, these institutions will have to submit capital conservation plans to the supervisory authorities to ensure a swift replenishment of the buffers.

Proposal for a

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

**on the access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms and amending Directive 2002/87/EC of the European Parliament and of the Council on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate**

(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>14</sup>,

Having regard to the opinion of the European Data Protection Supervisor<sup>15</sup>,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006<sup>16</sup> relating to the taking up and pursuit of the business of credit institutions and Directive 2006/49/EC of the European Parliament and of the Council of 14 June 2006<sup>17</sup> on the capital adequacy of investment firms and credit institutions ("institutions") have been significantly amended on several occasions. Many provisions of Directives 2006/48/EC and 2006/49/EC are applicable to both credit institutions and investment firms. For the sake of clarity and in order to ensure a coherent application of those provisions, it would be desirable to merge these provisions into new legislation applicable to both credit institutions and investment firms. For greater accessibility, the provisions of the Annexes to those Directives should be integrated into the enacting terms of this new legislation.

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<sup>14</sup> OJ C , , p. .

<sup>15</sup> OJ C , , p. .

<sup>16</sup> OJ L 177, 30.6.2006, p. 1.

<sup>17</sup> OJ L 177, 30.6.2006, p. 201.

- (2) The new legislation should consist of two different legal instruments. This Directive should contain the provisions governing the authorisation of the business, the acquisition of qualifying holdings, the exercise of the freedom of establishment and of the freedom to provide services, the powers of supervisory authorities of home and host Member States in this regard and the provisions governing the initial capital and the supervisory review of credit institutions and investment firms. The main objective and subject-matter of this Directive is to coordinate national provisions concerning the access to the activity of credit institutions and investment firms, the modalities for their governance, and their supervisory framework. Apart from these provisions, Directives 2006/48/EC and 2006/49/EC also contained prudential requirements for credit institutions and investment firms. These requirements should be provided for in a Regulation establishing uniform and directly applicable prudential requirements for credit institutions and investment firms, since such requirements are closely related to the functioning of financial markets in respect of a number of assets held by credit institutions and investment firms. This Directive should therefore be read together with that Regulation. Both legal instruments together should form the legal framework governing banking activities and the prudential rules for credit institutions and investment firms.
- (3) The general prudential requirements laid down in Regulation [inserted by OP] are supplemented by individual arrangements to be decided by the competent authorities as a result of their ongoing supervisory review of each individual credit institution and investment firm. The range of such supervisory arrangements should be set out in this Directive and the competent authorities should be able to exert their judgment as to which arrangements should be imposed. With regard to such individual arrangements concerning liquidity, competent authorities should take into account the principles set out in the guidelines on liquidity published by the Committee of European Banking Supervisors<sup>18</sup>.
- (4) Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments<sup>19</sup> allows investment firms authorised by the competent authorities of their home Member State and supervised by the same authorities to establish branches and provide services freely in other Member States. That Directive accordingly provides for the coordination of the rules governing the authorisation and pursuit of the business of investment firms. It does not, however, establish the amounts of the initial capital of such firms or a common framework for monitoring the risks incurred by them, which should be provided by this Directive.
- (5) This Directive should constitute the essential instrument for the achievement of the internal market from the point of view of both the freedom of establishment and the freedom to provide financial services in the field of credit institutions.
- (6) The smooth operation of the internal market requires not only legal rules but also close and regular cooperation and significantly enhanced convergence of regulatory and supervisory practices between the competent authorities of the Member States.
- (7) Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking

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<sup>18</sup> Guidelines on Liquidity Cost Benefit Allocation of 27 October 2010 (<http://www.eba.europa.eu>).

<sup>19</sup> OJ L 145, 30.4.2004, p. 1.

Authority),<sup>20</sup> established EBA. This Directive should take into account the role and function of EBA set out in that Regulation and the procedures to be followed when conferring tasks to EBA.

- (8) Measures to coordinate the supervision of credit institutions should, both in order to protect savings and to create equal conditions of competition between these institutions, apply to all of them. Due regard should however be had to the objective differences in their statutes and their proper aims as laid down by national laws.
- (9) The scope of measures should therefore be as broad as possible, covering all institutions whose business is to receive repayable funds from the public, whether in the form of deposits or in other forms such as the continuing issue of bonds and other comparable securities and to grant credits for their own account. Exceptions should be provided for in the case of certain credit institutions to which this Directive does not apply. The provisions of this Directive should not affect the application of national laws which provide for special supplementary authorisations permitting credit institutions to carry on specific activities or undertake specific kinds of operations.
- (10) It is appropriate to effect harmonisation which is necessary and sufficient to secure the mutual recognition of authorisation and of prudential supervision systems, making possible the granting of a single licence recognised throughout the Union and the application of the principle of home Member State prudential supervision.
- (11) The principles of mutual recognition and home Member State supervision require that Member States' competent authorities should not grant or should withdraw an authorisation where factors such as the content of the activities programmes, the geographical distribution of activities or the activities actually carried on indicate clearly that a credit institution has opted for the legal system of one Member State for the purpose of evading the stricter standards in force in another Member State within whose territory it carries on or intends to carry on the greater part of its activities. Where there is no such clear indication, but the majority of the total assets of the entities in a banking group are located in another Member State, the competent authorities of which are responsible for exercising supervision on a consolidated basis, responsibility for exercising supervision on a consolidated basis should be changed only with the agreement of those competent authorities.
- (12) The competent authorities should not authorise or continue the authorisation of a credit institution where they are liable to be prevented from effectively exercising their supervisory functions by the close links between that institution and other natural or legal persons. Credit institutions already authorised should also satisfy the competent authorities in respect of those close links.
- (13) The reference to the supervisory authorities' effective exercise of their supervisory functions covers supervision on a consolidated basis which should be exercised over a credit institution or investment firm where the provisions of Union law so provide. In such cases, the authorities applied to for authorisation should be able to identify the authorities competent to exercise supervision on a consolidated basis over that credit institution or investment firm.

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<sup>20</sup> OJ L 331 , 15.12.2010, p. 12.



- (14) Credit institutions authorised in their home Member States should be allowed to carry on, throughout the Union, any or all of the activities listed in Annex I to this Directive by establishing branches or by providing services.
- (15) It is appropriate to extend mutual recognition to the activities listed in Annex I to this Directive when they are carried out by financial institutions which are subsidiaries of credit institutions, provided that such subsidiaries are covered by the consolidated supervision of their parent undertakings and meet certain strict conditions.
- (16) The host Member State should be able, in connection with the exercise of the right of establishment and the freedom to provide services, to require compliance with specific provisions of its own national laws or regulations on the part of institutions not authorised as credit institutions in their home Member States and with regard to activities not listed in Annex I to this Directive provided that, on the one hand, such provisions are not already covered by Regulation [inserted by OP], are compatible with Union law and are intended to protect the general good and that, on the other hand, such institutions or such activities are not subject to equivalent rules under this legislation or regulations of their home Member States.
- (17) Beyond Regulation [inserted by OP] that establishes directly applicable prudential rules for credit institutions and investment firms, Member States should ensure that there are no obstacles to carrying on activities receiving mutual recognition in the same manner as in the home Member State, as long as the latter do not conflict with legal provisions protecting the general good in the host Member State.
- (18) The rules governing branches of credit institutions having their head office outside the Union should be analogous in all Member States. It is important to provide that such rules may not be more favourable than those for branches of credit institutions from another Member State. The Union should be able to conclude agreements with third countries providing for the application of rules which accord such branches the same treatment throughout its territory. The branches of credit institutions authorised in third countries should not enjoy the freedom to provide services or the freedom of establishment in Member States other than those in which they are established.
- (19) Agreement should be reached, between the Union and third countries with a view to allowing the practical exercise of consolidated supervision over the largest possible geographical area.
- (20) Responsibility for supervising the financial soundness of a credit institution, and in particular its solvency should lie with its home Member State. The supervision of market risk should be the subject of close cooperation between the competent authorities of the home and host Member States.
- (21) Host Member State authorities should obtain information about activities carried out in their territories. Supervisory measures should be taken by the home Member State authorities unless the host authorities have to take precautionary emergency measures.
- (22) The smooth operation of the internal banking market requires not only legal rules but also close and regular cooperation and significantly enhanced convergence of regulatory and supervisory practices between the competent authorities of the Member States. To this end, consideration of problems concerning individual credit institutions and the mutual exchange of information should take place through EBA. That mutual

information procedure should in no case replace bilateral cooperation. Competent authorities of the host Member States should always be able, in an emergency, on their own initiative or following the initiative of the competent authorities of home Member State, to verify that the activities of a credit institution established within their territories comply with the relevant laws and with the principles of sound administrative and accounting procedures and adequate internal control.

- (23) It is appropriate to allow the exchange of information between the competent authorities and authorities or bodies which, by virtue of their function, help to strengthen the stability of the financial system. In order to preserve the confidential nature of the information forwarded, the list of addressees should remain within strict limits.
- (24) Certain behaviour, such as fraud or insider trading offences, is liable to affect the stability, including the integrity, of the financial system. It is necessary to specify the conditions under which exchange of information in such cases is authorised.
- (25) Where it is stipulated that information may be disclosed only with the express agreement of the competent authorities, these should be able to make their agreement subject to compliance with strict conditions.
- (26) Exchanges of information between, the competent authorities and central banks and other bodies with a similar function in their capacity as monetary authorities and, where appropriate, other public authorities responsible for supervising payment systems and departments of central government administrations should also be authorised.
- (27) For the purposes of strengthening the prudential supervision of institutions and the protection of clients of credit institutions, auditors should have a duty to report promptly to the competent authorities, wherever, during the performance of their tasks, they become aware of certain facts which are liable to have a serious effect on the financial situation or the administrative and accounting organisation of an institution. For that same reason Member States should also provide that such a duty applies in all circumstances where such facts are discovered by an auditor during the performance of his tasks in an undertaking which has close links with a credit institution. The duty of auditors to communicate, where appropriate, to the competent authorities certain facts and decisions concerning an institution which they discover during the performance of their tasks in a non-financial undertaking should not in itself change the nature of their tasks in that undertaking nor the manner in which they should perform those tasks in that undertaking.
- (28) In order to ensure compliance by institutions, those who effectively control their business and the members of the institutions' management body with the obligations deriving from this Directive and from Regulation [inserted by OP] and to ensure that they are subject to similar treatment across the Union, Member States should be required to provide for administrative sanctions and measures which are effective, proportionate and dissuasive. Therefore, administrative sanctions and measures set out by Member States should satisfy certain essential requirements in relation to addressees, criteria to be taken into account when applying a sanction or measure, publication of sanctions or measures, key sanctioning powers and levels of administrative pecuniary sanctions.

- (29) In particular, competent authorities should be empowered to impose pecuniary sanctions which are sufficiently high to offset the benefits that can be expected and to be dissuasive even for larger institutions and their managers.
- (30) In order to ensure a consistent application of sanctions across Member States, when determining the type of administrative sanctions or measures and the level of administrative pecuniary sanctions, Member States should be required to ensure that the competent authorities take into account all relevant circumstances.
- (31) In order to ensure sanctions have a dissuasive effect on the public at large, sanctions should normally be published, except in certain well-defined circumstances.
- (32) In order to detect potential breaches, competent authorities should have the necessary investigatory powers, and should establish effective mechanisms to encourage reporting of potential or actual breaches. These mechanisms should be without prejudice to adequate safeguards for accused persons.
- (33) This Directive should refer to both administrative sanctions and measures in order to cover all actions applied after a violation is committed, and which are intended to prevent further infringements, irrespective of their qualification as a sanction or a measure under national law.
- (34) This Directive should be without prejudice to any provisions in the law of Member States relating to criminal sanctions.
- (35) Member States should ensure that credit institutions and investment firms have internal capital that, having regard to the risks to which they are or may be exposed, is adequate in quantity, quality and distribution. Accordingly, Member States should ensure that credit institutions and investment firms have strategies and processes in place for assessing and maintaining the adequacy of their internal capital.
- (36) Competent authorities should be entrusted with ensuring that institutions have a good organisation and adequate own funds, having regard to the risks to which the institutions are or might be exposed. In this context, competent authorities of Member States may also take into account the risks to which part of the balance sheets of the institutions is exposed, in order to set the adequate own funds.
- (37) To ensure that credit institutions which are active in several Member States are not disproportionately burdened as a result of the continued responsibilities of individual Member State competent authorities as regards authorisation and supervision, it is essential to significantly enhance the cooperation between competent authorities. In this context, the role of the consolidating supervisor should be strengthened. EBA should support and enhance such cooperation.
- (38) In order to ensure comprehensive market discipline across the Union, it is appropriate that competent authorities publish information concerning the carrying on of the business of credit institutions and investment firms. Such information should be sufficient to enable a comparison of the approaches adopted by the different competent authorities of the Member States and complement requirements found in the Regulation regarding disclosure of technical information by institutions.

- (39) Supervision of institutions on a consolidated basis aims at protecting the interests of the depositors and investors of institutions and at ensuring the stability of the financial system. In order to be effective, supervision on a consolidated basis should therefore be applied to all banking groups, including those the parent undertakings of which are not credit institutions or investment firms. Member States should provide competent authorities with the necessary legal instruments to enable them to exercise such supervision.
- (40) In the case of groups with diversified activities where parent undertakings control at least one subsidiary, the competent authorities should be able to assess the financial situation of a credit institution or investment firm in such a group. The competent authorities should at least have the means of obtaining from all undertakings within a group the information necessary for the performance of their function. Cooperation between the authorities responsible for the supervision of different financial sectors should be established in the case of groups of undertakings carrying on a range of financial activities.
- (41) The Member States should be able to refuse or withdraw a banking authorisation in the case of certain group structures considered inappropriate for carrying on banking activities, because such structures cannot be supervised effectively. In this respect the competent authorities should have the necessary powers to ensure the sound and prudent management of credit institutions.
- (42) The mandates of competent authorities should take into account, in an appropriate way, the Union dimension. Competent authorities should therefore duly consider the effect of their decisions on the stability of the financial system in all other Member States concerned. Subject to national law, that principle should serve to promote financial stability across the Union and should not legally bind competent authorities to achieve a specific result.
- (43) Weaknesses in corporate governance in a number of institutions have contributed to excessive and imprudent risk-taking in the banking sector which led to the failure of individual institutions and systemic problems in Member States and globally. The very general provisions on governance of institutions and the non-binding nature of a substantial part of the corporate governance framework, based essentially on voluntary codes of conduct, did not facilitate the effective implementation of sound corporate governance practices by institutions. The absence of effective checks and balances within institutions resulted in a lack of effective oversight of management decision-making, which exacerbated short-term and excessively risky management strategies. The unclear role of the competent authorities in overseeing corporate governance systems in institutions did not allow for sufficient supervision of the effectiveness of the internal governance processes.
- (44) In order to address the potentially detrimental effect of poorly designed corporate governance arrangements on the sound management of risk, Member States should introduce principles and standards to ensure effective oversight by the management body, promote a sound risk culture at all levels of credit institutions and investment firms and enable competent authorities to monitor the adequacy of internal governance arrangements. These principles and standards should apply taking into account the nature, scale and complexity of institutions' activities.

- (45) In order to effectively monitor management actions and decisions, the management body of an institution should commit sufficient time to perform its functions and to be able to understand the business of the institution, its main risk exposures and the implications of the business and the risk strategy. Combining a too high number of directorships at the same time would preclude a member of the management body to spend adequate time for the performance of this oversight role. Therefore, it is necessary to limit the number of mandates a member of the management body of an institution may hold at the same time in different entities.
- (46) The lack of monitoring by boards of management decisions is partly due to the phenomenon of group think. This phenomenon is, among other reasons, caused by a lack of diversity in boards' composition. To facilitate independent opinions and critical challenge, management bodies of institutions should therefore be sufficiently diverse as regards age, gender, geographical provenance, educational and professional background to present a variety of views and experiences. Gender balance is of particular importance to ensure adequate representation of population. More diverse boards should more effectively monitor management and therefore contribute to improved risk oversight and resilience of institutions. Therefore, diversity should be one of the criteria of board composition.
- (47) Remuneration policies which encourage excessive risk-taking behaviour can undermine sound and effective risk management of credit institutions and investment firms. G-20 committed to implement the Financial Stability Board (FSB) Principles for Sound Compensation Practices and Implementing Standards (the FSB principles and standards) which address the potentially detrimental effect of poorly designed remuneration structures on the sound management of risk and control of risk-taking behaviour by individuals. This Directive aims at implementing international principles and standards at European level by introducing an express obligation for credit institutions and investment firms to establish and maintain, for categories of staff whose professional activities have a material impact on the risk profile of credit institutions and investment firms, remuneration policies and practices that are consistent with effective risk management.
- (48) In order to ensure that credit institutions and investment firms have in place sound remuneration policies, it is appropriate to specify clear principles on governance and on the structure of remuneration policies. In particular, remuneration policies should be aligned with the risk appetite, values and long-term interests of the credit institution or investment firm. For this purpose, the assessment of the performance-based components of remuneration should be based on longer-term performance and take into account the current and future risks associated with that performance. In order to ensure that the design of remuneration policies is integrated in the risk management of the credit institution, the management body, in its supervisory function, should adopt and periodically review the remuneration policies in place. The provisions on remuneration reflect differences between different types of credit institutions and investment firms in a proportionate manner, according to their size, internal organisation and the nature, scope and complexity of their activities and, in particular, it could not be proportionate for certain types of investment firms to comply with all of the principles.
- (49) Since poorly designed remuneration policies and incentive schemes are capable of increasing to an unacceptable extent the risks to which credit institutions and

investment firms are exposed, prompt remedial action and, if necessary, appropriate corrective measures should be taken. Consequently, it is appropriate to ensure that competent authorities have the power to impose qualitative or quantitative measures on the relevant entities that are designed to address problems that have been identified in relation to remuneration policies in the supervisory review.

- (50) The provisions on remuneration should be without prejudice to the full exercise of fundamental rights guaranteed by Article 153(5) of the TFEU, general principles of national contract and labour law, legislation regarding shareholders' rights and involvement and the general responsibilities of the management bodies of the institution concerned, as well as the rights, where applicable, of the social partners to conclude and enforce collective agreements, in accordance with national law and customs.
- (51) Capital requirements for credit risk and market risk should be based on external credit ratings only to the extent necessary. Where credit risk is material, institutions should therefore generally seek to implement internal ratings based approaches or internal models. However, standardised approaches that rely on external ratings could be used where credit risk is less material, which is typically the case for less sophisticated institutions, for immaterial exposure classes, or in situations where using internal approaches would be overly burdensome.
- (52) With respect to the supervision of liquidity, responsibility should lie with home Member States as soon as detailed criteria for the liquidity coverage requirement apply. It is therefore necessary to accomplish the coordination of supervision in this field in order to introduce supervision by the home Member State by that time. In order to ensure effective supervision, home and host country authorities should further cooperate in the field of liquidity.
- (53) Where within a group liquid assets in one institution will under stress circumstances match liquidity needs of another member of that group, competent authorities should exempt an institution from liquidity coverage requirements and should apply those requirements on a consolidated basis instead.
- (54) Measures taken according to Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions<sup>21</sup> should not conflict with measures taken on the basis of this Directive. Supervisory measures should not lead to discrimination among creditors from different Member States.
- (55) In the light of the financial crisis and the pro-cyclical mechanisms that contributed to its origin and aggravated its effect, the FSB, the BCBS, and the G20 made recommendations to mitigate the pro-cyclical effects of financial regulation. In December 2010, BCBS issued new global regulatory standards on bank capital adequacy, including rules requiring the maintenance of capital conservation and countercyclical capital buffers.
- (56) It is therefore appropriate to require credit institutions and investment firms to hold, in addition to other own fund requirements, a Capital Conservation Buffer and a

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<sup>21</sup> OJ L 125, 5.5.2001, p. 15.

Countercyclical Capital Buffer to ensure that credit institutions and investment firms accumulate during periods of economic growth a sufficient capital base to absorb losses in stressed periods. The Countercyclical Capital Buffer would be built up when aggregate credit growth is judged to be associated with a build-up of system-wide risk, and drawn down during stressed periods.

- (57) In order to ensure that countercyclical buffers properly reflect the risk to the banking sector of excessive credit growth, credit institutions and investment firms should calculate their institution specific buffers as a weighted average of the counter-cyclical buffer rates that apply for the countries where their credit exposures are located. Every Member State should therefore designate an authority responsible for quarterly setting the level of the Countercyclical Capital Buffer rate for exposures located in that Member State. That buffer rate should take into account the growth of credit levels and changes to the ratio of credit to GDP in that Member State, and any other variables relevant to the risks to financial stability.
- (58) In order to promote international consistency in setting Countercyclical Capital Buffer rates, BCBS has developed a methodology on the basis of the ratio between credits and GDP. This should serve as a common starting point for decisions on buffer rates by the relevant national authorities, but should not give rise to an automatic buffer setting or bind the designated authority. In particular, designated authorities could also take into account structural variables and the exposure of the banking sector to any other risk factors related to risks to financial stability.
- (59) In order to achieve coherent application and to assure macro-prudential oversight across the Union, it is appropriate that the European Systemic Risk Board (ESRB) develops principles tailored for the Union economy and is responsible for monitoring their application. This Directive should not prevent the ESRB from taking any actions it deems necessary under Regulation (EU) No 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board.<sup>22</sup>
- (60) It is appropriate that decisions of Member States on countercyclical buffer rates are coordinated as far as possible. In this regard, the ESRB, if requested by national authorities, could facilitate discussions among them about their proposed buffer settings. In order to promote a consistent approach to the factors on which designated authorities base those decisions, and to ensure that the setting of countercyclical buffer rates is consistent with the fundamental principles of the internal market, designated authorities should also be required to notify the ESRB and the EBA whenever they take into account variables other than the deviation of the ratio of credit-to-GDP from its long term trend and related guidance from the ESRB, and as a result set a buffer rate that is higher than it would have been if those variables had not been taken into account. The purpose of such notification should be for the ESRB and the EBA to assess the nature of those variables and the consistency of the setting of the buffer rate with the internal market principles.
- (61) Where a credit institution or investment firm fails to meet in full the requirements for a Capital Conservation Buffer and any additional countercyclical buffer, it should be

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<sup>22</sup> OJ L 331, 15.12.2010, p. 1.

subject to measures designed to ensure that it restores its levels of own funds in a timely manner. In order to conserve capital, it is appropriate to impose proportionate restrictions on discretionary distributions of profits, including dividend payments and payments of variable remuneration. So as to ensure that such institutions or firms have a credible strategy to restore levels of own funds, they should be required to draw up and agree with the competent authorities a capital conservation plan that sets out how the restrictions on distributions will be applied and other measures that the institution or firm intends to take to ensure compliance with the full buffer requirements.

- (62) Technical standards in financial services should ensure consistent harmonisation and adequate protection of depositors, investors and consumers across the Union. As a body with highly specialised expertise, it would be efficient and appropriate to entrust EBA with the elaboration of draft regulatory and implementing technical standards which do not involve policy choices, for submission to the Commission.
- (63) The Commission should adopt the draft regulatory technical standards developed by EBA in the areas of authorisation of and acquisitions of significant holdings in credit institutions, information exchange between competent authorities, exercise of the freedom of establishment and the freedom of services, supervisory collaboration, governance, remuneration policies and internal control mechanisms of credit institutions and investment firms, Supervision of mixed financial holding companies, and supervisory review by means of delegated acts pursuant to Article 290 TFEU and in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010.
- (64) The Commission should also be empowered to adopt implementing technical standards in the areas of authorisation of and acquisitions of significant holdings in credit institutions, information exchange between competent authorities, supervisory collaboration, specific prudential requirements, and disclosure of information by supervisory authorities by means of implementing acts pursuant to Article 291 TFEU and in accordance with Article 15 of Regulation (EU) No 1093/2010. EBA should be entrusted with drafting implementing technical standards for submission to the Commission.
- (65) In order to ensure uniform conditions for the implementation of this Directive, implementing powers should be conferred on the Commission. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council on laying down the rules and general principles concerning mechanisms for control by the Member States of the Commission's exercise of implementing powers<sup>23</sup>.
- (66) In order to specify the requirements set out in this Directive, the power to adopt acts in accordance with Article 290 of the TFEU should be delegated to the Commission in respect of clarifying the definitions and the terminology used in this Directive, expanding the list of activities subject to mutual recognition in the Annex, improving the exchange of information concerning branches of credit institutions, and adjusting the provisions dealing with their internal arrangements, processes and mechanisms. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level.

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<sup>23</sup> OJ L 55, 28.2.2011, p. 13.



- (67) The Commission, when preparing and drawing up delegated acts, should ensure a simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and Council.
- (68) Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II)<sup>24</sup> is relevant when qualifying holdings in a credit institution are acquired;
- (69) References in existing national laws, regulations and administrative provisions to the Directives repealed by this Directive should be construed as references to this Directive.
- (70) Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC<sup>25</sup>, Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS)<sup>26</sup>, Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC<sup>27</sup>, Directive 2002/87/EC of the European Parliament and of the Council of 16 December 2002 on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate<sup>28</sup>, and Directive [AIFMD] of the European Parliament and of the Council on Alternative Investment Fund Managers and amending directives 2003/41/EC and 2009/65/EC refer to provisions of Directives 2006/48/EC and 2006/49/EC that deal with own funds requirements and are now set out in Regulation [inserted by OP]. Consequently, references in those Directives to Directives 2006/48/EC and 2006/49/EC should be construed as references to the provisions governing own funds requirements in that Regulation.
- (71) In order to allow for technical standards to be developed in order to ensure that institutions that are part of a financial conglomerate apply the appropriate calculation methods for the determination of required capital on a consolidated basis, Directive 2002/87/EC needs to be amended accordingly.
- (72) In order for the internal banking market to operate with increasing effectiveness and for citizens of the Union to be afforded adequate levels of transparency, it is necessary that competent authorities publish in a way which allows for meaningful comparison the manner in which this Directive is implemented.

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<sup>24</sup> OJ L 335, 17.12.2009, p. 1.

<sup>25</sup> OJ L 319, 5.12.2007, p. 1.

<sup>26</sup> OJ L 302, 17.11.2009, p. 32.

<sup>27</sup> OJ L 267, 10.10.2009, p. 7.

<sup>28</sup> OJ L 35, 11.2.2003, p. 1.

- (73) With respect to the supervision of liquidity, there should be a period of time within which Member States effect transition towards the regulatory regime under which detailed criteria for the liquidity coverage requirement apply.
- (74) Directive 95/46 of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data<sup>29</sup> and Regulation (EU) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the EU institutions and bodies and on the free movement of such data<sup>30</sup>, should be fully applicable to the processing of personal data for the purposes of this Directive.
- (75) Since the objectives of this Directive, namely the introduction of rules concerning the access to the activity of the business of credit institutions, and the prudential supervision of credit institutions and investment firms, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and the effects of the proposed action, be better achieved at European Union (hereinafter Union) level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on the 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.
- (76) The obligation to transpose this Directive into national law should be confined to those provisions which represent a substantive change as compared with earlier Directives.
- (77) Directive 2006/48/EC relating to the taking up and pursuit of the business of credit institutions and Directive 2006/49/EC of the European Parliament and of the Council of 14 June 2006, should therefore be repealed,

HAVE ADOPTED THIS DIRECTIVE:

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<sup>29</sup> OJ L 281, 23.11.1995, p. 31.  
<sup>30</sup> OJ L 8, 12.1.2001, p. 1.

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# **Title I**

## **Subject matter, scope and definitions**

### *Article 1*

#### *Subject matter*

This Directive lays down rules requiring Member States to achieve common results in the following areas:

- (a) access to the activity of credit institutions and investment firms (hereinafter referred to as institutions);
- (b) supervisory powers and tools for the prudential supervision of institutions by competent authorities;
- (c) the prudential supervision of institutions by competent authorities in relation to risks not addressed by the uniform rules set out in Regulation [inserted by OP].
- (d) publication requirements for competent authorities in the field of prudential regulation and supervision of institutions.

### *Article 2*

#### *Scope*

- 1. Article 34 and Title VII, Chapter 3 shall apply to financial holding companies, mixed financial holding companies and mixed-activity holding companies which have their head offices in the Union;
- 2. The institutions to which this Directive does not apply pursuant to Paragraph 3 of this Article, with the exception, however, of the central banks, shall be treated as financial institutions for the purposes of Article 34 and Title VII, Chapter 3.
- 3. This Directive shall not apply to the following:
  - (1) access to the activity of investment firms in so far as it is regulated by Directive 2004/39/EC;
  - (2) central banks,
  - (3) post office giro institutions,
  - (4) in Belgium, the ‘Institut de Réescompte et de Garantie/Herdiscontering- en Waarborginstituut’,

- (5) in Denmark, the ‘Dansk Eksportfinansieringsfond’, the ‘Danmarks Skibskredit A/S’ and the ‘KommuneKredit’,
- (6) in Germany, the ‘Kreditanstalt für Wiederaufbau’, undertakings which are recognised under the ‘Wohnungsgemeinnützigkeitsgesetz’ as bodies of State housing policy and are not mainly engaged in banking transactions, and undertakings recognised under that law as non-profit housing undertakings,
- (7) in Greece, the ‘Ταμείο Παρακαταθηκών και Δανείων’ (Tamio Parakatathikon kai Danion),
- (8) in Spain, the ‘Instituto de Crédito Oficial’,
- (9) in France, the ‘Caisse des dépôts et consignations’,
- (10) in Ireland, credit unions and the friendly societies,
- (11) in Italy, the ‘Cassa depositi e prestiti’,
- (12) in Latvia, the ‘krājaizdevu sabiedrības’, undertakings that are recognised under the ‘krājaizdevu sabiedrību likums’ as cooperative undertakings rendering financial services solely to their members,
- (13) in Lithuania, the ‘kredito unijos’ other than the ‘Centrinė kredito unija’,
- (14) in Hungary, the ‘Magyar Fejlesztési Bank Rt.’ and the ‘Magyar Export-Import Bank Rt.’,
- (15) in the Netherlands, the ‘Nederlandse Investeringsbank voor Ontwikkelingslanden NV’, the ‘NV Noordelijke Ontwikkelingsmaatschappij’, the ‘NV Industriebank Limburgs Instituut voor Ontwikkeling en Financiering’ and the ‘Overijsselse Ontwikkelingsmaatschappij NV’,
- (16) in Austria, undertakings recognised as housing associations in the public interest and the ‘Österreichische Kontrollbank AG’,
- (17) in Poland, the ‘Spółdzielcze Kasy Oszczędnościowo — Kredytowe’ and the ‘Bank Gospodarstwa Krajowego’,
- (18) in Portugal, ‘Caixas Económicas’ existing on 1 January 1986 with the exception of those incorporated as limited companies and of the ‘Caixa Económica Montepio Geral’,
- (19) in Finland, the ‘Teollisen yhteistyön rahasto Oy/Fonden för industriellt samarbete AB’, and the ‘Finnvera Oyj/Finnvera Abp’,
- (20) in Sweden, the ‘Svenska Skeppshypotekskassan’,
- (21) in the United Kingdom, the National Savings Bank, the Commonwealth Development Finance Company Ltd, the Agricultural Mortgage Corporation Ltd, the Scottish Agricultural Securities Corporation Ltd, the Crown Agents for overseas governments and administrations, credit unions and municipal banks;

(22) in Slovenia, the “SID-Slovenska izvozna in razvojna banka, d.d. Ljubljana”.

### *Article 3*

#### *Prohibition for undertakings other than credit institutions from carrying on the business of taking deposits or other repayable funds from the public*

1. Member States shall prohibit persons or undertakings that are not credit institutions from carrying on the business of taking deposits or other repayable funds from the public.
2. Paragraph 1 shall not apply to the taking of deposits or other funds repayable by a Member State or by a Member State's regional or local authorities or by public international bodies of which one or more Member States are members or to cases expressly covered by national or Union legislation, provided that those activities are subject to regulations and controls intended to protect depositors and investors and applicable to those cases.

### *Article 4*

#### *Definitions*

1. The definitions referred to in Article 4 of Regulation [inserted by OP] shall apply.
2. For the purposes of this Directive, the following definitions shall also apply:
  - (a) ‘ancillary services undertaking’ means an undertaking the principal activity of which consists in owning or managing property, managing data-processing services, or any other similar activity which is ancillary to the principal activity of one or more credit institutions;
  - (b) ‘risk of excessive leverage’ means the risk resulting from an institution’s vulnerability due to leverage or contingent leverage that may require unintended corrective measures to its business plan, including distressed selling of assets which might result in losses or in valuation adjustments to its remaining assets;
  - (c) ‘internal approaches’ means the approaches referred to in Articles 138 (1), , 216, 220, 301 (2), 277, 352, and 254 (3) of Regulation [inserted by OP].

## **Title II**

### **Competent authorities**

#### *Article 5*

##### *Designation and powers of the competent authorities*

1. Member States shall designate competent authorities that carry out the duties provided for in this Directive. They shall inform the Commission and EBA thereof, indicating any division of duties.
2. Member States shall ensure that the competent authorities monitor the activities of institutions so as to assess compliance with the requirements of this Directive and Regulation [inserted by OP].
3. Member States shall ensure that the appropriate measures are in place to enable the competent authorities to obtain the information needed to assess the compliance of institutions with those obligations.
4. Member States shall ensure that the competent authorities have the expertise, resources, operational capacity and independence necessary to carry out the supervisory and investigative functions set out in this Directive and Regulation [inserted by OP]. Competent authorities shall be given all supervisory and investigatory powers that are necessary for the exercise of their functions.
5. Member States shall require that institutions provide the competent authorities of their home Member States with all the information necessary for the assessment of their compliance with the rules adopted in accordance with this Directive and Regulation [inserted by OP]. Member States shall also ensure that internal control mechanisms and administrative and accounting procedures of the institutions permit the verification of their compliance with such rules at all times.
6. Member States shall ensure that institutions shall register all their transactions and document systems and processes, which are subject to this Directive and Regulation [inserted by OP] in such a manner that the competent authorities are able to verify compliance with the requirements of this Directive and Regulation [inserted by OP] at all times.

#### *Article 6*

##### *Coordination within Member States*

Where Member States have more than one competent authority for the prudential supervision of credit institutions, investment firms and financial institutions, Member States shall take the requisite measures to organise coordination between such authorities.



## *Article 7*

### *Cooperation with EBA*

In the exercise of their duties, the competent authorities shall take into account the convergence in respect of supervisory tools and supervisory practices in the application of the laws, regulations and administrative requirements adopted pursuant to this Directive. For that purpose, Member States shall ensure that:

- (a) the competent authorities participate in the activities of EBA;
- (b) competent authorities make every effort to comply with those guidelines and recommendations issued by EBA in accordance with Article 16 of Regulation (EU) No. 1093/2010;
- (c) national mandates conferred on the competent authorities do not inhibit the performance of their duties as members of EBA or under this Directive and Regulation [inserted by OP].

## *Article 8*

### *European dimension of supervision*

The competent authorities in one Member State shall, in the exercise of their general duties, duly consider the potential impact of their decisions on the stability of the financial system in all other Member States concerned and, in particular, in emergency situations, based on the information available at the relevant time.

## **Title III**

### **Requirements for access to the activity of credit institutions**

#### **Chapter 1**

#### **General requirements for access to the activity of credit institutions**

##### *Article 9*

##### *Authorisation*

1. Member States shall require credit institutions to obtain authorisation before commencing their activities. Without prejudice to Articles 10 to 14, they shall lay down the requirements for such authorisation and notify EBA.
2. EBA shall develop draft regulatory technical standards on the following:
  - (a) specifying 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;
  - (b) specifying the conditions to comply with the requirement set out in Article 13;
  - (c) specifying the requirements applicable to shareholders and members with qualifying holdings;
  - (d) specifying obstacles which may prevent effective exercise of the supervisory functions of the competent authority, as provided for in Article 14.

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

3. EBA shall develop draft implementing technical standards on standard forms, templates and procedures for such provision of information.

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.

4. EBA shall submit the draft technical standards referred to in paragraphs 2 and 3 to the Commission by 31 December 2015.

## *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.

## *Article 11*

### *Economic needs*

Member States shall not require the application for authorisation to be examined in terms of the economic needs of the market.

## *Article 12*

### *Initial capital*

1. Without prejudice to other general conditions laid down by national law, the competent authorities shall not grant authorisation when the credit institution does not possess separate own funds or in cases where initial capital is less than EUR 5 million.
2. Initial capital shall comprise capital and reserves as referred to in Article 24 (a) to (e) of Regulation [inserted by OP].
3. Member States may decide that credit institutions which do not fulfil the requirement of separate own funds and which were in existence on 15 December 1979 may continue to carry on their business. They may exempt such credit institutions from complying with the requirement contained in the first subparagraph of Article 13(1).
4. Member States may, subject to the following conditions, grant authorisation to particular categories of credit institutions the initial capital of which is less than that specified in paragraph 1:
  - (a) the initial capital shall be no less than EUR 1 million;
  - (b) the Member States concerned shall notify the Commission and EBA of their reasons for exercising that option.

## *Article 13*

### *Effective direction of the business and place of the head office*

1. Competent authorities shall grant an authorisation to the credit institution only when there are at least two persons who effectively direct the business of the credit institution.

They shall not grant authorisation if these persons are not of sufficiently good repute or lack sufficient knowledge, skills and experience to perform such duties.

2. Each Member State shall require that:
  - (a) any credit institution which is a legal person and which, under its national law, has a registered office shall have its head office in the same Member State as its registered office;
  - (b) any other credit institution shall have its head office in the Member State which granted its authorisation and in which it actually carries on its business.

#### *Article 14*

##### *Shareholders and members*

1. The competent authorities shall not grant authorisation for commencing the activity of credit institutions unless they have been informed of the identities of the shareholders or members, whether direct or indirect, natural or legal persons, that have qualifying holdings, and of the amounts of those holdings.

In determining whether the criteria for a qualifying holding are fulfilled, the voting rights referred to in Articles 9 and 10 of Directive 2004/109/EC<sup>31</sup>, as well as the conditions regarding aggregation thereof laid down in Article 12(4) and (5) of that Directive shall be taken into account.

Member States shall not take into account voting rights or shares which investment firms or credit institutions may hold as a result of providing the underwriting of financial instruments or placing of financial instruments on a firm commitment basis included under point 6 of Section A of Annex I to Directive 2004/39/EC, provided that those rights are not exercised or otherwise used to intervene in the management of the issuer, and disposed of within one year of acquisition.

2. The competent authorities shall not grant authorisation 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.
3. Where close links exist between the credit institution and other natural or legal persons, the competent authorities shall grant authorisation only if those links do not prevent the effective exercise of their supervisory functions.

The competent authorities shall not grant authorisation where the laws, regulations or administrative provisions of a third country governing one or more natural or legal persons with which the credit institution has close links, or difficulties involved in the enforcement of those laws, regulations or administrative provisions, prevent the effective exercise of their supervisory functions.

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<sup>31</sup> Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market (OJ L 390, 31.12.2004, p. 38).

The competent authorities shall require credit institutions to provide them with the information they require to monitor compliance with the conditions referred to in this paragraph on a continuous basis.

### *Article 15*

#### *Refusal of the authorisation*

Where a competent authority decides not to grant an authorisation, it shall notify the applicant of the decision and the reasons thereof within six months of receipt of the application or, should the application be incomplete, within six months of the applicant sending the information required for the decision.

A decision shall, in any case, be taken within 12 months of the receipt of the application.

### *Article 16*

#### *Prior consultation with the competent authorities of other Member States*

1. The competent authority shall, before granting authorisation to a credit institution, consult the competent authorities of the other Member State involved in the following cases:
  - (a) the credit institution concerned is a subsidiary of a credit institution authorised in another Member State;
  - (b) the credit institution concerned is a subsidiary of the parent undertaking of a credit institution authorised in another Member State;
  - (c) the credit institution concerned is controlled by the same persons, whether natural or legal, as control a credit institution authorised in another Member State.
2. The competent authority shall, before granting authorisation to a credit institution, consult the competent authority of a Member State involved, responsible for the supervision of insurance undertakings or investment firms in the following cases:
  - (a) the credit institution concerned is a subsidiary of an insurance undertaking or investment firm authorised in the Union;
  - (b) the credit institution concerned is a subsidiary of the parent undertaking of an insurance undertaking or investment firm authorised in the Union;
  - (c) the credit institution concerned is controlled by the same person, whether natural or legal, as controls an insurance undertaking or investment firm authorised in the Union.
3. The relevant competent authorities referred to in paragraphs 1 and 2 shall in particular consult each other when assessing the suitability of the shareholders and the reputation and experience of members of the management body involved in the

management of another entity of the same group. They shall exchange any information regarding the suitability of shareholders and the reputation and experience of members of the management body which is of relevance for the granting of an authorisation as well as for the ongoing assessment of compliance with operating conditions.

#### *Article 17*

##### *Branches of credit institutions authorised in another Member State*

Host Member States shall not require authorisation or endowment capital for branches of credit institutions authorised in other Member States. The establishment and supervision of such branches shall be effected in accordance with Articles 35, 36(1)-(3), 37, 40 to 46 and 49, 73 and 74.

#### *Article 18*

##### *Withdrawal of authorisation*

The competent authorities may only withdraw the authorisation granted to a credit institution in any of the following cases where such an institution:

- (a) does not make use of the authorisation within 12 months, expressly renounces the authorisation or has ceased to engage in business for more than six months, if the Member State concerned has made no provision for the authorisation to lapse in such cases;
- (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) no longer possesses sufficient own funds 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;
- (e) falls within one of the other cases where national law provides for withdrawal of authorisation;
- (f) commits one of the breaches referred to in Article 67(1).

#### *Article 19*

##### *Name of credit institutions*

For the purposes of exercising their activities, credit institutions may, notwithstanding any provisions in the host Member State concerning the use of the words 'bank', 'savings bank' or other banking names, use throughout the territory of the Union the same name that they use in the Member State in which their head office is situated. In the event of there being any danger

of confusion, the host Member State may, for the purposes of clarification, require that the name be accompanied by certain explanatory particulars.

#### *Article 20*

##### *Notification of the authorisation and withdrawal of authorisation to EBA*

1. Competent authorities shall notify to EBA every authorisation granted under Article 9.
2. A list containing the name of each credit institution to which authorisation has been granted shall be published on EBA's website and updated regularly.
3. The consolidating supervisor shall provide the competent authorities concerned and EBA with all information regarding the group of institutions in accordance with Articles 14(3), 73(1) and 104(2), in particular regarding the legal and organisational structure of the group and its governance.
4. The name of each credit institution that does not have the capital specified in Article 12(1) shall be mentioned to that effect in the list.
5. The competent authorities shall notify each withdrawal of authorisation to EBA together with the reasons for such a decision.

#### *Article 21*

##### *Exemptions for credit institutions permanently affiliated to a central body*

1. Competent authorities may exempt a credit institution that meets the conditions laid down in Article 9 of Regulation [inserted by OP] from Article 10, 12 and 13(1) of this Directive, under the conditions set out in Article 9 of that Regulation.
2. In case of exemptions exercised by the competent authorities in accordance with Article 9 of Regulation [inserted by OP], Articles 17, 33, 34, 35, 36(1)-(3) and 39-46 of this Directive shall apply to the whole as constituted by the central body together with its affiliated institutions.

## **Chapter 2**

### **Qualifying holding in a credit institution**

#### *Article 22*

##### *Notification and assessment of proposed acquisitions*

1. Member States shall require any natural or legal person or such persons acting in concert (hereinafter referred to as the proposed acquirer), who have taken a decision either to acquire, directly or indirectly, a qualifying holding in a credit institution or

to further increase, directly or indirectly, such a qualifying holding in a credit institution as a result of which the proportion of the voting rights or of the capital held would reach or exceed 20 %, 30 % or 50 % or so that the credit institution would become its subsidiary (hereinafter referred to as the proposed acquisition), first to notify in writing the competent authorities of the credit institution in which they are seeking to acquire or increase a qualifying holding, indicating the size of the intended holding and relevant information, as referred to in Article 23(4). Member States need not apply the 30 % threshold where, in accordance with Article 9(3)(a) of Directive 2004/109/EC, they apply a threshold of one-third.

2. The competent authorities shall, promptly and in any event within two working days following receipt of the notification, as well as following the possible subsequent receipt of the information referred to in paragraph 3, acknowledge receipt thereof in writing to the proposed acquirer.

The competent authorities shall have a maximum of sixty working days as from the date of the written acknowledgement of receipt of the notification and all documents required by the Member State to be attached to the notification on the basis of the list referred to in Article 23(4) (hereinafter referred to as the assessment period), to carry out the assessment provided for in Article 23(1) (hereinafter referred to as the assessment).

The competent authorities shall inform the proposed acquirer of the date of the expiry of the assessment period at the time of acknowledging receipt.

3. The competent authorities may, during the assessment period, if necessary, and no later than on the fiftieth working day of the assessment period, request any further information that is necessary to complete the assessment. Such request shall be made in writing and shall specify the additional information needed.

For the period between the date of request for information by the competent authorities and the receipt of a response thereto by the proposed acquirer, the assessment period shall be interrupted. The interruption shall not exceed twenty working days. Any further requests by the competent authorities for completion or clarification of the information shall be at their discretion but may not result in an interruption of the assessment period.

4. The competent authorities may extend the interruption referred to in the second subparagraph of paragraph 3 up to thirty working days if the proposed acquirer is situated or regulated outside the Union or a natural or legal person not subject to supervision under this Directive or Directives 2009/65/EC, 2009/138EC, or 2004/39/EC .
5. If the competent authorities, upon completion of the assessment, decide to oppose the proposed acquisition, they shall, within two working days, and not exceeding the assessment period, inform the proposed acquirer in writing and provide the reasons for that decision. Subject to national law, an appropriate statement of the reasons for the decision may be made accessible to the public at the request of the proposed acquirer. This shall not prevent a Member State from allowing the competent authority to publish such information in the absence of a request by the proposed acquirer.



6. If the competent authorities do not oppose the proposed acquisition within the assessment period in writing, it shall be deemed to be approved.
7. The competent authorities may fix a maximum period for concluding the proposed acquisition and extend it where appropriate.
8. Member States may not impose requirements for notification to and approval by the competent authorities of direct or indirect acquisitions of voting rights or capital that are more stringent than those set out in this Directive.
9. EBA shall develop draft regulatory technical standards to establish an exhaustive list of information, referred to in Article 23(4), to be included by proposed acquirers in their notification, without prejudice to paragraph 3 of this Article.

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.

10. EBA shall develop draft implementing technical standards to establish common procedures, forms and templates for the consultation process between the relevant competent authorities as referred to in Article 24.

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.

11. EBA shall submit the draft technical standards referred to in paragraphs 9 and 10 to the Commission by 31 December 2015.

### *Article 23*

#### *Assessment criteria*

1. In assessing the notification provided for in Article 22(1) and the information referred to in Article 22(3), the competent authorities shall, in order to ensure the sound and prudent management of the credit institution in which an acquisition is proposed, and having regard to the likely influence of the proposed acquirer on the credit institution, assess the suitability of the proposed acquirer and the financial soundness of the proposed acquisition according to the following criteria:
  - (a) the reputation of the proposed acquirer;
  - (b) the reputation and experience of any person who will direct the business of the credit institution as a result of the proposed acquisition;
  - (c) the financial soundness of the proposed acquirer, in particular in relation to the type of business pursued and envisaged in the credit institution in which the acquisition is proposed;
  - (d) whether the credit institution will be able to comply and continue to comply with the prudential requirements based on this Directive and Regulation

[inserted by OP], and where applicable, other Directives, notably, Directives 2009/110/EC and 2002/87/EC, in particular, whether the group of which it will become a part has a structure that makes it possible to exercise effective supervision, effectively exchange information among the competent authorities and determine the allocation of responsibilities among the competent authorities;

- (e) whether there are reasonable grounds to suspect that, in connection with the proposed acquisition, money laundering or terrorist financing within the meaning of Article 1 of Directive 2005/60/EC<sup>32</sup> is being or has been committed or attempted, or that the proposed acquisition could increase the risk thereof.
2. The competent authorities may oppose the proposed acquisition only if there are reasonable grounds for doing so on the basis of the criteria set out in paragraph 1 or if the information provided by the proposed acquirer is incomplete.
  3. Member States shall neither impose any prior conditions in respect of the level of holding that must be acquired nor allow their competent authorities to examine the proposed acquisition in terms of the economic needs of the market.
  4. Member States shall publish a list specifying the information that is necessary to carry out the assessment and that must be provided to the competent authorities at the time of notification referred to in Article 22(1). The information required shall be proportionate and adapted to the nature of the proposed acquirer and the proposed acquisition. Member States shall not require information that is not relevant for a prudential assessment.
  5. Notwithstanding Article 22(2), (3) and (4), where two or more proposals to acquire or increase qualifying holdings in the same credit institution have been notified to the competent authority, the latter shall treat the proposed acquirers in a non-discriminatory manner.

## *Article 24*

### *Cooperation between competent authorities*

1. The relevant competent authorities shall work in full consultation with each other when carrying out the assessment if the proposed acquirer is one of the following:
  - (a) a credit institution, assurance undertaking, insurance undertaking, reinsurance undertaking, investment firm or management company within the meaning of Article 2(1), point b of Directive 2009/65/EC (hereinafter referred to as the UCITS management company) authorised in another Member State or in a sector other than that in which the acquisition is proposed;

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<sup>32</sup> Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of financial system for the purpose of money laundering and terrorist financing (OJ L 309, 25.11.2005, p. 15).

- (b) the parent undertaking of a credit institution, assurance undertaking, insurance undertaking, reinsurance undertaking, investment firm or UCITS management company authorised in another Member State or in a sector other than that in which the acquisition is proposed;
  - (c) a natural or legal person controlling a credit institution, assurance undertaking, insurance undertaking, reinsurance undertaking, investment firm or UCITS management company authorised in another Member State or in a sector other than that in which the acquisition is proposed.
2. The competent authorities shall, without undue delay, provide each other with any information which is essential or relevant for the assessment. In this regard, the competent authorities shall communicate to each other upon request all relevant information and shall communicate on their own initiative all essential information. A decision by the competent authority that has authorised the credit institution in which the acquisition is proposed shall indicate any views or reservations expressed by the competent authority responsible for the proposed acquirer.

#### *Article 25*

##### *Notification in case of divestiture*

The Member States shall require any natural or legal person who has taken a decision to dispose, directly or indirectly, of a qualifying holding in a credit institution first to notify in writing the competent authorities, indicating the size of his intended holding. Such a person shall likewise notify the competent authorities if he has taken a decision to reduce his qualifying holding so that the proportion of the voting rights or of the capital held would fall below 20 %, 30 % or 50 % or so that the credit institution would cease to be his subsidiary. Member States need not apply the 30 % threshold where, in accordance with Article 9(3)(a) of Directive 2004/109/EC, they apply a threshold of one-third.

#### *Article 26*

##### *Information obligations and sanctions*

1. Credit institutions shall, on becoming aware of any acquisitions or disposals of holdings in their capital that cause holdings to exceed or fall below one of the thresholds referred to in Article 22(1) and Article 25, inform the competent authorities of those acquisitions or disposals.

Credit institutions listed on a regulated market as referred to in the list to be published by the European Securities and Markets Authority (ESMA) according to Article 47 of Directive 2004/39/EC shall, at least once a year, inform the competent authorities of the names of shareholders and members possessing qualifying holdings and the sizes of such holdings as shown, for example, by the information received at the annual general meetings of shareholders and members or as a result of compliance with the regulations relating to companies listed on stock exchanges.

2. The Member States shall require that, where the influence exercised by the persons referred to in Article 22(1) is likely to operate to the detriment of the prudent and

sound management of the institution, the competent authorities shall take appropriate measures to put an end to that situation. Such measures may consist in injunctions, sanctions, subject to Articles 65 to 69, against members of the management body and managers, or the suspension of the exercise of the voting rights attaching to the shares held by the shareholders or members of the credit institution in question.

Similar measures shall apply to natural or legal persons who fail to comply with the obligation to provide prior information, as laid down in Article 22(1) and subject to Articles 65 to 69.

If a holding is acquired despite the opposition of the competent authorities, the Member States shall, regardless of any other sanctions to be adopted, provide either for exercise of the corresponding voting rights to be suspended, or for the nullity of votes cast or for the possibility of their annulment.

## *Article 27*

### *Criteria for qualifying holdings*

In determining whether the criteria for a qualifying holding in the context of Articles 22, 25 and 26 are fulfilled, the voting rights referred to in Articles 9 and 10 of Directive 2004/109/EC, as well as the conditions regarding aggregation thereof laid down in Article 12(4) and (5) of that Directive, shall be taken into account.

In determining whether the criteria for a qualifying holding referred to in Article 26 are fulfilled, Member States shall not take into account voting rights or shares which investment firms or credit institutions may hold as a result of providing the underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis included under point 6 of Section A of Annex I to Directive 2004/39/EC, provided that those rights are, on the one hand, not exercised or otherwise used to intervene in the management of the issuer and, on the other, disposed of within one year of acquisition.

## **Title IV**

### **Initial capital of investment firms**

#### *Article 28*

##### *Initial capital of investment firms*

1. Initial capital of investment firms shall only comprise the items referred to in points (a) to (e) of Article 24 of Regulation [inserted by OP].
2. All investment firms other than those referred to in Articles 29 to 31 shall have initial capital of EUR 730 000.

#### *Article 29*

##### *Initial capital of particular types of investment firms*

1. An investment firm that does not deal in any financial instruments for its own account or underwrite issues of financial instruments on a firm commitment basis, but which holds clients' money or securities and which offers one or more of the following services, shall have initial capital of EUR 125 000:
  - (a) the reception and transmission of investors' orders for financial instruments;
  - (b) the execution of investors' orders for financial instruments;
  - (c) the management of individual portfolios of investments in financial instruments.
2. The competent authorities may allow an investment firm which executes investors' orders for financial instruments to hold such instruments for its own account if the following conditions are met:
  - (a) such positions arise only as a result of the firm's failure to match investors' orders precisely;
  - (b) the total market value of all such positions is subject to a ceiling of 15 % of the firm's initial capital;
  - (c) the firm meets the requirements laid down in Articles 87 to 90 and Part Four of Regulation [inserted by OP];
  - (d) such positions are incidental and provisional in nature and strictly limited to the time required to carry out the transaction in question.

3. Member States may reduce the amount referred to in paragraph 1 to EUR 50 000 where a firm is not authorised to hold clients' money or securities, to deal for its own account, or to underwrite issues on a firm commitment basis.
4. The holding of non-trading-book positions in financial instruments in order to invest own funds shall not be considered as dealing in relation to the services set out in paragraph 1 or for the purposes of paragraph 3.

### *Article 30*

#### *Initial capital of local firms*

Local firms shall have initial capital of EUR 50 000 insofar as they benefit from the freedom of establishment or to provide services specified in Articles 31 and 32 of Directive 2004/39/EC.

### *Article 31*

#### *Firms that do not hold money or securities belonging to their clients*

1. Coverage for the firms referred to in point (c) of Article 4(8) of Regulation [inserted by OP] shall take one of the following forms:
  - (a) initial capital of EUR 50 000;
  - (b) professional indemnity insurance covering the whole territory of the Union or some other comparable guarantee against liability arising from professional negligence, representing at least EUR 1 000 000 applying to each claim and in aggregate EUR 1 500 000 per year for all claims;
  - (c) a combination of initial capital and professional indemnity insurance in a form resulting in a level of coverage equivalent to that referred to in points (a) or (b).

The amounts referred to in the first sub-paragraph shall be periodically reviewed by the Commission in order to take account of changes in the European Index of Consumer Prices as published by Eurostat, in line with and at the same time as the adjustments made under Article 4(7) of Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation<sup>33</sup>.

2. If a firm referred to in point (c) of Article 4(8) of Regulation [inserted by OP] is also registered under Directive 2002/92/EC<sup>34</sup>, it shall comply with Article 4(3) of that Directive and have coverage in one of the following forms:
  - (a) initial capital of EUR 25 000;

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<sup>33</sup> OJ L 9, 15.1.2003, p. 3.

<sup>34</sup> Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation, OJ L 9, 15.1.2003, p. 3.

- (b) professional indemnity insurance covering the whole territory of the Union or some other comparable guarantee against liability arising from professional negligence, representing at least EUR 500 000 applying to each claim and in aggregate EUR 750 000 per year for all claims;
- (c) a combination of initial capital and professional indemnity insurance in a form resulting in a level of coverage equivalent to that referred to in points (a) or (b).

## *Article 32*

### *Grandfathering clause*

1. By way of derogation from Articles 28(2), 29(1), 29(3) and 30, Member States may continue an authorisation of investment firms and firms covered by Article 30 which was in existence before 31 December 1995, the own funds of which firms or investment firms are less than the initial capital levels specified for them in Articles 28(2), 29(1), 29(3), and 30.

The own funds of such firms or investment firms shall not fall below the highest reference level calculated after 23 March 1993. That reference level shall be the average daily level of own funds calculated over a six-month period preceding the date of calculation. It shall be calculated every six months in respect of the corresponding preceding period.

2. If control of a firm covered by paragraph 1 is taken by a natural or legal person other than the person who controlled it previously, the own funds of that firm shall attain at least the level specified for them in Articles 28(2), 29(1), 29(3), and 30, except in the case of a first transfer by inheritance made after 31 December 1995, subject to the competent authorities' approval and for a period of not more than 10 years from the date of that transfer.

## **Title V**

# **Provisions concerning the freedom of establishment and the freedom to provide services**

## **Chapter 1**

### **General Principles**

#### *Article 33*

##### *Credit institutions*

The Member States shall provide that the activities listed in Annex I to this Directive may be carried on within their territories, in accordance with Article 35, Article 36(1), (2) and (3), Article 39(1) and (2) and Articles 40 to 46 either by the establishment of a branch or by way of the provision of services, by any credit institution authorised and supervised by the competent authorities of another Member State, provided that such activities are covered by the authorisation.

#### *Article 34*

##### *Financial institutions*

1. The Member States shall provide that the activities listed in Annex I to this Directive may be carried on within their territories, in accordance with Article 35, Article 36(1), (2) and (3), Article 39(1) and (2) and Articles 40 to 46, either by the establishment of a branch or by way of the provision of services, by any financial institution from another Member State, whether a subsidiary of a credit institution or the jointly-owned subsidiary of two or more credit institutions, the memorandum and Articles of association of which permit the carrying on of those activities and which fulfils each of the following conditions:
  - (a) the parent undertaking or undertakings shall be authorised as credit institutions in the Member State by the law of which the financial institution is governed;
  - (b) the activities in question shall actually be carried on within the territory of the same Member State;
  - (c) the parent undertaking or undertakings shall hold 90 % or more of the voting rights attaching to shares in the capital of the financial institution;
  - (d) the parent undertaking or undertakings shall satisfy the competent authorities regarding the prudent management of the financial institution and shall have declared, with the consent of the relevant home Member State competent



authorities, that they jointly and severally guarantee the commitments entered into by the financial institution;

- (e) the financial institution shall be effectively included, for the activities in question in particular, in the consolidated supervision of the parent undertaking, or of each of the parent undertakings, in accordance with Title VII, Chapter 3 of this Directive and Part One, Title II, Chapter 2 of Regulation [inserted by OP](prudential consolidation), in particular for the purposes of the own funds requirements set out in Article 87 of Regulation [inserted by OP], for the control of large exposures provided for in Part Four of that Regulation and for purposes of the limitation of holdings provided for in Articles 84 and 85 of that Regulation.

Compliance with these conditions shall be verified by the competent authorities of the home Member State and the latter shall supply the financial institution with a certificate of compliance which shall form part of the notification referred to in Articles 35 and 39.

2. If a financial institution as referred to in the first subparagraph of paragraph 1 ceases to fulfil any of the conditions imposed, the home Member State shall notify the competent authorities of the host Member State and the activities carried on by that financial institution in the host Member State shall become subject to the legislation of the host Member State.
3. Paragraphs 1 and 2 shall apply accordingly to subsidiaries of a financial institution as referred to in the first subparagraph of paragraph 1.

## **Chapter 2**

### **The right of establishment of credit institutions**

#### *Article 35*

##### *Notification requirement and interaction between competent authorities*

1. A credit institution wishing to establish a branch within the territory of another Member State shall notify the competent authorities of its home Member State.
2. Member States shall require every credit institution wishing to establish a branch in another Member State to provide all the following information when effecting the notification referred to in paragraph 1:
  - (a) the Member State within the territory of which it plans to establish a branch;
  - (b) a programme of operations setting out, inter alia, the types of business envisaged and the structural organisation of the branch;

- (c) the address in the host Member State from which documents may be obtained;
  - (d) the names of those to be responsible for the management of the branch.
3. Unless the competent authorities of the home Member State have reason to doubt the adequacy of the administrative structure or the financial situation of the credit institution, taking into account the activities envisaged, they shall within three months of receipt of the information referred to in paragraph 2 communicate that information to the competent authorities of the host Member State and shall inform the credit institution accordingly.

The home Member State's competent authorities shall also communicate the amount and composition of own funds and the sum of the own funds requirements under 87 of Regulation [inserted by OP]of the credit institution.

By way of derogation from the second subparagraph, in the case referred to in Article 34, the home Member State's competent authorities shall communicate the amount and composition of own funds of the financial institution and the total risk exposure amounts under Article 87 of Regulation [inserted by OP]of the credit institution which is its parent undertaking.

4. Where the competent authorities of the home Member State refuse to communicate the information referred to in paragraph 2 to the competent authorities of the host Member State, they shall give reasons for their refusal to the credit institution concerned within three months of receipt of all the information.

That refusal or a failure to reply, shall be subject to a right to apply to the courts in the home Member State.

5. EBA shall develop draft regulatory technical standards to specify the information to be notified in accordance with this Article.

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

6. EBA shall develop draft implementing technical standards to establish standard forms, templates and procedures for such notification.

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.

7. EBA shall submit the draft technical standards referred to in paragraphs 5 and 6 to the Commission by 1 January 2014.

## Article 36

### *Commencement of activities*

1. Before the branch of a credit institution commences its activities the competent authorities of the host Member State shall, within two months of receiving the information referred to in Article 35, prepare for the supervision of the credit institution in accordance with Chapter 4 and if necessary indicate the conditions under which, in the interest of the general good, those activities shall be carried on in the host Member State.
2. On receipt of a communication from the competent authorities of the host Member State, or in the event of the expiry of the period provided for in paragraph 1 without receipt of any communication from the latter, the branch may be established and may commence its activities.
3. In the event of a change in any of the particulars communicated pursuant to points (b), (c) or (d) of Article 35(2), a credit institution shall give written notice of the change in question to the competent authorities of the home and host Member States at least one month before making the change so as to enable the competent authorities of the home Member State to take a decision pursuant to Article 35 and the competent authorities of the host Member State to take a decision setting out the conditions for the change pursuant to paragraph 1 of this Article.
4. Branches which have commenced their activities, in accordance with the provisions in force in their host Member States, before 1 January 1993, shall be presumed to have been subject to the procedure laid down in Article 35 and in paragraphs 1 and 2 of this Article. They shall be governed, from 1 January 1993, by paragraph 3 of this Article and by Articles 33, Article 53 and Chapter 4.
5. EBA shall develop draft regulatory technical standards to specify the information to be notified in accordance with this Article.

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

6. EBA shall develop draft implementing technical standards to establish standard forms, templates and procedures for such notification.

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.

7. EBA shall submit the draft technical standards referred to in paragraphs 5 and 6 to the Commission by 1 January 2014.

### *Article 37*

#### *Information about refusals*

The Member States shall inform the Commission and EBA of the number and type of cases in which there has been a refusal pursuant to Article 35 and Article 36(1), (2) and (3) .

### *Article 38*

#### *Aggregation of branches*

Any number of places of business set up in the same Member State by a credit institution with headquarters in another Member State shall be regarded as a single branch.

## **Chapter 3**

### **Exercise of the freedom to provide services**

#### *Article 39*

##### *Notification procedure*

1. Any credit institution wishing to exercise the freedom to provide services by carrying on its activities within the territory of another Member State for the first time shall notify the competent authorities of the home Member State, of the activities on the list in Annex I to this Directive which it intends to carry on.
2. The competent authorities of the home Member State shall, within one month of receipt of the notification provided for in paragraph 1, send that notification to the competent authorities of the host Member State.
3. This Article shall not affect rights acquired by credit institutions providing services before 1 January 1993.
4. EBA shall develop draft regulatory technical standards to specify the information to be notified in accordance with this Article.

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 develop draft implementing technical standards to establish standard forms, templates and procedures for such notification.

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.

6. EBA shall submit the draft technical standards referred to in paragraphs 4 and 5 to the Commission by 1 January 2014.

## **Chapter 4**

### **Powers of the competent authorities of the host Member State**

#### *Article 40*

##### *Reporting requirements*

The competent authorities of the host Member States may require that all credit institutions having branches within their territories shall report to them periodically on their activities in those host Member States.

Such reports may only be required for information purposes and for the application of Article 52(1).

The competent authorities of the host Member States may in particular require information from the credit institutions referred to in the first subparagraph in order to allow those competent authorities to assess whether a branch is significant according to Article 52(1).

#### *Article 41*

##### *Measures taken by the competent authorities of the home Member State in relation to activities carried out in the host Member State*

1. Where the competent authorities of the host Member State ascertain that a credit institution having a branch or providing services within its territory fulfils one of the following conditions in relation to the activities carried out in that host Member State, they shall inform the competent authorities of the home Member State:
  - (a) The credit institution does not comply with the national provisions implementing this Directive or with Regulation [inserted by OP];
  - (b) The credit institution is expected not to comply with the national provisions implementing this Directive or with Regulation [inserted by OP].

The competent authorities of the home Member State shall, without undue delay, take all appropriate measures to ensure that the credit institution concerned puts an end to that irregular situation or takes measures to avert the risk of non-compliance. Those measures shall be communicated to the competent authorities of the host Member State.

2. Where the competent authorities of the host Member State allege that the competent authorities of the home Member State have not fulfilled their obligations or will not fulfill their obligation pursuant to paragraph 1, they may refer the matter to EBA and request its assistance in accordance with Article 19 of Regulation (EU) No

1093/2010. In that case, EBA may act in accordance with the powers conferred on it by that Article. EBA shall take any decision under Article 19(3) of Regulation (EU) No 1093/2010 within 24 hours.

#### *Article 42*

##### *Justification*

Any measure taken pursuant to Articles 41(1), 43 or 44 involving penalties or restrictions on the exercise of the freedom to provide services or the freedom of establishment shall be properly justified and communicated to the credit institution concerned.

#### *Article 43*

##### *Precautionary measures*

1. Before following the procedure in Article 41, the competent authorities of the host Member State may, in emergency situations, pending measures by the competent authorities of the home Member State or reorganisation measures referred to in Article 2 of Directive 2001/24/EC, take any precautionary measures necessary to protect the collective interests of depositors, investors and clients in the host Member State.
2. Precautionary measures shall be proportionate to their purpose, which is to precautionarily protect against a detrimental impact on the collective interests of depositors, investors and clients in the host Member State. Measures may include a suspension of payment. They shall not result in a preference for the creditors of the credit institution in the host Member State over creditors in other Member States.
3. Precautionary measures may only be taken before a reorganisation measure referred to in Article 2 of Directive 2001/24/EC has been taken. Any precautionary measure shall cease to have effect when the administrative or judicial authorities of the home Member State take reorganisation measures within the meaning of Article 2 of Directive 2001/24/EC.
4. The competent authorities of the host Member State shall terminate precautionary measures where they have become obsolete under Article 41 unless they cease to have effect according to paragraph 3.
5. The Commission, EBA and the competent authorities of the other Member States concerned shall be informed of precautionary measures without undue delay.

Where competent authorities of the home Member State have objections against measures taken by the competent authorities of the host Member State, they may refer the matter to EBA and request its assistance in accordance with Article 19 of Regulation (EU) No 1093/2010. In that case, EBA may act in accordance with the powers conferred on it by that Article. Where it acts, EBA shall take any decision under Article 19(3) of Regulation (EU) No 1093/2010 within 24 hours.

6. The Commission may, after consulting the competent authorities of the Member States concerned and EBA, decide that the Member State in question shall amend or abolish precautionary measures.

#### *Article 44*

##### *Powers of host Member States*

Host Member States may, without being affected by Articles 40 and 41, exercise the powers conferred on them under this Directive to take appropriate measures to prevent or to punish irregularities committed within their territories which are contrary to the legal rules they have adopted pursuant to this Directive or in the interests of the general good. This shall include the possibility of preventing offending credit institutions from initiating further transactions within their territories.

#### *Article 45*

##### *Measures following the withdrawal of authorisation*

In the event of the withdrawal of authorisation, the competent authorities of the host Member State shall be informed and shall take appropriate measures to prevent the credit institution concerned from initiating further transactions within its territory and to safeguard the interests of depositors.

#### *Article 46*

##### *Advertising*

Nothing in this Chapter shall prevent credit institutions with head offices in other Member States from advertising their services through all available means of communication in the host Member State, subject to any rules governing the form and the content of such advertising adopted in the interests of the general good.

## **Title VI**

### **Relations with third countries**

#### *Article 47*

##### *Notification in relation to third countries' branches and conditions of access for credit institutions having those branches*

1. Member States shall not apply to branches of credit institutions having their head office outside the Union, when commencing or carrying on their business, provisions which result in more favourable treatment than that accorded to branches of credit institutions having their head office in the Union.
2. The competent authorities shall notify the Commission, EBA and the European Banking Committee of all authorisations for branches granted to credit institutions having their head office in a third country.
3. The Union may, through agreements concluded with one or more third countries, agree to apply provisions which accord to branches of a credit institution having its head office outside the Union identical treatment throughout the territory of the Union.

#### *Article 48*

##### *Cooperation with third countries' competent authorities regarding supervision on a consolidated basis*

1. The Commission may submit proposals to the Council, either at the request of a Member State or on its own initiative, for the negotiation of agreements with one or more third countries regarding the means of exercising supervision on a consolidated basis over the following:
  - (a) institutions the parent undertakings of which have their head offices in a third country;
  - (b) institutions situated in third countries the parent undertakings of which, whether credit institutions, financial holding companies or mixed financial holding companies, have their head offices in the Union.
2. The agreements referred to in paragraph 1 shall, in particular, seek to ensure all of the following:
  - (a) that the competent authorities of the Member States are able to obtain the information necessary for the supervision, on the basis of their consolidated financial situations, of credit institutions, financial holding companies mixed financial holding companies situated in the Union and which have as



subsidiaries credit institutions or financial institutions situated outside the Union, or holding participation in such institutions;

- (b) that the competent authorities of third countries are able to obtain the information necessary for the supervision of parent undertakings the head offices of which are situated within their territories and which have as subsidiaries credit institutions or financial institutions situated in one or more Member States or holding participation in such institutions;
  - (c) that EBA is able to obtain the information from the competent authorities of the Member States received from national authorities of third countries in accordance with Article 35 of Regulation (EU) No 1093/2010.
3. Without prejudice to Article 218 of the Treaty, the Commission shall, with the assistance of the European Banking Committee, examine the outcome of the negotiations referred to in paragraph 1 and the resulting situation.
  4. EBA shall assist the Commission for the purposes of this Article in accordance with Article 33 of Regulation (EU) No 1093/2010.

# **Title VII**

## **Prudential supervision**

### **Chapter 1**

#### **Principles of prudential supervision**

##### **SECTION I**

##### **COMPETENCE OF HOME AND HOST MEMBER STATE**

###### *Article 49*

###### *Competence of control of the home Member State*

1. The prudential supervision of an institution, including that of the activities it carries on in accordance with Articles 33 and 34, shall be the responsibility of the competent authorities of the home Member State, without prejudice to those provisions of this Directive which give responsibility to the competent authorities of the host Member State.
2. Paragraph 1 shall not prevent supervision on a consolidated basis.

###### *Article 50*

###### *Competence of the host Member State*

Measures taken by the host Member State may not provide for discriminatory or restrictive treatment based on the fact that an institution is authorised in another Member State.

###### *Article 51*

###### *Collaboration concerning supervision*

1. The competent authorities of the Member States concerned shall collaborate closely in order to supervise the activities of institutions operating, in particular through a branch, in one or more Member States other than that in which their head offices are situated. They shall supply one another with all information concerning the management and ownership of such institutions that is likely to facilitate their supervision and the examination of the conditions for their authorisation, and all information likely to facilitate the monitoring of institutions, in particular with regard

to liquidity, solvency, deposit guarantee, the limiting of large exposures, administrative and accounting procedures and internal control mechanisms.

2. The competent authorities of the home Member State shall provide the competent authorities of host Member States immediately with any information and findings pertaining to liquidity supervision in accordance with Part Six of Regulation [inserted by OP] and Title VII, Chapter 3 of this Directive of the activities performed by the institution through the branch, to the extent that such information is relevant for the protection of depositors or investors in the host Member State.
3. The competent authorities of the home Member State shall inform the competent authorities of all host Member States immediately where liquidity stress occurs or can reasonably be expected to occur. This information shall also include details about the planning and implementation of a recovery plan and about any prudential measures taken in that context.
4. The competent authorities of the home Member State shall communicate and explain upon request to the competent authorities of the host Member State how information and findings provided by the latter have been taken into account. Where, following communication of information and findings, the competent authorities of the host Member State maintains that no appropriate measures have been taken by the competent authorities of the home Member State, the competent authorities of the host Member State may refer the matter to EBA in accordance with Article 19 of Regulation (EU) No 1093/2010. In that case, EBA may act in accordance with the powers conferred on it by that Article. Where it acts, EBA shall take any decision within one month.
5. The competent authorities may refer to EBA situations where a request for collaboration, in particular to exchange information, has been rejected or has not been acted upon within a reasonable time. Without prejudice to Article 258 of the Treaty, EBA may, in those situations, act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1093/2010.
6. EBA shall develop draft regulatory technical standards to specify the information contained in this Article.

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

7. EBA shall develop draft implementing technical standards to establish standard forms, templates and procedures for the information sharing requirements which are likely to facilitate the monitoring of institutions.

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.

8. EBA shall submit the draft technical standards referred to in paragraphs 6 and 7 to the Commission by 1 January 2014.

## Article 52

### *Significant branches*

1. The competent authorities of a host Member State may make a request to the consolidating supervisor where Article 107(1) applies or to the competent authorities of the home Member State, for a branch of an institution that does not fulfil the criteria set out in Articles 90 of Regulation [inserted by OP] to be considered as significant.

That request shall provide reasons for considering the branch to be significant with particular regard to the following:

- (a) whether the market share of the branch of an institution in terms of deposit exceeds 2 % in the host Member State;
- (b) the likely impact of a suspension or closure of the operations of the institution on market liquidity and the payment and clearing and settlement systems in the host Member State;
- (c) the size and the importance of the branch in terms of number of clients within the context of the banking or financial system of the host Member State.

The competent authorities of the home and host Member States, and the consolidating supervisor where Article 108 applies, shall do everything within their power to reach a joint decision on the designation of a branch as being significant.

If no joint decision is reached within two months of receipt of a request under the first subparagraph, the competent authorities of the host Member State shall take their own decision within a further period of two months on whether the branch is significant. In taking their decision, the competent authorities of the host Member State shall take into account any views and reservations of the consolidating supervisor or the competent authorities of the home Member State.

If, at the end of the initial two-month period 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 of the host Member State shall defer their decision and await the decision that EBA may take in accordance with Article 19(3) of that Regulation. The competent authorities of the host Member State shall take their decision in conformity with that of EBA. The two-month period shall be deemed to be the conciliation phase within the meaning of Article 19 of that Regulation. EBA shall take its decision within 1 month. The matter shall not be referred to EBA after the end of the initial two month period or after a joint decision has been reached.

The decisions referred to in the third subparagraph shall be set out in a document containing the fully reasoned decision and transmitted to the competent authorities concerned, and shall be binding on the competent authorities in the Member States concerned.

The designation of a branch as being significant shall not affect the rights and responsibilities of the competent authorities under this Directive.

2. The competent authorities of the home Member State shall communicate to the competent authorities of a host Member State where a significant branch is established the information referred to in Article 112(1)(c) and (d) and carry out the tasks referred to in Article 107(1)(c) in cooperation with the competent authorities of the host Member State.

If a competent authority of a home Member State becomes aware of an emergency situation within an institution as referred to in Article 109(1), it shall alert without undue delay the authorities referred to in the fourth paragraph of Articles 59(4) and 60.

The competent authorities of the home Member State shall communicate to the competent authorities of the host Member States where significant branches are established the results of the risk assessments of institutions with such branches referred to in Article 92 and, where applicable, Article 108(2)(a). They shall also communicate decisions under Articles 64, 98 and 99 in so far as those assessments and decisions are relevant to those branches.

The competent authorities of the home Member States shall consult the competent authorities of the host Member States where significant branches are established about operational steps required by Article 84(10), where this is relevant for liquidity risks in the host Member State's currency.

Where the competent authorities of the home Member State have not consulted the competent authorities of the host Member State, or where operational steps referred to in Article 84(10) taken by the competent authorities of the home Member State are not adequate, the competent authorities of the host Member State may refer the matter to EBA in accordance with Article 19 of Regulation (EU) No 1093/2010. In that case, EBA may act in accordance with the powers conferred on it by that Article.

3. Where Article 111 does not apply, the competent authorities supervising an institution with significant branches in other Member States shall establish and chair a college of supervisors to facilitate the cooperation under paragraph 2 of this Article and Article 51. The establishment and functioning of the college shall be based on written arrangements to be determined, after consultation with competent authorities concerned, by the competent authority of the home Member State. The competent authority of the home Member State shall decide which competent authorities participate in a meeting or in an activity of the college.

The decision of the competent authority of the home Member State shall take account of the relevance of the supervisory activity to be planned or coordinated for those authorities, in particular the potential impact on the stability of the financial system in the Member States concerned referred to in Article 8 and the obligations referred to in paragraph 2 of this Article.

The competent authority of the home Member State shall keep all members of the college fully informed, in advance, of the organisation of such meetings, the main issues to be discussed and the activities to be considered. The competent authority of the home Member State shall also keep all the members of the college fully informed, in a timely manner, of the actions taken in those meetings or the measures carried out.

4. The competent authorities of the host Member State shall have the power to carry out on a case by case basis on-the-spot inspections of the activities carried out by branches of institutions on their territory and require information from a branch about its activities. Before the inspection, the competent authorities of the home Member State shall be consulted. After the inspection, the competent authorities of the host Member State shall communicate to the competent authorities of the home Member State the information obtained and findings that are relevant for the risk assessment of the institution or the stability of the financial system in the host Member State. The competent authorities of the home Member State shall duly take into account this information and these findings in determining their supervisory examination programme referred to in Article 96, having regard also to the stability of the financial system in the host member State.
5. EBA shall develop draft regulatory technical standards in order to specify general conditions for the functioning of colleges of supervisors.  
  
Power is delegated to the Commission to adopt these regulatory technical standards in accordance with the procedure laid down in Articles 10 to 14 of Regulation (EU) No 1093/2010.
6. EBA shall develop draft implementing technical standards in order to determine the operational functioning of colleges of supervisors.  
  
Power is conferred on the Commission to adopt these implementing technical standards in accordance with Article 15 of Regulation (EU) No 1093/2010.
7. EBA shall submit the draft technical standards referred to in paragraphs 5 and 6 to the Commission by 31 December 2015.

### *Article 53*

#### *On-the-spot verification of branches established in another Member State*

1. Host Member States shall provide that, where an institution authorised in another Member State carries on its activities through a branch, the competent authorities of the home Member State may, after having first informed the competent authorities of the host Member State, carry out themselves or through the intermediary of persons they appoint for that purpose on-the-spot verification of the information referred to in Article 51.
2. The competent authorities of the home Member State may also, for purposes of the verification of branches, have recourse to one of the other procedures laid down in Article 116.

## SECTION II

### EXCHANGE OF INFORMATION AND PROFESSIONAL SECRECY

#### *Article 54*

##### *Professional secrecy*

1. Member States shall provide that all persons working for or who have worked for the competent authorities, as well as auditors or experts acting on behalf of the competent authorities, shall be bound by the obligation of professional secrecy.

No confidential information which they may receive in the course of their duties may be divulged to any person or authority whatsoever, except in summary or collective form, such that individual credit institutions cannot be identified, without prejudice to cases covered by criminal law.

Nevertheless, where a credit institution has been declared bankrupt or is being compulsorily wound up, confidential information which does not concern third parties involved in attempts to rescue that credit institution may be divulged in civil or commercial proceedings.

2. Paragraph 1 shall not prevent the competent authorities of the various Member States from exchanging information or transmitting information to EBA in accordance with this Directive, Regulation [inserted by OP], with other Directives applicable to credit institutions, and with Articles 31 and 35 of Regulation (EU) No 1093/2010. That information shall be subject to the conditions relating to professional secrecy set out in paragraph 1.
3. Paragraph 1 shall not prevent the competent authorities from publishing the outcome of stress tests carried out in accordance with Article 97 or Article 32 of Regulation (EU) No 1093/2010 and from transmitting the outcome of stress tests to EBA for the purpose of the publication by EBA of the results of EU-wide stress tests.

#### *Article 55*

##### *Use of confidential information*

Competent authorities receiving confidential information under Article 54 may use it only in the course of their duties and only for any of the following purposes:

- (a) to check that the conditions governing the access to the activity of credit institutions are met and to facilitate monitoring, on a non-consolidated or consolidated basis, of the conduct of such activity, especially with regard to the monitoring of liquidity, solvency, large exposures, and administrative and accounting procedures and internal control mechanisms;
- (b) to impose sanctions;

- (c) in an appeal against a decision of the competent authority including court proceedings pursuant to Article 71;
- (d) in court proceedings initiated pursuant to special provisions provided for in Union law adopted in the field of credit institutions.

## *Article 56*

### *Cooperation agreements*

Member States and EBA, in accordance with Article 33 of Regulation (EU) No 1093/2010, may conclude cooperation agreements, providing for exchanges of information, with the competent authorities of third countries or with authorities or bodies of third countries as defined in Article 57 and Article 58(1) of this Directive only if the information disclosed is subject to guarantees of professional secrecy at least equivalent to those referred to in Article 54(1) of this Directive. Such exchange of information shall be for the purpose of performing the supervisory tasks of those authorities or bodies.

Where the information originates in another Member State, it shall not be disclosed without the express agreement of the authorities which have disclosed it and, where appropriate, solely for the purposes for which those authorities gave their agreement.

## *Article 57*

### *Exchange of information within a Member State*

Articles 54(1) and 55 shall not preclude the exchange of information within a Member State, where there are two or more competent authorities in the same Member State, or between Member States, between competent authorities and the following, in the discharge of their supervisory functions:

- (a) authorities entrusted with the public duty of supervising other financial organisations and insurance companies and the authorities responsible for the supervision of financial markets;
- (b) bodies involved in the liquidation and bankruptcy of credit institutions and in other similar procedures;
- (c) persons responsible for carrying out statutory audits of the accounts of credit institutions and other financial institutions.

Articles 54(1) and 55 shall not preclude the disclosure to bodies which administer deposit-guarantee schemes of information necessary to the exercise of their functions.

In both cases, the information received shall be subject to the conditions of professional secrecy specified in Article 54(1).



## Article 58

### *Exchange of information with oversight bodies*

1. Notwithstanding Articles 54 to 56, Member States may authorise exchange of information between the competent authorities and the following:
  - (a) the authorities responsible for overseeing the bodies involved in the liquidation and bankruptcy of credit institutions and in other similar procedures;
  - (b) the authorities responsible for overseeing persons charged with carrying out statutory audits of the accounts of insurance undertakings, credit institutions, investment firms and other financial institutions.
2. In the cases referred to in paragraph 1, Member States shall require fulfilment of at least the following conditions:
  - (a) the information shall be for the purpose of performing the supervisory task referred to in paragraph 1;
  - (b) information received in this context shall be subject to the conditions of professional secrecy specified in Article 54(1);
  - (c) where the information originates in another Member State, it may not be disclosed without the express agreement of the competent authorities which have disclosed it and, where appropriate, solely for the purposes for which those authorities gave their agreement.

Member States shall communicate to EBA the names of the authorities which may receive information pursuant to paragraphs 1 and 2.

3. Notwithstanding Articles 54 to 56, Member States may, with the aim of strengthening the stability, including integrity, of the financial system, authorise the exchange of information between the competent authorities and the authorities or bodies responsible under law for the detection and investigation of breaches of company law.

In such cases Member States shall require fulfilment of at least the following conditions:

- (a) the information is for the purpose of performing the task referred to in the first subparagraph;
- (b) information received in this context is subject to the conditions of professional secrecy specified in Article 54(1);
- (c) where the information originates in another Member State, it may not be disclosed without the express agreement of the competent authorities which have disclosed it and, where appropriate, solely for the purposes for which those authorities gave their agreement.

4. Where, in a Member State, the authorities or bodies referred to in the paragraph 1 perform their task of detection or investigation with the aid, in view of their specific competence, of persons appointed for that purpose and not employed in the public sector, the possibility of exchanging information provided for in the first subparagraph may be extended to such persons under the conditions specified in the second subparagraph.
5. Member States shall communicate to EBA the names of the authorities or bodies which may receive information pursuant to this Article.
6. In order to implement paragraph 4, the authorities or bodies referred to in the paragraph 1 shall communicate to the competent authorities which have disclosed the information, the names and precise responsibilities of the persons to whom it is to be sent.

#### *Article 59*

##### *Transmission of information concerning monetary, systemic and payment aspects*

1. Nothing in this Chapter shall prevent a competent authority from transmitting information to the following for the purposes of their tasks:
  - (a) central banks and other bodies with a similar function in their capacity as monetary authorities when the information is relevant for the exercise of their respective statutory tasks, including the conduct of monetary policy and related liquidity provision, oversight of payments, clearing and settlement systems, and the safeguarding of stability of the financial system;
  - (b) where appropriate, other public authorities responsible for overseeing payment systems;
  - (c) the European Systemic Risk Board (ESRB), where that information is relevant for the exercise of its statutory tasks under Regulation (EU) No 1092/2010<sup>35</sup>.
2. Nothing in this Chapter shall prevent the authorities or bodies referred to in the first subparagraph from communicating to the competent authorities such information as they may need for the purposes of Article 55.
3. Information received in this context shall be subject to the conditions of professional secrecy specified in Article 54(1).
4. In an emergency situation as referred to in Article 109(1), Member States shall allow the competent authorities to communicate, without delay, information to the central banks where that information is relevant for the exercise of their statutory tasks, including the conduct of monetary policy and related liquidity provision, the oversight of payments, clearing and settlement systems, and the safeguarding of the

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<sup>35</sup> Regulation (EU) No 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board, OJ L 331, 15.12.2010, p. 1.

stability of the financial system, and to the ESRB where such information is relevant for the exercise of its statutory tasks.

## *Article 60*

### *Transmission of information to other entities*

1. Notwithstanding Articles 54(1) and 55, the Member States may, by virtue of provisions laid down by law, authorise the disclosure of certain information to other departments of their central government administrations responsible for legislation on the supervision of credit institutions, financial institutions, investment services and insurance companies and to inspectors acting on behalf of those departments.

However, such disclosures may be made only where necessary for reasons of prudential control.

In an emergency situation as referred to in Article 109(1), Member States shall allow competent authorities to disclose information which is relevant to the departments referred to in the first paragraph in all Member States concerned.

2. Member States may authorise the disclosure of certain information related to the prudential supervision of institutions to parliamentary enquiry committees, courts of auditors and other entities in charge of enquiries in a Member State, under the following conditions:
  - (a) Such entities have a precise mandate defined by national law to investigate or scrutinize the actions of authorities responsible for the supervision of institutions or for legislation on such supervision;
  - (b) The information is strictly necessary for fulfilling the mandate referred to in point (a);
  - (c) The persons having access to the information are subject to secrecy requirements under national law, which ensure that the information is not disclosed to anybody who is not member or employee of such entities;
  - (d) Where the information originates in another Member State, it may not be disclosed without the express agreement of the competent authorities which have disclosed it and solely for the purposes for which those authorities gave their agreement.

To the extent that the disclosure of information related to prudential supervision involves processing of personal data, any processing by the entities mentioned above shall respect the applicable national laws implementing Directive 95/46/EC.

## Article 61

### *Information obtained by on-the-spot verifications*

Member States shall provide that information received under Articles 52(4), 54(2) and 57 and information obtained by means of the on-the-spot verification referred to in Article 53(1) and (2) may never be disclosed in the cases referred to in Article 60 except with the express consent of the competent authorities which disclosed the information or of the competent authorities of the Member State in which on-the-spot verification was carried out.

## Article 62

### *Information concerning clearing and settlement services*

3. Nothing in this Chapter shall prevent the competent authorities of a Member State from communicating the information referred to in Articles 54 to 56 to a clearing house or other similar body recognised under national law for the provision of clearing or settlement services for one of their national markets if they consider that it is necessary to communicate the information in order to ensure the proper functioning of those bodies in relation to defaults or potential defaults by market participants. The information received in this context shall be subject to the conditions of professional secrecy specified in Article 54(1).
4. The Member States shall, however, ensure that information received under Article 54(2) may not be disclosed in the circumstances referred to in paragraph 1 without the express consent of the competent authorities which disclosed it.

## SECTION III

### **DUTY OF PERSONS RESPONSIBLE FOR THE LEGAL CONTROL OF ANNUAL AND CONSOLIDATED ACCOUNTS**

## Article 63

### *Duty of persons responsible for the legal control of annual and consolidated accounts*

1. Member States shall provide at least that any person authorised within the meaning of Directive 2006/43/EEC<sup>36</sup> performing in an institution the task described in Article 51 of Directive 78/660/EEC<sup>37</sup>, Article 37 of Directive 83/349/EEC<sup>38</sup> or Article 73 of Directive 2009/65/EC, or any other statutory task, shall have a duty to report promptly to the competent authorities any fact or decision concerning that institution

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<sup>36</sup> Directive 2006/43 of the European Parliament and of the Council of 17 May 2006 on statutory audit of annual accounts and consolidated accounts (OJ L 157, 9.6.2006, p. 87).

<sup>37</sup> Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54 (3) (g) of the Treaty on the annual accounts of certain types of companies, OJ L 222, 14.8.1978, p. 11.

<sup>38</sup> Seventh Council Directive 83/349/EEC of 13 June 1983 based on the Article 54 (3) (g) of the Treaty on consolidated accounts, OJ L 193, 18.7.1983, p. 1.

of which that person has become aware while carrying out that task, which is liable to:

- (a) constitute a material breach of the laws, regulations or administrative provisions which lay down the conditions governing authorisation or which specifically govern pursuit of the activities of institutions;
- (b) affect the continuous functioning of the institution;
- (c) lead to refusal to certify the accounts or to the expression of reservations.

Member States shall provide at least that that person shall likewise have a duty to report any fact or decision of which he becomes aware in the course of carrying out a task as described in the first sub-paragraph in an undertaking having close links resulting from a control relationship with the institution within which he is carrying out that task.

2. The disclosure in good faith to the competent authorities, by persons authorised within the meaning of Directive 2006/43/EEC, of any fact or decision referred to in paragraph 1 shall not constitute a breach of any restriction on disclosure of information imposed by contract or by any legislative, regulatory or administrative provision and shall not involve such persons in any liability.

## **SECTION IV**

### **SUPERVISORY POWERS, POWER OF SANCTION AND RIGHT OF APPEAL**

#### *Article 64*

##### *Supervisory powers*

For the purposes of Article 99 and the application of Regulation [inserted by OP], competent authorities shall have at least the following powers:

- (a) to require institutions to hold specific own funds related to elements of risks and risks not covered by Article 1 of Regulation [inserted by OP], as determined by the competent authorities under Article 98;
- (b) to require the reinforcement of the arrangements, processes, mechanisms and strategies implemented to comply with Articles 72 to 74;
- (c) to require institutions to apply a specific provisioning policy or treatment of assets in terms of own funds requirements;
- (d) 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;
- (e) to require the reduction of the risk inherent in the activities, products and systems of institutions;

- (f) to require institutions to limit variable remuneration as a percentage of net revenues when it is inconsistent with the maintenance of a sound capital base;
- (g) to require institutions to use net profits to strengthen own funds, including by restricting or prohibiting distributions to shareholders or members by the institution;
- (h) to impose additional or more frequent reporting requirements, including reporting on capital and liquidity positions;
- (i) to impose restrictions on maturity mismatches between assets and liabilities;
- (j) to prohibit the payment or distribution of dividend or interest on Additional Tier 1 instruments.

#### *Article 65*

##### *Sanctions*

1. Member States shall provide that their respective competent authorities may take appropriate administrative sanctions and measures where the provisions of Regulation [inserted by OP] or the national provisions adopted in the implementation of this Directive have not been complied with, and shall ensure that they are applied. The sanctions and measures shall be effective, proportionate and dissuasive.
2. Member States shall ensure that where obligations apply to institutions, financial holding companies, mixed financial holding companies and mixed-activity holding companies, in case of a breach sanctions can be applied to the members of the management body, and to any other individuals who under national law are responsible for the breach.
3. Competent authorities shall be given all investigatory powers that are necessary for the exercise of their functions. In the exercise of their sanctioning powers, competent authorities shall cooperate closely to ensure that sanctions or measures produce the desired results and coordinate their action when dealing with cross border cases.

#### *Article 66*

##### *Authorisation requirements and requirements for acquisitions of qualifying holdings*

1. This Article shall apply to the following:
  - (a) carrying on the business of taking deposits or other repayable funds from the public without being a credit institution in breach of Article 3;
  - (b) commencing activities as a credit institution without obtaining authorisation in breach of Article 9;
  - (c) acquiring, directly or indirectly, a qualifying holding in a credit institution or further increasing, directly or indirectly, such a qualifying holding in a credit institution as a result of which the proportion of the voting rights or of the

capital held would reach or exceed 20 %, 30 % or 50 % or so that the credit institution would become its subsidiary (hereinafter referred to as the proposed acquisition), without notifying in writing the competent authorities of the credit institution in which they are seeking to acquire or increase a qualifying holding, in breach of Article 22(1);

- (d) disposing, directly or indirectly, of a qualifying holding in a credit institution or reducing a qualifying holding so that the proportion of the voting rights or of the capital held would fall below 20 %, 30 % or 50 % or so that the credit institution would cease to be a subsidiary, without notifying in writing the competent authorities in breach of Article 25.

2. Member States shall ensure that in the cases referred to in paragraph 1, the administrative sanctions and measures that can be applied include at least the following:

- (a) a public statement which indicates the natural or legal person responsible and the nature of the breach;
- (b) an order requiring the natural or legal person responsible to cease the conduct and to desist from a repetition of that conduct;
- (c) in case of a legal person, administrative pecuniary sanctions of up to 10 % of the total annual turnover of the undertaking in the preceding business year; where the undertaking is a subsidiary of a parent undertaking, the relevant total annual turnover shall be the total annual turnover resulting from the consolidated account of the ultimate parent undertaking in the preceding business year;
- (d) in case of a natural person, administrative pecuniary sanctions of up to EUR 5 000 000, or in the Member States where the Euro is not the official currency, the corresponding value in the national currency on the date of adoption of this Directive;
- (e) administrative pecuniary sanctions of up to twice the amount of the benefit derived from the breach where that benefit can be determined.

#### *Article 67*

##### *Other provisions*

1. This Article shall apply in all the following circumstances:

- (a) an institution has obtained an authorisation through false statements or any other irregular means, in breach of Article 18(b);
- (b) an institution, on becoming aware of any acquisitions or disposals of holdings in their capital that cause holdings to exceed or fall below one of the thresholds referred to in Article 22(1) and Article 25, fails to inform the competent authorities of those acquisitions or disposals in breach of the first subparagraph of Article 26(1).

- (c) An institution listed on a regulated market as referred to in the list to be published by ESMA according to Article 47 of Directive 2004/39/EC does not, at least once a year, inform the competent authorities of the names of shareholders and members possessing qualifying holdings and the sizes of such holdings in breach of the second subparagraph of Article 26(1).
- (d) an institution fails to have in place governance arrangements required by the competent authorities in accordance with the national provisions implementing Article 73;
- (e) an institution fails to report information on the obligation to meet own funds requirements set out in Article 87 of Regulation [inserted by OP] to the competent authorities as required by the first subparagraph of Article 95(1) of that Regulation;
- (f) an institution fails to report to the competent authorities the data on capital requirements required by Article 96 of Regulation [inserted by OP];
- (g) an institution fails to report information about a large exposure to the competent authorities as required by Article 383(1) of Regulation [inserted by OP];
- (h) an institution fails to report information on liquidity to the competent authorities as required by Article 403(1) and 403(2) of Regulation [inserted by OP];
- (i) an institution fails to report information on the leverage ratio to the competent authorities as required by Article 417(1) of Regulation [inserted by OP];
- (j) an institution fails to hold at all times liquid assets as required by Article 401 of Regulation [inserted by OP];
- (k) an institution incurs an exposure in excess of the limits laid down in Article 384 of Regulation [inserted by OP];
- (l) an institution which is exposed to the credit risk of a securitisation position without satisfying the conditions laid down in Article 394 of Regulation [inserted by OP];
- (m) an institution fails to disclose information in accordance with Articles 418(1) to (3) or 436(1) of Regulation [inserted by OP].

2. Without prejudice to the supervisory powers of competent authorities in accordance with Article 64, Member States shall ensure that in the cases referred to in paragraph 1, the administrative sanctions and measures that can be applied include at least the following:

- (a) a public statement which indicates the natural or legal person and the nature of the breach;
- (b) an order requiring the natural or legal person to cease the conduct and to desist from a repetition of that conduct;



- (c) in case of an institution, withdrawal of the authorisation of the institution in accordance with Article 18;
- (d) a temporary ban against any member of the institution's management body or any other natural person, who is held responsible, to exercise functions in institutions;
- (e) in case of a legal person, administrative pecuniary sanctions of up to 10 % of the total annual turnover of that legal person in the preceding business year; where the legal person is a subsidiary of a parent undertaking, the relevant total annual turnover shall be the total annual turnover resulting from the consolidated account of the ultimate parent undertaking in the preceding business year;
- (f) in case of a natural person, administrative pecuniary sanctions of up to EUR 5 000 000, or in the Member States where the Euro is not the official currency, the corresponding value in the national currency on the date of entry into force of this Directive;
- (g) administrative pecuniary sanctions of up to twice the amount of the profits gained or losses avoided because of the breach where those can be determined.

#### *Article 68*

##### *Publication of sanctions*

Member States shall ensure that the competent authorities publish any sanction or measure imposed for breach of the provisions of Regulation [inserted by OP] or of the national provisions adopted in the implementation of this Directive without undue delay including information on the type and nature of the breach and the identity of persons responsible for it, unless such publication would seriously jeopardise the stability of financial markets. Where publication would cause a disproportionate damage to the parties involved, competent authorities shall publish the sanctions on an anonymous basis.

#### *Article 69*

##### *Effective application of sanctions and exercise of sanctioning powers by competent authorities*

1. Member States shall ensure that when determining the type of administrative sanctions or measures and the level of administrative pecuniary sanctions, the competent authorities shall take into account all relevant circumstances, including:
  - (a) the gravity and the duration of the breach;
  - (b) the degree of responsibility of the responsible natural or legal person;
  - (c) the financial strength of the responsible natural or legal person, as indicated by the total turnover of the responsible legal person or the annual income of the responsible natural person;

- (d) the importance of profits gained or losses avoided by the responsible natural or legal person, insofar as they can be determined;
  - (e) the losses for third parties caused by the breach, insofar as they can be determined;
  - (f) the level of cooperation of the responsible natural or legal person with the competent authority;
  - (g) previous breaches by the responsible natural or legal person.
2. EBA shall issue guidelines addressed to competent authorities in accordance with Article 16 of Regulation (EU) No 1093/2010 on types of administrative measures and sanctions and level of administrative pecuniary sanctions.

## *Article 70*

### *Reporting of breaches*

1. Member States shall ensure that competent authorities establish effective mechanisms to encourage reporting of breaches of the provisions of Regulation [inserted by OP] and of national provisions implementing this Directive to competent authorities.
2. The mechanisms referred to in paragraph 1 shall include at least:
  - (a) specific procedures for the receipt of reports on breaches and their follow-up;
  - (b) appropriate protection for employees of institutions who denounce breaches committed within the institution;
  - (c) protection of personal data concerning both the person who reports the breaches and the natural person who is allegedly responsible for a breach, in compliance with the principles laid down in Directive 95/46/EC.
3. Member States shall require institutions to have in place appropriate procedures for their employees to report breaches internally through a specific channel.

## *Article 71*

### *Right of appeal*

Member States shall ensure that decisions and measures taken in pursuance of laws, regulations and administrative provisions adopted in accordance with this Directive or Regulation [inserted by OP] are subject to the right of appeal. The same shall apply where no decision is taken, within six months of its submission, in respect of an application for authorisation which contains all the information required under the provisions in force.

## **Chapter 2**

### **Review Processes**

#### **SECTION I**

##### **INTERNAL CAPITAL ADEQUACY ASSESSMENT PROCESS**

###### *Article 72*

###### *Internal Capital*

Institutions shall have in place sound, effective and complete strategies and processes to assess and maintain on an ongoing basis the amounts, types and distribution of internal capital that they consider adequate to cover the nature and level of the risks to which they are or might be exposed.

These strategies and processes shall be subject to regular internal review to ensure that they remain comprehensive and proportionate to the nature, scale and complexity of the activities of the institution concerned.

#### **SECTION II**

##### **ARRANGEMENTS, PROCESSES AND MECHANISMS OF INSTITUTIONS**

###### **SUB-SECTION 1**

###### **GENERAL PRINCIPLES**

###### *Article 73*

###### *Procedures and internal control mechanisms*

1. Competent authorities shall require every institution to have robust governance arrangements, which include a clear organisational structure with well-defined, transparent and consistent lines of responsibility, effective processes to identify, manage, monitor and report the risks it is or might be exposed to, adequate internal control mechanisms, including sound administration and accounting procedures, and remuneration policies and practices that are consistent with and promote sound and effective risk management.
2. The arrangements, processes and mechanisms referred to in paragraph 1 shall be comprehensive and proportionate to the nature, scale and complexity of the

institution's activities. The technical criteria established in Sub-sections 2 and 3 shall be taken into account.

3. EBA shall develop draft regulatory technical standards to specify the arrangements, processes and mechanisms referred to in paragraph 1, in accordance with the principles of proportionality and comprehensiveness set out in paragraph 2.

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

EBA shall submit those draft regulatory technical standards to the Commission by 31 December 2015.

#### *Article 74*

##### *Oversight of remuneration policies*

1. Competent authorities shall use the information collected in accordance with the criteria for disclosure established in Article 435 (1) of Regulation [inserted by OP] to benchmark remuneration trends and practices. The competent authorities shall provide EBA with that information.
2. EBA shall issue guidelines on sound remuneration policies which comply with the principles set out in Article 88. The guidelines shall take into account the principles on sound remuneration policies set out in the Commission Recommendation of 30 April 2009 on remuneration policies in the financial services sector<sup>39</sup>.

ESMA shall cooperate closely with EBA to develop guidelines on remuneration policies for categories of staff involved in the provision of investment services and activities within the meaning of point 2 of Article 4(1) of Directive 2004/39/EC.

EBA shall use the information received from the competent authorities in accordance with paragraph 3 to benchmark remuneration trends and practices at Union level.

3. Competent authorities shall collect information on the number of individuals per institution in pay brackets of at least EUR 1 million, including the business area involved and the main elements of salary, bonus, long-term award and pension contribution. That information shall be forwarded to EBA, which shall publish it on an aggregate home Member State basis in a common reporting format. EBA may elaborate guidelines to facilitate the implementation of this paragraph and ensure the consistency of the information collected.

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<sup>39</sup> C(2009) 3159.

## SUB-SECTION 2

### TECHNICAL CRITERIA CONCERNING THE ORGANISATION AND TREATMENT OF RISKS

#### *Article 75*

#### *Treatment of risks*

1. Competent authorities shall ensure that the management body approves and periodically reviews the strategies and policies for taking up, managing, monitoring and mitigating the risks the institution is or might be exposed to, including those posed by the macroeconomic environment in which it operates in relation to the status of the business cycle.
2. Competent authorities shall ensure that the management body in its supervisory function devotes sufficient time to consideration of risk issues.
3. Competent authorities shall ensure that institutions establish a risk committee composed of members of the management body who do not perform any executive function in the institution concerned. Members of the risk committee shall have appropriate knowledge, skills and expertise to fully understand and monitor the risk strategy and the risk appetite of the institution.

The risk committee shall advise the management body in its supervisory function on the institution's overall current and future risk appetite and strategy and assist the management body in its supervisory function in overseeing the implementation of that strategy.

Competent authorities may authorise an institution not to establish a separate risk committee taking into account the nature, scale and complexity of credit institution's activities.

4. Competent authorities shall ensure that the risk committee, or, when such a committee has not been established, the management body in its supervisory function regularly communicates with the institution's risk management function and shall, where appropriate, have access to external expert advice.

The risk committee, or, when such a committee has not been established, the management body in its supervisory function, shall determine the nature, the amount, the format, and the frequency of the information on risk it shall receive from senior management.

5. Competent authorities shall ensure that institutions have a risk management function independent from the operational and management functions and which shall have sufficient authority, stature, resources and access to the management body.

The risk management function shall be responsible for identifying, measuring, and reporting on risk exposures. The risk management function shall be actively involved

in elaborating institution's risk strategy and in all material risk management decisions. The risk management function shall be able to deliver a complete view on the whole range of risks of the institution.

The risk management function shall be able to report directly to the management body in its supervisory function when necessary, independent from senior management.

The head of the risk management function shall be an independent senior executive with distinct responsibility for the risk management function. Where the nature, scale and complexity of the activities of the institution do not justify a specially appointed person, another senior person within the institution may fulfil this function, provided there is no conflict of interest.

The head of the risk management function shall not be removed without prior approval of the management body in its supervisory function and shall be able to have direct access to the management body in its supervisory function when necessary.

#### *Article 76*

##### *Internal Approaches for calculating own funds requirements*

1. Competent authorities shall ensure that institutions take appropriate steps to develop internal ratings based approaches for calculating own funds requirements for credit risk where their exposures are material in absolute terms and where they have at the same time a large number of material counterparties.
2. Competent authorities shall ensure that institutions take appropriate steps to develop and use internal models for calculating own funds requirements for specific risk of debt instruments in the trading book, together with internal models to calculate own funds requirements for default and migration risk where their exposures to specific risk are material in absolute terms and where they have a large number of material positions in debt instruments of different issuers.
3. EBA shall develop draft regulatory technical standards to further define the notion 'exposures which are material in absolute terms' referred to in paragraph 1 and 2 and the thresholds for large numbers of material counterparties and positions in debt instruments of different issuers. EBA shall submit those draft regulatory technical standards to the Commission by 1 January 2014.

Power is conferred on the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with the procedure laid down in Article 14 of Regulation (EU) No 1093/2010.

#### *Article 77*

##### *Credit and counterparty risk*

Competent authorities shall ensure the following:

- (a) Credit-granting is based on sound and well-defined criteria. The process for approving, amending, renewing, and re-financing credits is clearly established;
- (b) Institutions have internal methodologies that enable them to assess the credit risk of exposures to individual borrowers, securities or counterparties as well as credit risk at the portfolio level. In particular, internal methodologies shall not rely solely or mechanistically on external ratings. Where own funds requirements are based on a rating by an External Credit Assessment Institution (ECAI) or based on the fact that an exposure is unrated, institutions shall use their own methodologies in order to assess the appropriateness of the rank-ordering of credit risk implicit in those own funds requirements and take the result into account in their allocation of internal capital;
- (c) The ongoing administration and monitoring of the various credit risk-bearing portfolios and exposures of institutions, including for identifying and managing problem credits and for making adequate value adjustments and provisions, is operated through effective systems;
- (d) Diversification of credit portfolios is adequate given an institution's target markets and overall credit strategy.

#### *Article 78*

##### *Residual risk*

Competent authorities shall ensure that the risk that recognised credit risk mitigation techniques used by institutions prove less effective than expected is addressed and controlled by means of written policies and procedures.

#### *Article 79*

##### *Concentration risk*

Competent authorities shall ensure that the concentration risk arising from exposures to counterparties, including central counterparties, groups of connected counterparties, and counterparties in the same economic sector, geographic region or from the same activity or commodity, the application of credit risk mitigation techniques, and including in particular risks associated with large indirect credit exposures such as a single collateral issuer, is addressed and controlled by means of written policies and procedures.

#### *Article 80*

##### *Securitisation risk*

1. Competent authorities shall ensure that the risks arising from securitisation transactions in relation to which the credit institutions are investor, originator or sponsor, including reputational risks, such as arise in relation to complex structures or products, are evaluated and addressed through appropriate policies and

procedures, to ensure that the economic substance of the transaction is fully reflected in the risk assessment and management decisions.

2. Competent authorities shall ensure that liquidity plans to address the implications of both scheduled and early amortisation exist at institutions which are originators of revolving securitisation transactions involving early amortisation provisions.

### *Article 81*

#### *Market risk*

1. Competent authorities shall ensure that policies and processes for the measurement and management of all material sources and effects of market risks are implemented.
2. When the short position falls due before the long position, competent authorities shall ensure that institutions also take measures against the risk of a shortage of liquidity.
3. The internal capital shall be adequate for material market risks that are not subject to an own funds requirement.

Institutions, which have, in calculating own funds requirements for position risk in accordance with Part Three, Title IV, Chapter 2 of Regulation [inserted by OP], netted off their positions in one or more of the equities constituting a stock-index against one or more positions in the stock-index future or other stock-index product shall have adequate internal capital to cover the basis risk of loss caused by the future's or other product's value not moving fully in line with that of its constituent equities; institutions shall also do this when they hold opposite positions in stock-index futures which are not identical in respect of either their maturity or their composition or both.

Where using the treatment in Article 334 of Regulation [inserted by OP], institutions shall ensure that they hold sufficient internal capital against the risk of loss which exists between the time of the initial commitment and the next working day.

### *Article 82*

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

Competent authorities shall ensure that institutions implement systems to evaluate and manage the risk arising from potential changes in interest rates that affect an institution's non-trading activities.

### *Article 83*

#### *Operational risk*

1. Competent authorities shall ensure that institutions implement policies and processes to evaluate and manage the exposure to operational risk, including to low-frequency



high-severity events. Institutions shall articulate what constitutes operational risk for the purposes of those policies and procedures.

2. Competent authorities shall ensure that contingency and business continuity plans are in place to ensure an institution's ability to operate on an ongoing basis and limit losses in the event of severe business disruption.

#### *Article 84*

##### *Liquidity risk*

1. Competent authorities shall ensure that institutions have robust strategies, policies, processes and systems for the identification, measurement, management and monitoring of liquidity risk over an appropriate period of time, including intra-day, so as to ensure that institutions maintain adequate levels of liquidity buffers. Those strategies, policies, processes and systems shall be tailored to business lines, currencies, branches and legal entities and shall include adequate allocation mechanisms of liquidity costs, benefits and risks.
2. The strategies, policies, processes and systems referred to in paragraph 1 shall be proportionate to the complexity, risk profile, scope of operation of the institutions and risk tolerance set by the management body and reflect the institution's importance in each Member State in which it carries on business. Institutions shall communicate risk tolerance to all relevant business lines.
3. Competent authorities shall ensure that institutions develop methodologies for the identification, measurement, management and monitoring of funding positions. Those methodologies shall include the current and projected material cash-flows in and arising from assets, liabilities, off-balance-sheet items, including contingent liabilities and the possible impact of reputational risk.
4. Competent authorities shall ensure that institutions distinguish between pledged and unencumbered assets that are available at all times, in particular during emergency situations. They shall also take into account the legal entity in which assets reside, the country where assets are legally recorded either in a register or in an account as well as their eligibility and shall monitor how assets can be mobilised in a timely manner.
5. Competent authorities shall ensure that institutions also have regard to existing legal, regulatory and operational limitations to potential transfers of liquidity and unencumbered assets amongst entities, both within and outside the EEA.
6. Competent authorities shall ensure that institutions consider different liquidity risk mitigation tools, including a system of limits and liquidity buffers in order to be able to withstand a range of different stress events and an adequately diversified funding structure and access to funding sources. Those arrangements shall be reviewed regularly.
7. Competent authorities shall ensure that alternative scenarios on liquidity positions and on risk mitigants are considered and the assumptions underlying decisions concerning the funding position shall be reviewed regularly. For these purposes,

alternative scenarios shall address, in particular, off-balance sheet items and other contingent liabilities, including those of Securitisation Special Purpose Entities (SSPE) or other special purpose entities, as referred to in Regulation [inserted by OP], in relation to which the institution acts as sponsor or provides material liquidity support.

8. Competent authorities shall ensure that institutions consider the potential impact of institution-specific, market-wide and combined alternative scenarios. Different time periods and varying degrees of stress conditions shall be considered.
9. Competent authorities shall ensure that institutions adjust their strategies, internal policies and limits on liquidity risk and develop effective contingency plans, taking into account the outcome of the alternative scenarios referred to in paragraph 7.
10. Competent authorities shall ensure that institutions have in place liquidity recovery plans setting out adequate strategies and proper implementation measures in order to address possible liquidity shortfalls, including in relation to branches established in another Member State. Those plans shall be regularly tested, updated on the basis of the outcome of the alternative scenarios set out in paragraph 7, be reported to and approved by senior management, so that internal policies and processes can be adjusted accordingly. Institutions shall take the necessary operational steps in advance to ensure that liquidity recovery plans can be implemented immediately. For credit institutions, such operational steps shall include holding collateral immediately available for central bank funding. This includes holding collateral where necessary in the currency of another Member State, or currency of a third country to which the credit institution has exposures, and where operationally necessary within the territory of a host Member State or third country whose currency it is exposed to.

## *Article 85*

### *Risk of excessive leverage*

1. Competent authorities shall ensure that the institution has policies and processes in place for the identification, management and monitoring of the risk of excessive leverage. Indicators for the risk of excessive leverage shall include the leverage ratio determined in accordance with Article 416 of Regulation [inserted by OP] and mismatches between assets and obligations.
2. Competent authorities shall ensure that institutions address the risk of excessive leverage in a precautionary manner by taking due account of potential increases in the risk of excessive leverage caused by reductions of the institution's own funds through expected or realised losses, depending on the applicable accounting rules. To this end, institutions shall be able to withstand a range of different stress events with respect to the risk of excessive leverage.

## SUB-SECTION 3

### GOVERNANCE

#### *Article 86*

##### *Governance arrangements*

1. Member States shall ensure that the management body defines and oversees the implementation of the governance arrangements that ensure effective and prudent management of an institution, including the segregation of duties in the organisation and the prevention of conflicts of interest.

Those arrangements shall comply with the following principles:

- (a) the management body shall have the overall responsibility for the institution, including approving and overseeing the implementation of the institution's strategic objectives, risk strategy and internal governance;
- (b) the management body shall be responsible for providing effective oversight of senior management;
- (c) the chairman of the management body of an institution shall not exercise simultaneously the functions of a chief executive officer within the same institution, unless justified and authorised by competent authorities.

Competent authorities shall ensure that the management body monitors and periodically assesses the effectiveness of the institution's governance arrangements and takes appropriate steps to address any deficiencies.

2. Competent authorities shall ensure that institutions establish a nomination committee composed of members of the management body who do not perform any executive function in the institution concerned.

The nomination committee shall carry out the following:

- (a) identify and recommend, for the approval of the management body in its supervisory function candidates to fill management body vacancies. In doing so, the nomination committee shall evaluate the balance of knowledge, skills, diversity and experience of the management body, prepare a description of the roles and capabilities for a particular appointment, and assess the time commitment expected;
- (b) periodically assess the structure, size, composition and performance of the management body, and make recommendations to the management body in its supervisory function with regard to any changes;
- (c) periodically assess the knowledge, skills and experience of individual members of the management body and of the management body collectively, and report this to the management body in its supervisory function;

- (d) periodically review the policy of the management body for selection and appointment of senior management and make recommendations to the management body.

In performing its duties, the nomination committee shall be able to use any forms of resources it deems appropriate, including external advice, and shall receive appropriate funding from the institution to this effect.

Competent authorities may authorise an institution not to establish a separate nomination committee taking into account the nature, scale and complexity of the institution's activities.

Where, under national law, the management body does not have any competence in the process of appointment of its members, this paragraph shall not apply.

## *Article 87*

### *Management body*

1. Competent authorities shall require that all members of the management body of any institution shall at all times be of sufficiently good repute, possess sufficient knowledge, skills and experience and commit sufficient time to perform their duties. Members of the management body shall, in particular, fulfil the following requirements:
  - (a) Members of the management body shall commit sufficient time to perform their functions in the institution. They shall not combine at the same time more than one of the following combinations:
    - (i) one executive directorship with two non-executive directorships;
    - (ii) four non-executive directorships.

Executive or non-executive directorships held within the same group shall count as one single directorship.

Competent authorities may authorise a member of the management body of an institution to combine more directorships than permitted, if this does not prevent the member from committing sufficient time to perform its functions in the institution, taking into account individual circumstances and the nature, scale and complexity of the institution's activities.

- (b) The management body shall possess adequate collective knowledge, skills and experience to be able to understand the institution's activities, including the main risks.
- (c) Each member of the management body shall act with honesty, integrity and independence of mind to effectively challenge the decisions of the senior management where necessary.

2. Competent authorities shall require institutions to devote adequate human and financial resources to the induction and training of members of the management body.
3. Competent authorities shall require institutions to take into account diversity as one of the criteria for selection of members of the management body. In particular, institutions shall put in place a policy promoting gender, age, geographical, educational and professional diversity on the management body.
4. Competent authorities shall use the information collected in accordance with the criteria for disclosure established in Article 422 of Regulation [inserted by OP] to benchmark diversity practices. The competent authorities shall provide EBA with that information. EBA shall use this information to benchmark diversity practices at Union level.
5. EBA shall develop draft regulatory technical standards to specify the following:
  - (a) the notion of sufficient time commitment of a member of the management body to perform his functions, in relation to the individual circumstances and the nature, scale and complexity of activities of the institution which competent authorities must take into account when they authorise a member of the management body of an institution to combine more directorships than permitted as referred to in paragraph 1(a);
  - (b) the notion of adequate collective knowledge, skills and experience of the management body as referred to in paragraph 1(b);
  - (c) the notions of honesty, integrity and independence of mind of a member of the management body as referred to in paragraph 1(c);
  - (d) the notion of adequate human and financial resources devoted to the induction and training of members of the management body as referred to in paragraph 2;
  - (e) the notion of diversity to be taken into account for the selection of members of the management body as referred to in paragraph 3.

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.

EBA shall submit those draft regulatory technical standards to the Commission by 31 December 2015.

## *Article 88*

### *Remuneration policies*

1. The application of Articles 88(2) to 91 shall be ensured by competent authorities for institutions at group, parent company and subsidiary levels, including those established in offshore financial centres.

2. 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 way and to the extent that is appropriate to their size, internal organisation and the nature, the scope and the complexity of their activities:
- (a) the remuneration policy is consistent with and promotes sound and effective risk management and does not encourage risk-taking that exceeds the level of tolerated risk of the institution;
  - (b) the remuneration policy is in line with the business strategy, objectives, values and long-term interests of the institution, and incorporates measures to avoid conflicts of interest;
  - (c) the management body, in its supervisory function, of the institution adopts and periodically reviews the general principles of the remuneration policy and is responsible for its implementation;
  - (d) the implementation of the remuneration policy is, at least annually, subject to central and independent internal review for compliance with policies and procedures for remuneration adopted by the management body in its supervisory function;
  - (e) staff engaged in control functions are independent from the business units they oversee, have appropriate authority, and are remunerated in accordance with the achievement of the objectives linked to their functions, independent of the performance of the business areas they control;
  - (f) the remuneration of the senior officers in the risk management and compliance functions is directly overseen by the remuneration committee referred to in Article 91 or, if such a committee has not been established, by the management body in its supervisory function.

#### *Article 89*

##### *Institutions that benefit from government intervention*

In the case of institutions that benefit from exceptional government intervention, the following principles shall apply in addition to those set out in Article 88(2):

- (a) variable remuneration is strictly limited as a percentage of net revenue where it is inconsistent with the maintenance of a sound capital base and timely exit from government support;
- (b) the relevant competent authorities require institutions to restructure remuneration in a manner aligned with sound risk management and long-term growth, including, where appropriate, establishing limits to the remuneration of the persons who effectively direct the business of the credit institution within the meaning of Article 13(1);

- (c) no variable remuneration is paid to the persons who effectively direct the business of the institution within the meaning of Article 13(1) unless justified.

## *Article 90*

### *Variable elements of remuneration*

1. For variable elements of remunerations, the following principles shall apply in addition to those set out in Article 88(2):
  - (a) where remuneration is performance related, the total amount of remuneration is based on a combination of the assessment of the performance of the individual and of the business unit concerned and of the overall results of the institution and when assessing individual performance, financial and non-financial criteria are taken into account;
  - (b) the assessment of the performance is set in a multi-year framework in order to ensure that the assessment process is based on longer-term performance and that the actual payment of performance-based components of remuneration is spread over a period which takes account of the underlying business cycle of the credit institution and its business risks;
  - (c) the total variable remuneration does not limit the ability of the institution to strengthen its capital base;
  - (d) guaranteed variable remuneration is exceptional and occurs only when hiring new staff and is limited to the first year of employment;
  - (e) fixed and variable components of total remuneration are appropriately balanced and the fixed component represents a sufficiently high proportion of the total remuneration to allow the operation of a fully flexible policy on variable remuneration components, including the possibility to pay no variable remuneration component;
  - (f) institutions shall set the appropriate ratios between the fixed and the variable component of the total remuneration;
  - (g) payments related to the early termination of a contract reflect performance achieved over time and are designed in a way that does not reward failure;
  - (h) the measurement of performance used to calculate variable remuneration components or pools of variable remuneration components includes an adjustment for all types of current and future risks and takes into account the cost of the capital and the liquidity required;
  - (i) the allocation of the variable remuneration components within the credit institution shall also take into account all types of current and future risks;
  - (j) a substantial portion, and in any event at least 50 %, of any variable remuneration shall consist of an appropriate balance of the following:

- (i) shares or equivalent ownership interests, subject to the legal structure of the institution concerned or share-linked instruments or equivalent non-cash instruments, in case of a non-listed institution;
- (ii) where appropriate, other instruments within the meaning of Article 49 of Regulation [inserted by OP] that adequately reflect the credit quality of the institution as a going concern.

The instruments referred to in this point shall be subject to an appropriate retention policy designed to align incentives with the longer-term interests of the institution. Member States or their competent authorities may place restrictions on the types and designs of those instruments or prohibit certain instruments as appropriate. This point shall be applied to both the portion of the variable remuneration component deferred in accordance with point (k) and the portion of the variable remuneration component not deferred;

- (k) a substantial portion, and in any event at least 40 %, of the variable remuneration component is deferred over a period which is not less than three to 5 years and is correctly aligned with the nature of the business, its risks and the activities of the member of staff in question.

Remuneration payable under deferral arrangements shall vest no faster than on a pro-rata basis. In the case of a variable remuneration component of a particularly high amount, at least 60 % of the amount shall be deferred. The length of the deferral period shall be established in accordance with the business cycle, the nature of the business, its risks and the activities of the member of staff in question;

- (l) the variable remuneration, including the deferred portion, is paid or vests only if it is sustainable according to the financial situation of the institutions as a whole, and justified according to the performance of the institution, the business unit and the individual concerned.

Without prejudice to the general principles of national contract and labour law, the total variable remuneration shall generally be considerably contracted where subdued or negative financial performance of the institution occurs, taking into account both current remuneration and reductions in payouts of amounts previously earned, including through malus or clawback arrangements;

- (m) the pension policy is in line with the business strategy, objectives, values and long-term interests of the credit institution;

If the employee leaves the institution before retirement, discretionary pension benefits shall be held by the institution for a period of 5 years in the form of instruments referred to in point (j). In case of an employee reaching retirement, discretionary pension benefits shall be paid to the employee in the form of instruments referred to in point (j) subject to a five-year retention period;

- (n) staff members are required to undertake not to use personal hedging strategies or remuneration- and liability-related insurance to undermine the risk alignment effects embedded in their remuneration arrangements;



- (o) variable remuneration is not paid through vehicles or methods that facilitate the non-compliance with the requirements of this Directive or Regulation [inserted by OP].
2. EBA shall develop draft regulatory technical standards with respect to the criteria to determine the appropriate ratios between fixed and the variable component of the total remuneration referred to in point (e) and to specifying the classes of instruments that satisfy the conditions laid down point (j)(ii).

EBA shall submit those draft regulatory technical standards to the Commission by 31 December 2013.

Power is conferred on the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with the procedure laid down in Article 10 to 14 of Regulation (EU) No 1093/2010.

### *Article 91*

#### *Remuneration Committee*

1. Competent authorities shall ensure that institutions that are significant in terms of their size, internal organisation and the nature, the scope and the complexity of their activities establish a remuneration committee. The remuneration committee shall be constituted in such a way as to enable it to exercise competent and independent judgment on remuneration policies and practices and the incentives created for managing risk, capital and liquidity.
2. Competent authorities shall ensure that the remuneration committee is responsible for the preparation of decisions regarding remuneration, including those which have implications for the risk and risk management of the credit institution concerned and which are to be taken by the management body in its supervisory function. The Chair and the members of the remuneration committee shall be members of the management body who do not perform any executive functions in the credit institution concerned. When preparing such decisions, the remuneration committee shall take into account the long-term interests of shareholders, investors and other stakeholders in the institution.

## **SECTION III**

### **SUPERVISORY REVIEW AND EVALUATION PROCESS**

#### *Article 92*

##### *Supervisory review and evaluation*

1. Taking into account the technical criteria set out in Article 94, the competent authorities shall review the arrangements, strategies, processes and mechanisms implemented by the institutions to comply with this Directive and Regulation [inserted by OP] and evaluate the risks to which the institutions are or might be

exposed, and the risks that an institution poses to the financial system taking into account the identification and measurement of systemic risk under Article 23 of Regulation (EU) No 1093/2010.

2. The scope of the review and evaluation referred to in paragraph 1 shall cover all requirements of this Directive.
3. On the basis of the review and evaluation referred to in paragraph 1, the competent authorities shall determine whether the arrangements, strategies, processes and mechanisms implemented by the institutions and the own funds held by these ensure a sound management and coverage of their risks.
4. Competent authorities shall establish the frequency and intensity of the review and evaluation referred to in paragraph 1 having regard to the size, systemic importance, nature, scale and complexity of the activities of the institution concerned and taking into account the principle of proportionality. The review and evaluation shall be updated at least on an annual basis.

### *Article 93*

#### *Supervision of mixed financial holding companies*

1. Where a mixed financial holding company is subject to equivalent provisions under this Directive and under Directive 2002/87/EC, in particular in terms of risk-based supervision, the consolidating supervisor may, after consulting the other competent authorities responsible for the supervision of subsidiaries, apply only the provision of Directive 2002/87/EC to that mixed financial holding company.
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 provision of the Directive relating to the most significant financial sector as defined in Article 3(2) of Directive 2002/87/EC.
3. The consolidating supervisor shall inform EBA and the European Insurance and Occupational Pensions Authority (EIOPA) established by Regulation (EU) No 1094/2010<sup>40</sup> of the decisions taken under paragraphs 1 and 2.
4. EBA, EIOPA and ESMA shall, through the Joint Committee referred to in Article 54 of those Regulations, develop guidelines aimed at converging supervisory practices and shall, within three years of the adoption of those guidelines, develop draft regulatory technical standards.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with the procedure laid down in

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<sup>40</sup> Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC, OJ L 331, 15.12.2010, p. 48.

Articles 10 to 14 of Regulation (EU) No 1093/2010, of Regulation (EU) No 1094/2010 and of Regulation (EU) No 1095/2010<sup>41</sup>.

#### *Article 94*

##### *Technical criteria for the supervisory review and evaluation*

1. In addition to credit, market and operational risks, the review and evaluation performed by competent authorities pursuant to Article 92 shall include all of the following:
  - (a) the results of the stress test carried out by institutions applying an IRB approach;
  - (b) the exposure to and management of concentration risk by institutions, including their compliance with the requirements laid down in Part Four of Regulation [inserted by OP] and Article 79 of this Directive;
  - (c) the robustness, suitability and manner of application of the policies and procedures implemented by institutions for the management of the residual risk associated with the use of recognized credit risk mitigation techniques;
  - (d) the extent to which the own funds held by an institution in respect of assets which it has securitised are adequate having regard to the economic substance of the transaction, including the degree of risk transfer achieved;
  - (e) the exposure to, measurement and management of liquidity risk by institutions, including the development of alternative scenario analyses, the management of risk mitigants (in particular the level, composition and quality of liquidity buffers) and effective contingency plans;
  - (f) the impact of diversification effects and how such effects are factored into the risk measurement system;
  - (g) the results of stress tests carried out by institutions using an internal model to calculate market risk own funds requirements under Part Three, Title IV, Chapter 5 of Regulation [inserted by OP];
  - (h) the geographical location of institutions' exposures;
  - (i) the business model of the institution.
2. For the purposes of point (e) of paragraph 1, the competent authorities shall regularly carry out a comprehensive assessment of the overall liquidity risk management by institutions and promote the development of sound internal methodologies. While conducting those reviews, the competent authorities shall have regard to the role

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<sup>41</sup> Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC, OJ L 331, 15.12.2010, p. 84.

played by institutions in the financial markets. The competent authorities in one Member State shall duly consider the potential impact of their decisions on the stability of the financial system in all other Member States concerned.

3. Competent authorities shall monitor whether an institution has provided implicit support to a securitisation. If an institution is found to have provided implicit support on more than one occasion the competent authority shall take appropriate measures reflective of the increased expectation that it will provide future support to its securitisation thus failing to achieve a significant transfer of risk.
4. For the purposes of the determination to be made under Article 92(3) of this Directive, competent authorities shall consider whether the valuation adjustments taken for positions/portfolios in the trading book, as set out in Article 100 of Regulation [inserted by OP], enable the institution to sell or hedge out its positions within a short period without incurring material losses under normal market conditions.
5. The review and evaluation performed by competent authorities shall include the exposure of institutions to the interest rate risk arising from non-trading activities. Measures shall be required in the case of institutions whose economic value declines by more than 20 % of their own funds as a result of a sudden and unexpected change in interest rates the size of which shall be prescribed by the competent authorities and shall not differ between institutions.
6. The review and evaluation performed by competent authorities shall include the exposure of institutions to the risk of excessive leverage as reflected by indicators of excessive leverage, including the leverage ratio determined in accordance with Article 416 of Regulation [inserted by OP] . In determining the adequacy of the leverage ratio of institutions and of the arrangements, strategies, processes and mechanisms implemented by institutions to manage the risk of excessive leverage, competent authorities may take into account the business model of these institutions.
7. The review and evaluation performed by competent authorities shall include governance arrangements of institutions, their corporate culture and values, and the ability of members of the management body to perform their duties. In performing this review and evaluation, competent authorities shall, at least, review agendas and supporting documents for meetings of the management body and its committees, and the results of the internal or external evaluation of performance of the management body.

#### *Article 95*

##### *Application of supervisory measures to a type of institutions*

1. Where the competent authorities determine under Article 92 that a certain type of institutions is or might be exposed to similar risks or pose similar risks to the financial system, they may apply Articles 98 and 99 in a similar manner to this type of institutions.

The type of institutions may in particular be determined according to the criteria referred to in Article 94(1) (h) and (i).

2. The competent authorities shall notify EBA where they apply paragraph 1. EBA shall monitor supervisory practices and issue guidelines to specify how similar risks should be assessed. Those guidelines shall be adopted in accordance with Article 16 of Regulation (EU) No 1093/2010.

#### *Article 96*

##### *Supervisory examination programme*

1. The competent authorities shall, at least annually, adopt a supervisory examination programme for the institutions they supervise. Such programme shall take into account the supervisory review and evaluation process under Article 92. It shall contain the following elements:
  - (a) An indication how competent authorities intend to carry out their tasks and allocate their resources.
  - (b) An identification which institutions are intended to be subject to enhanced supervision and make provision for such supervision as set out in paragraph 3.
  - (c) A plan for on-site inspections at the premises used by a institution, including its branches and subsidiaries established in other Member States in accordance with Articles 53, 114 and 116.
2. Supervisory examination programmes shall include the following institutions:
  - (a) Institutions for which the results of the stress tests referred to point (g) of Article 94(1) and Article 97, or the outcome of the supervisory review and evaluation process under Article 92, indicate significant risks to their ongoing financial soundness or indicate breaches of the requirements of this Directive and Regulation [inserted by OP];
  - (b) Institutions that pose systemic risk to the financial system;
  - (c) Any other institution for which the competent authorities deem this necessary.
3. When deemed appropriate under Article 92, one or more of the following measures shall be taken if necessary:
  - (a) An increase in the number or frequency of on-site inspections of the institution;
  - (b) A permanent presence of the competent authority at the institution;
  - (c) Additional or more frequent reporting by the institution;
  - (d) Additional or more frequent review of the operational, strategic or business plans of the institution;
  - (e) Thematic examinations monitoring specific risks that are likely to materialise.

## Article 97

### *Supervisory stress testing*

1. The competent authorities shall carry out annual supervisory stress tests on institutions they supervise, where the review and evaluation process under Article 92 shows the need for such tests, and the stress tests carried out under Article 32 of Regulation (EU) No 1093/2010 do not sufficiently address the outcome of the process under Article 92.
2. EBA shall issue guidelines in accordance with Article 16 of Regulation (EU) No. 1093/2010 to ensure that common methodologies are used by the competent authorities when conducting annual supervisory stress tests.

## Article 98

### *Ongoing review of the permission to use internal approaches*

1. Competent authorities shall continuously review, or re-assess at least every 3 years, institutions' compliance with internal approaches. They shall have particular regard to changes in the institution's business and to the implementation of those approaches to new products.
2. For institutions that have been granted permission to use internal approaches, competent authorities shall in particular review and assess that the institution uses well developed and up-to-date techniques and practices.
3. If for an internal market risk model numerous overshootings referred to in Article 355 of Regulation [inserted by OP] indicate that the model is not sufficiently accurate, the competent authorities shall revoke the permission for using the internal model or impose appropriate measures to ensure that the model is improved promptly.
4. If an institution is permitted to use an internal approach but the approach does not meet the applicable requirements anymore, the competent authorities shall require the institution to present a plan to restore compliance with the requirements and set a deadline for its implementation. The competent authorities shall require improvements to that plan if it is unlikely to result in full compliance or if the deadline is inappropriate. If the institution is unlikely to be able to restore compliance within an appropriate deadline, the permission to use the internal approach shall be revoked or limited to compliant areas or those where compliance can be achieved within an appropriate deadline. If it is likely that the non-compliance leads to inadequate own funds, the competent authorities shall timely require commensurate additional own funds. The competent authorities shall monitor the implementation of the plan and shall impose appropriate sanctions in accordance with Article 64 if the institution materially lags behind its plan.
5. In order to promote consistent soundness of internal approaches in the Union, EBA shall analyse internal approaches across institutions, including the consistency of implementation of the definition of default and how those institutions treat similar risks or exposures.

EBA shall develop guidelines in accordance with Article 16 of Regulation (EU) No 1093/2010, which contain benchmarks on the basis of that analysis.

Competent authorities shall take into account that analysis and those benchmarks for the review of the permissions they grant to institutions to use internal approaches.

## **SECTION IV**

### **SUPERVISORY MEASURES**

#### *Article 99*

##### *Supervisory measures*

1. Competent authorities shall require any institution to take the necessary measures at an early stage to address relevant problems in the following circumstances:
  - (a) The institution does not meet the requirements of this Directive;
  - (b) An institution is likely to breach the requirements of this Directive;
2. For the purposes of paragraph 1 competent authorities shall have the powers referred to in Article 64.

#### *Article 100*

##### *Specific own funds requirements*

1. A specific own funds requirement related to risks not covered by Article 1 of Regulation [inserted by OP] shall be imposed by the competent authorities at least on the institutions which do not meet the requirements laid down in Articles 72 to 74 and Article 382 of Regulation [inserted by OP], or in respect of which a negative determination has been made on the issue described in Article 92(3), if the sole application of other measures is unlikely to improve the arrangements, processes, mechanisms and strategies sufficiently within an appropriate timeframe.
2. For the purposes of determining the appropriate level of own funds on the basis of the review and evaluation carried out in accordance with Article 92, the competent authorities shall assess whether any imposition of a specific own funds requirement in excess of the capital requirement is necessary to capture risks to which an institution is or might be exposed, taking into account the following:
  - (a) the quantitative and qualitative aspects of institutions' assessment process referred to in Article 72;
  - (b) institutions' arrangements, processes and mechanisms referred to in Article 73 and 74;

- (c) the outcome of the review and evaluation carried out in accordance with Article 92.
3. Where an institution reports to the competent authority in accordance with Article 367(5) of Regulation [inserted by OP] that the stress test results referred to in that Article materially exceed its own funds requirement for the correlation trading portfolio, the competent authorities shall consider a specific own funds requirement against the correlation trading portfolio in order to cover that excess.

### *Article 101*

#### *Specific publication requirements*

1. Member States shall empower the competent authorities to require institutions:
- (a) to publish information referred to in Part Eight of Regulation [inserted by OP] more than once per year, and to set deadlines for publication;
  - (b) to use specific media and locations for publications other than the financial statements; Member States shall empower competent authorities to require parent undertakings to publish annually either in full or by way of references to equivalent information, a description of their legal structure and governance and organisational structure of the group of institutions in accordance with Articles 14(3), 73(1) and 104(2).

### *Article 102*

#### *Consistency of supervisory reviews, evaluations and supervisory measures*

1. Competent authorities shall notify EBA of the following:
- (a) the functioning of their review and evaluation system referred to in Article 92;
  - (b) the methodology used to base decisions referred to in Articles 94(3) and Articles 97, 98 and 99 on the systems referred to in point (a).

Competent authorities shall notify EBA of the decisions including their reasons, which they have taken in accordance with Articles 94(3) and Articles 97, 98 and 99.

2. EBA shall annually report to the European Parliament and the Council on the degree of convergence of the application of the provisions of this Chapter between Member States.

In order to increase the degree of such convergence, EBA shall conduct peer reviews in accordance with Article 30 of Regulation (EU) No 1093/2010.

3. EBA shall develop draft regulatory technical standards to further specify the following:
- (a) the common procedure and methodology for review and evaluation systems referred to in paragraph 1 and in Article 92;



- (b) the criteria concerning the organisation and treatment of the risks referred to in Articles 75 to 85 and the criteria on review and evaluation by the competent authorities as referred to in Article 92.
4. Powers are delegated to the Commission to adopt the regulatory technical standards referred to in paragraph 3 in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010.

EBA shall submit the draft technical standards referred to in paragraph 3 to the Commission by 31 December 2015.

## SECTION V

### LEVEL OF APPLICATION

#### *Article 103*

##### *Internal capital adequacy assessment process*

1. Competent authorities shall require every institution which is neither a subsidiary in the Member State where it is authorised and supervised, nor a parent undertaking, and every institution not included in the consolidation pursuant to Article 17 of Regulation [inserted by OP], to meet the obligations laid down in Article 72 on an individual basis.

Competent authorities may exempt an institution that meets the conditions laid down in Article 9 of Regulation [inserted by OP] from Article 72.

Where the competent authorities waive the application of own fund requirements on a consolidated basis provided for in Article 14 of Regulation [inserted by OP], the requirements of Article 72 shall apply on an individual basis.

2. Competent authorities shall require parent institutions in a Member State, to the extent and in the manner prescribed in Article 16 of Regulation [inserted by OP], to meet the obligations laid down in Article 72 on the basis of their consolidated financial situation.
3. Competent authorities shall require institutions controlled by a parent financial holding company or a parent mixed financial holding company in a Member State, to the extent and in the manner prescribed in Article 16 of Regulation [inserted by OP], to meet the obligations laid down in Article 72 on the basis of the consolidated financial situation of that financial holding company or mixed financial holding company.

Where more than one institution is controlled by a parent financial holding company or a parent mixed financial holding company in a Member State, the first subparagraph shall apply only to the institution to which supervision on a consolidated basis applies in accordance with Article 106.

4. Competent authorities shall require subsidiary institutions to apply the requirements laid down in Article 72 on a sub-consolidated basis if those institutions, or the parent undertaking where it is a financial holding company or mixed financial holding company, have a institution or a financial institution or an asset management company as defined in Article 2(5) of Directive 2002/87/EC as a subsidiary in a third country, or hold a participation in such an undertaking.
5. The consolidated financial situation shall be determined in accordance with Part One, Title II, Chapter 2, Sections 2 and 3 of Regulation [inserted by OP]

#### *Article 104*

##### *Institutions' arrangements, processes and mechanisms*

1. Competent authorities shall require institutions to meet the obligations laid down in Section II on an individual basis, unless Member States make use of the derogation provided for in Article 6 of Regulation [inserted by OP].
2. Competent authorities shall require the parent undertakings and subsidiaries subject to this Directive to meet the obligations laid down in Section II of this Chapter on a consolidated or sub-consolidated basis, to ensure that their arrangements, processes and mechanisms required by those provisions 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 subsidiaries not subject to this Directive implement arrangements, processes and mechanisms to ensure compliance with those provisions.
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 credit institution or credit institutions controlled by an EU parent financial holding company or EU parent mixed financial holding company, 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.

#### *Article 105*

##### *Review and evaluation and supervisory measures*

1. Competent authorities shall apply the review and evaluation process referred to in Section III and the supervisory measures referred to in Section IV in accordance with the level of application of the requirements of Regulation [inserted by OP] set out in Part One, Title I of that Regulation.
2. Where the competent authorities waive the application of own funds requirements on a consolidated basis provided for in Article 14 of Regulation [inserted by OP] , the requirements of Article 92 of this Directive shall apply to the supervision of investment firms on an individual basis.

## Chapter 3

### Supervision on a consolidated basis

#### SECTION I

##### PRINCIPLES FOR CONDUCTING SUPERVISION ON A CONSOLIDATED BASIS

###### *Article 106*

###### *Determination of the consolidating supervisor*

1. Where a parent undertaking is a parent institution in a Member State or an EU parent institution, supervision on a consolidated basis shall be exercised by the competent authorities that authorised it.
2. Where the parent of a institution is a parent financial holding company or parent mixed financial holding company in a Member State or an EU parent financial holding company or EU parent mixed financial holding company, supervision on a consolidated basis shall be exercised by the competent authorities that authorised the institution.
3. Where institutions authorised in two or more Member States have as their parent the same parent financial holding company or parent mixed financial holding company in a Member State or the same EU parent financial holding company or EU parent mixed financial holding company, supervision on a consolidated basis shall be exercised by the competent authorities of the institution authorised in the Member State in which the financial holding company or mixed financial holding company was set up.

Where the parent undertakings of institutions authorised in two or more Member States comprise more than one financial holding company or mixed financial holding company with head offices in different Member States and there is a credit institution in each of these States, supervision on a consolidated basis shall be exercised by the competent authority of the credit institution with the largest balance sheet total.

4. Where more than one institution authorised in the Union has as its parent the same financial holding company or mixed financial holding company and none of these institutions has been authorised in the Member State in which the financial holding company or mixed financial holding company was set up, supervision on a consolidated basis shall be exercised by the competent authority that authorised the institution with the largest balance sheet total, which shall be considered, for the purposes of this Directive, as the institution controlled by an EU parent financial holding company or EU parent mixed financial holding company.
5. In particular cases, the competent authorities may by common agreement waive the criteria referred to in paragraphs 1 and 2 if their application would be inappropriate,

taking into account the institutions and the relative importance of their activities in different countries, and appoint a different competent authority to exercise supervision on a consolidated basis. In these cases, before taking their decision, the competent authorities shall give the EU parent institution, EU parent financial holding company, EU parent mixed financial holding company, or institution with the largest balance sheet total, as appropriate, an opportunity to state its opinion on that decision.

6. The competent authorities shall notify the Commission and EBA of any agreement falling within paragraph 5.

#### *Article 107*

##### *Coordination of supervisory activities by the consolidating supervisor*

1. In addition to the obligations imposed by the provisions of this Directive and Regulation [inserted by OP], the consolidating supervisor shall carry out the following tasks:
  - (a) coordination of the gathering and dissemination of relevant or essential information in going concern and emergency situations;
  - (b) planning and coordination of supervisory activities in going-concern situations, including in relation to the activities referred to in Title VII, Chapter 3, in cooperation with the competent authorities involved;
  - (c) planning and coordination of supervisory activities in cooperation with the competent authorities involved, and if necessary with central banks, in preparation for and during emergency situations, including adverse developments in institutions or in financial markets using, where possible, existing defined channels of communication for facilitating crisis management.
2. Where the consolidating supervisor fails to carry out the tasks referred to in the first subparagraph or where the competent authorities do not cooperate with the consolidating supervisor to the extent required in carrying out the tasks in the first subparagraph, any of the competent authorities concerned may refer the matter to EBA, which may act in accordance with Article 19 of Regulation (EU) No 1093/2010.
3. The planning and coordination of supervisory activities referred to in paragraph 1(c) includes exceptional measures referred to in Article 112(1)(d) and 112(4)(b), the preparation of joint assessments, the implementation of contingency plans and communication to the public.

#### *Article 108*

##### *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 72 and 92 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 98 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 84 and relating to the need for institution-specific parameters different from those set out in Part Six of Regulation [inserted by OP] in accordance with Article 99 of this Directive.

2. The joint decision 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 in accordance with Articles 72 and 92 to the other relevant competent authorities.
- (b) for the purposes of paragraph 1(b) within one month after submission by the consolidating supervisor of a report containing the assessment of the liquidity risk profile of the group in accordance with Article 84.

The joint decision shall also duly consider the risk assessment of subsidiaries performed by relevant competent authorities in accordance with Articles 72 and 92.

The joint decision shall be set out in a document containing the fully reasoned decision 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 period referred to in paragraph 2, a decision on the application of Articles 72, 84, 92, 98 and 99 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 period 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 period referred to in paragraph 2 shall be deemed the conciliation period within the meaning of the Regulation. 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 72, 84, 92, 98 and 99 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 the time period 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 its decision in conformity with the decision of EBA. The time period referred to in the paragraph 2 shall be deemed the conciliation period 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 period or after a joint decision has been reached.

The decisions shall be set out in a document containing the fully reasoned decisions and shall take into account the risk assessment, views and reservations of the other competent authorities expressed during the time period 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 decision 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 binding on the competent authorities in the Member State concerned.

The joint decision referred to in the paragraph 2 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 Articles 98 and 99. 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 72, 84, 92, 98 and 99 with a view to facilitating joint decisions.

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

EBA shall develop draft implementing technical standards for submission to the Commission by 31 December 2013.

## *Article 109*

### *Information requirements in emergency situations*

1. Where an emergency situation, including a situation as defined in Article 18 of Regulation (EU) No 1093/2010 or a situation of adverse developments in markets, arises, which potentially jeopardises the market liquidity and the stability of the financial system in any of the Member State where entities of a group have been authorised or where significant branches referred to in Article 52 are established, the consolidating supervisor shall, subject to Chapter 1, Section 2, and where applicable Articles 54 and 58 of Directive 2004/39/EC, alert as soon as is practicable, EBA, ESRB and the authorities referred to in Article 59(4) and in Article 60 and shall communicate all information essential for the pursuance of their tasks. Those obligations shall apply to all competent authorities if the authority referred to in Article 59(4) becomes aware of a situation described in the first subparagraph, it shall alert as soon as is practicable the competent authorities referred to in Article 107, and EBA.

Where possible, the competent authority and the authority referred to in Article 59(4) shall use existing defined channels of communication.

2. The consolidating supervisor responsible for supervision on a consolidated basis shall, when it needs information which has already been given to another competent authority, contact this authority whenever possible in order to prevent duplication of reporting to the various authorities involved in supervision.

## *Article 110*

### *Coordination and cooperation arrangements*

1. In order to facilitate and establish effective supervision, the consolidating supervisor and the other competent authorities shall have written coordination and cooperation arrangements in place.

Under these arrangements additional tasks may be entrusted to the consolidating supervisor and procedures for the decision-making process and for cooperation with other competent authorities, may be specified.

2. The competent authorities responsible for authorising the subsidiary of a parent undertaking which is a institution may, by bilateral agreement, in accordance with Article 28 of Regulation (EU) No 1093/2010, delegate their responsibility for supervision to the competent authorities which authorised and supervise the parent undertaking so that they assume responsibility for supervising the subsidiary in accordance with this Directive. EBA shall be kept informed of the existence and content of such agreements. It shall forward such information to the competent authorities of the other Member States and to the European Banking Committee.

## Article 111

### *Colleges of supervisors*

1. The consolidating supervisor shall establish colleges of supervisors to facilitate the exercise of the tasks referred to in Articles 107 to 109(1) and subject to the confidentiality requirements of paragraph 2 of this Article and compatibility with Union law, ensure appropriate coordination and cooperation with relevant third-country competent authorities where appropriate.

EBA shall contribute to promoting and monitoring the efficient, effective and consistent functioning of colleges of supervisors referred to in this Article in accordance with Article 21 of Regulation (EU) No 1093/2010. To that end, EBA shall participate as it deems appropriate and shall be considered as a competent authority for that purpose.

Colleges of supervisors shall provide a framework for the consolidating supervisor, EBA and the other competent authorities concerned to carry out the following tasks:

- (a) exchanging information among themselves and with EBA in accordance with Article 21 of Regulation (EU) No 1093/2010;
  - (b) agreeing on voluntary entrustment of tasks and voluntary delegation of responsibilities where appropriate;
  - (c) determining supervisory examination programmes referred to in Article 94 based on a risk assessment of the group in accordance with Article 92;
  - (d) increasing the efficiency of supervision by removing unnecessary duplication of supervisory requirements, including in relation to the information requests referred to in Articles 109 and 112(2);
  - (e) consistently applying the prudential requirements under this Directive and Regulation [inserted by OP] across all entities within a group of institutions without prejudice to the options and discretions available in Union legislation;
  - (f) applying Article 107(1)(c) taking into account the work of other forums that may be established in that area.
2. The competent authorities participating in the colleges of supervisors and EBA shall cooperate closely. The confidentiality requirements under Chapter 1, Section II of this Directive, and Articles 54 and 58 of Directive 2004/39/EC shall not prevent the competent authorities from exchanging confidential information within colleges of supervisors. The establishment and functioning of colleges of supervisors shall not affect the rights and responsibilities of the competent authorities under this Directive and regulation [inserted by OP].
  3. The establishment and functioning of the colleges shall be based on written arrangements referred to in Article 110, determined after consultation with competent authorities concerned by the consolidating supervisor.



4. EBA shall develop draft regulatory technical standards in order to specify general conditions of functioning of the colleges of supervisors.

EBA shall submit these draft regulatory technical standards by 31 December 2013.

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

5. EBA shall develop draft implementing technical standards in order to determine the operational functioning of the colleges of supervisors.

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

EBA shall submit these draft implementing technical standards by 31 December 2013.

6. The competent authorities responsible for the supervision of subsidiaries of an EU parent credit institution or an EU parent financial holding company or EU parent mixed financial holding company and the competent authorities of a host Member State where significant branches as referred to in Article 52 are established, central banks as appropriate, and third countries' competent authorities where appropriate and subject to confidentiality requirements that are equivalent, in the opinion of all competent authorities, to the requirements under Chapter 1 Section II, and where applicable, Articles 54 and 58 of Directive 2004/39/EC, may participate in colleges of supervisors.
7. The consolidating supervisor shall chair the meetings of the college and shall decide which competent authorities participate in a meeting or in an activity of the college. The consolidating supervisor shall keep all members of the college fully informed, in advance, of the organisation of such meetings, the main issues to be discussed and the activities to be considered. The consolidating supervisor shall also keep all the members of the college fully informed, in a timely manner, of the actions taken in those meetings or the measures carried out.
8. The decision of the consolidating supervisor shall take account of the relevance of the supervisory activity to be planned or coordinated for those authorities, in particular the potential impact on the stability of the financial system in the Member States concerned referred to in Article 8 and the obligations referred to in Article 52(2).
9. The consolidating supervisor, subject to the confidentiality requirements under Chapter 1, Section II, and where applicable, Articles 54 and 58 of Directive 2004/39/EC, shall inform EBA of the activities of the college of supervisors, including in emergency situations, and communicate to EBA all information that is of particular relevance for the purposes of supervisory convergence.

## Article 112

### Cooperation obligations

1. The competent authorities shall cooperate closely with each other. They shall provide one another with any information which is essential or relevant for the exercise of the other authorities' supervisory tasks under this Directive and Regulation [inserted by OP]. In this regard, the competent authorities shall communicate on request all relevant information and shall communicate on their own initiative all essential information.

The competent authorities shall cooperate with EBA for the purposes of this Directive and Regulation [inserted by OP], in accordance with Regulation (EU) No (EU) No 1093/2010.

The competent authorities shall provide EBA with all information necessary to carry out its duties under this Directive, Regulation [inserted by OP], and under Regulation (EU) No 1093/2010, in accordance with Article 35 of that Regulation.

Information referred to in the first subparagraph shall be regarded as essential if it could materially influence the assessment of the financial soundness of a institution or financial institution in another Member State.

In particular, consolidating supervisors of EU parent credit institutions and institutions controlled by EU parent financial holding companies or EU parent mixed financial holding companies shall provide the competent authorities in other Member States who supervise subsidiaries of these parent undertakings with all relevant information. In determining the extent of relevant information, the importance of these subsidiaries within the financial system in those Member States shall be taken into account.

The essential information referred to in the first subparagraph shall include, in particular, the following items:

- (a) Identification of the group's legal structure and the governance and organisational structure, including all regulated entities, non-regulated entities, non-regulated subsidiaries and significant branches belonging to the group, the parent undertakings, in accordance with Articles 14(3), 73(1) and 104(2), as well as of the competent authorities of the regulated entities in the group;
- (b) procedures for the collection of information from the institutions in a group, and the verification of that information;
- (c) adverse developments in institutions or in other entities of a group, which could seriously affect the institutions;
- (d) major sanctions and exceptional measures taken by competent authorities in accordance with this Directive, including the imposition of a specific own fund requirement under Article 100 and the imposition of any limitation on the use of the Advanced Measurement Approach for the calculation of the own funds requirements under Article 301 (2) of Regulation [inserted by OP].

2. The competent authorities may refer to EBA any of the following situations:
  - (a) where a competent authority has not communicated essential information;
  - (b) where a request for cooperation, in particular to exchange relevant information, has been rejected or has not been acted upon within a reasonable time.

Without prejudice to Article 258 TFEU, EBA may act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1093/2010.

3. The competent authorities responsible for the supervision of credit institutions controlled by an EU parent credit institution shall whenever possible contact the consolidating supervisor when they need information regarding the implementation of approaches and methodologies set out in this Directive and Regulation [inserted by OP] that may already be available to that competent authority.
4. The competent authorities concerned shall, prior to their decision, consult each other with regard to the following items, where these decisions are of importance for other competent authorities' supervisory tasks:
  - (a) changes in the shareholder, organisational or management structure of credit institutions in a group, which require the approval or authorisation of competent authorities; and
  - (b) major sanctions or exceptional measures taken by competent authorities, including the imposition of an additional own funds requirement under Article 99 and the imposition of any limitation on the use of the Advances Measurement Approaches for the calculation of the own funds requirements under Article 301 (2) of Regulation [inserted by OP].

For the purposes of point (b), the consolidating supervisor shall always be consulted.

However, a competent authority may decide not to consult in cases of urgency or where such consultation may jeopardise the effectiveness of the decisions. In this case, the competent authority shall, without delay, inform the other competent authorities.

### *Article 113*

#### *Verification of information concerning entities in other Member States*

Where, in applying this Directive and Regulation [inserted by OP], the competent authorities of one Member State wish in specific cases to verify the information concerning a institution, a financial holding company, a mixed financial holding company, a financial institution, an ancillary services undertaking, a mixed-activity holding company, a subsidiary of the kind covered in Article 119 or a subsidiary of the kind covered in Article 114(3), situated in another Member State, they shall ask the competent authorities of that other Member State to have that verification carried out. The authorities which receive such a request shall, within the framework of their competence, act upon it either by carrying out the verification themselves, by allowing the authorities who made the request to carry it out, or by allowing

an auditor or expert to carry it out. The competent authority which made the request may, if it so wishes, participate in the verification when it does not carry out the verification itself.

## SECTION II

### FINANCIAL HOLDING COMPANIES AND MIXED FINANCIAL HOLDING COMPANIES

#### *Article 114*

##### *Inclusion of holding companies in consolidated supervision*

1. Member States shall adopt any measures necessary, where appropriate, to include financial holding companies and mixed financial holding companies in consolidated supervision. Without prejudice to Article 115, the consolidation of the financial situation of the financial holding company or mixed financial holding company shall not in any way imply that the competent authorities are required to play a supervisory role in relation to the financial holding company or mixed financial holding company on a stand-alone basis except where required to apply Chapter 3.
2. When the competent authorities of a Member State do not include a institution subsidiary in supervision on a consolidated basis under one of the cases provided for in points (a) and (b) of Article 13 of Regulation [inserted by OP], the competent authorities of the Member State in which that institution subsidiary is situated may ask the parent undertaking for information which may facilitate their supervision of that institution.
3. Member States shall provide that their competent authorities responsible for exercising supervision on a consolidated basis may ask the subsidiaries of a credit institution, a financial holding company or mixed financial holding company, which are not included within the scope of supervision on a consolidated basis for the information referred to in Article 116. In such a case, the procedures for transmitting and verifying the information laid down in that Article shall apply.

#### *Article 115*

##### *Qualification of directors*

The Member States shall require that persons who effectively direct the business of a financial holding company or mixed financial holding company be of sufficiently good repute and have sufficient experience to perform those duties.

#### *Article 116*

##### *Requests for information and inspections*

1. Pending further coordination of consolidation methods, Member States shall provide that, where the parent undertaking of one or more institutions is a mixed-activity holding company, the competent authorities responsible for the authorisation and

supervision of those institutions shall, by approaching the mixed-activity holding company and its subsidiaries either directly or via institution subsidiaries, require them to supply any information which would be relevant for the purpose of supervising the institution subsidiaries.

2. Member States shall provide that their competent authorities may carry out, or have carried out by external inspectors, on-the-spot inspections to verify information received from mixed-activity holding companies and their subsidiaries. If the mixed-activity holding company or one of its subsidiaries is an insurance undertaking, the procedure laid down in Article 119 may also be used. If a mixed-activity holding company or one of its subsidiaries is situated in a Member State other than that in which the institution subsidiary is situated, on-the-spot verification of information shall be carried out in accordance with the procedure laid down in Article 113.

### *Article 117*

#### *Supervision*

1. Without prejudice to Part V of Regulation [inserted by OP], Member States shall provide that, where the parent undertaking of one or more institutions is a mixed-activity holding company, the competent authorities responsible for the supervision of these institutions shall exercise general supervision over transactions between the institution and the mixed-activity holding company and its subsidiaries.
2. Competent authorities shall require institutions to have in place adequate risk management processes and internal control mechanisms, including sound reporting and accounting procedures, in order to identify, measure, monitor and control transactions with their parent mixed-activity holding company and its subsidiaries appropriately. Competent authorities shall require the reporting by the institution of any significant transaction with these entities other than the one referred to in Article 383 of Regulation [inserted by OP]. These procedures and significant transactions shall be subject to overview by the competent authorities.

Where these intra-group transactions are a threat to a institution's financial position, the competent authority responsible for the supervision of the institution shall take appropriate measures.

### *Article 118*

#### *Exchange of information*

1. Member States shall take the necessary steps to ensure that there are no legal impediments preventing the exchange, as between undertakings included within the scope of supervision on a consolidated basis, mixed-activity holding companies and their subsidiaries, or subsidiaries of the kind covered in Article 114, of any information which would be relevant for the purposes of supervision in accordance with Chapter 3, and Articles 105 to 114 and this Article.
2. Where a parent undertaking and any of its subsidiaries that are institutions are situated in different Member States, the competent authorities of each Member State

shall communicate to each other all relevant information which may allow or aid the exercise of supervision on a consolidated basis.

Where the competent authorities of the Member State in which a parent undertaking is situated do not themselves exercise supervision on a consolidated basis pursuant to Articles 106, they may be invited by the competent authorities responsible for exercising such supervision to ask the parent undertaking for any information which would be relevant for the purposes of supervision on a consolidated basis and to transmit it to these authorities.

3. Member States shall authorise the exchange between their competent authorities of the information referred to in paragraph 2, on the understanding that, in the case of financial holding companies, mixed financial holding companies, financial institutions or ancillary services undertakings, the collection or possession of information shall not in any way imply that the competent authorities are required to play a supervisory role in relation to those institutions or undertakings standing alone.

Similarly, Member States shall authorise their competent authorities to exchange the information referred to in Article 116 on the understanding that the collection or possession of information does not in any way imply that the competent authorities play a supervisory role in relation to the mixed-activity holding company and those of its subsidiaries which are not credit institutions, or to subsidiaries of the kind covered in Article 114(3).

#### *Article 119*

##### *Cooperation*

1. Where an institution, financial holding company, mixed financial holding company or a mixed-activity holding company controls one or more subsidiaries which are insurance companies or other undertakings providing investment services which are subject to authorisation, the competent authorities and the authorities entrusted with the public task of supervising insurance undertakings or those other undertakings providing investment services shall cooperate closely. Without prejudice to their respective responsibilities, those authorities shall provide one another with any information likely to simplify their task and to allow supervision of the activity and overall financial situation of the undertakings they supervise.
2. Information received, in the framework of supervision on a consolidated basis, and in particular any exchange of information between competent authorities which is provided for in this Directive, shall be subject to the obligation of professional secrecy defined in Chapter 1, Section 2 for credit institutions or Directive 2004/39/EC for investment firms.
3. The competent authorities responsible for supervision on a consolidated basis shall establish lists of the financial holding companies or mixed financial holding companies referred to in Article 10 of Regulation [inserted by OP]. Those lists shall be communicated to the competent authorities of the other Member States, to EBA and to the Commission.

## Article 120

### *Sanctions*

In accordance with Title VII, Chapter 1 Section IV, Member States shall ensure that sanctions or measures aimed at ending observed breaches or the causes of such breaches may be imposed on financial holding companies, mixed financial holding companies, and mixed-activity holding companies, or their effective managers, that infringe laws, regulations or administrative provisions enacted to implement Chapter 3.

## Article 121

### *Assessment of equivalence of third countries' consolidated supervision*

1. Where an institution, the parent undertaking of which is an institution or a financial holding company or mixed financial holding company, the head office of which is in a third country, is not subject to consolidated supervision under Articles 106, the competent authorities shall verify whether the institution is subject to consolidated supervision by a third-country competent authority which is equivalent to that governed by the principles laid down in this Directive and the requirements of Part One, Title II, Chapter 2 of Regulation [inserted by OP].

The verification shall be carried out by the competent authority which would be responsible for consolidated supervision if paragraph 3 were to apply, at the request of the parent undertaking or of any of the regulated entities authorised in the Union or on its own initiative. That competent authority shall consult the other competent authorities involved.

2. The Commission may request the European Banking Committee to give general guidance as to whether the consolidated supervision arrangements of competent authorities in third countries are likely to achieve the objectives of consolidated supervision as defined in this Chapter, in relation to institutions, the parent undertaking of which has its head office in a third country. The Committee shall keep any such guidance under review and take into account any changes to the consolidated supervision arrangements applied by such competent authorities. EBA shall assist the Commission and the European Banking Committee in carrying out those tasks, including as to whether such guidance should be updated.

The competent authority carrying out the verification referred to in the first subparagraph of paragraph 1 shall take into account any such guidance. For that purpose, the competent authority shall consult EBA before adopting a decision.

3. In the absence of such equivalent supervision, Member States shall apply the provisions of this Directive and Regulation [inserted by OP] to the institution by analogy or shall allow their competent authorities to apply other appropriate supervisory techniques which achieve the objectives of supervision on a consolidated basis of institutions.

Those supervisory techniques shall, after consultation with the other competent authorities involved, be agreed upon by the competent authority which would be responsible for consolidated supervision.

Competent authorities may in particular require the establishment of a financial holding company or mixed financial holding company which has its head office in the Union, and apply the provisions on consolidated supervision to the consolidated position of that financial holding company or the consolidated position of the institutions of that mixed financial holding company.

The supervisory techniques shall be designed to achieve the objectives of consolidated supervision as defined in this Chapter and shall be notified to the other competent authorities involved, EBA and the Commission.

## **Chapter 4**

### **Capital Buffers**

#### **SECTION I**

#### **CAPITAL CONSERVATION AND COUNTERCYCLICAL CAPITAL BUFFERS**

##### *Article 122* *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 123;
- (2) 'Combined Buffer Requirement' means the total Common Equity Tier 1 capital required to meet the requirement for the Capital Conservation Buffer extended by an institution specific Countercyclical Capital Buffer if more than 0% of risk weighted assets;
- (3) '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 126, Article 127 or by a relevant third country authority (as the case may be);
- (4) 'Domestically authorised institution' means an institution that has been authorised in the Member State for which a particular designated authority is responsible;
- (5) 'Institution specific countercyclical capital buffer' means the own funds that an institution is required to maintain in accordance with Article 124;

##### *Article 123* *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 87 of Regulation [inserted by OP], a Capital Conservation Buffer of Common Equity



Tier 1 capital equivalent to 2.5% of their total risk exposure amount calculated in accordance with Article 87(3) of that Regulation on an individual and consolidated basis, as applicable in accordance with Part One, Title II of that Regulation.

2. Institutions shall not use Common Equity Tier 1 capital that is maintained to meet the requirement under paragraph 1 to meet any requirements imposed under Article 100.
3. Where an institution fails to meet fully the requirement under paragraph 1, it shall be subject to the restrictions on distributions set out in paragraphs 2 and 3 of Article 131.

#### *Article 124*

##### *Requirement to maintain an institution specific countercyclical capital buffer*

1. Member States shall require institutions to maintain an institution specific Countercyclical Capital Buffer calculated in accordance with Article 130.
2. 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 87 of Regulation [inserted by OP], the requirement to maintain a Capital Conservation Buffer under Article 123 and any requirement imposed under Article 100.
3. Where an institution fails to meet fully the requirement under paragraph 1, it shall be subject to the restrictions on distributions set out in paragraphs 2 and 3 of Article 131.

## **SECTION II**

### **SETTING AND CALCULATING COUNTERCYCLICAL CAPITAL BUFFERS**

#### *Article 125*

##### *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 126(1) on setting countercyclical buffer rates, including the following:
  - (a) principles to guide designated authorities when exercising their judgement as to the appropriate countercyclical buffer rate, ensure that authorities adopt a sound approach to relevant macro-economic cycles and promote sound and consistent decision-making;
  - (b) guidance on:
    - (i) the measurement and calculation of the deviation from long term trends of ratios of credit to GDP;

- (ii) the calculation of buffer guides required by Article 126(2);
  - (c) guidance on variables that indicate or might indicate the build-up of system-wide risk in a financial system, and on other relevant factors that should inform the decisions of designated authorities on the appropriate countercyclical buffer rate under Article 126;
  - (d) guidance on variables that indicate that the buffer should be reduced or fully released.
2. 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 126*  
*Setting countercyclical buffer rates*

1. Each Member State shall designate an authority (hereafter, 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 judgement in setting the countercyclical buffer rate in accordance with paragraph 3. The buffer guide shall be based on the deviation of the ratio of credit-to-GDP from its long-term trend, taking into account:
  - (a) the growth of levels of credit within that jurisdiction and, in particular, 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 125(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 125(1)(a), (c) and (d) and any recommendations issued by the ESRB under paragraph 9; and
  - (c) any other variables that the designated authority considers relevant.
4. The variables referred to in point (c) of paragraph 3 may include structural variables and the exposure of the banking sector to particular risk factors, or to any other factors related to risks to financial stability.

Where, in setting the countercyclical buffer rate, a designated authority takes into account variables mentioned in point (c), and the setting of that buffer rate would have been lower if variables mentioned in point (c) had not been taken into account, the designated authority shall notify EBA and the ESRB. EBA and the ESRB shall assess whether the variables on which the buffer rate is based relate to risks to

financial stability and whether the setting of a buffer rate taking into account those variables is consistent with the fundamental principles of the internal market for financial services as reflected in Union legislation in the field of financial services.

By way of derogation from paragraph 3, the designated authority shall review the part of the countercyclical buffer rate based on the other variables referred to in point (c) of paragraph 3 on an annual basis only. That part shall not be taken into account by institutions established in another Member State for the purposes of calculating their institution specific countercyclical capital buffer.

5. The countercyclical buffer rate, expressed as a percentage of the total risk exposure amount referred to in Article 87(3) of Regulation [inserted by OP] of institutions that have credit exposures in that Member State, must be between 0% and 2.5%, calibrated in steps of 0.25 percentage points or multiples of 0.25 percentage points. Where justified in view 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 referred to in Article 87(3) of Regulation [inserted by OP] for the purpose set out in Article 130(3).
6. When a designated authority sets the countercyclical buffer rate above zero for the first time, or when 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 may be no later than 12 months after the date when the increased buffer setting is announced in accordance with paragraph 8. If the date is less than 12 months after the increased buffer setting is announced, that shorter deadline for application shall be justified by exceptional circumstances.
7. 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.
8. 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, including by reference to any variables other than those covered by the buffer guide that the designated authority took into account in accordance with point (c) of paragraph 3 when setting the countercyclical 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 mentioned 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;
- (h) where the designated authority has taken into account variables mentioned in point (c) of paragraph 3, an indication of the amount of the buffer rate that relates to those variables.

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.

9. The ESRB may issue recommendations in accordance with Article 16 of Regulation (EU) No. 1092/2010 concerning the quarterly setting of the countercyclical buffer rate in a specific Member State or, where appropriate, in more than one Member State.

#### *Article 127*

#### *Recognition of countercyclical buffer rates in excess of 2.5%*

1. Where a designated authority, in accordance with Article 126(5), or a relevant third country authority has set a countercyclical buffer rate in excess of 2.5% of the total risk exposure amount referred to in Article 87(3) of Regulation [inserted by OP], 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.
2. Where a designated authority recognises a buffer rate in excess of 2.5% of the total risk exposure amount referred to in Article 87(3) of Regulation [inserted by OP] in accordance with paragraph 1, 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 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 mentioned 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 128*

#### *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 (hereinafter referred to as '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 129*

#### *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 mentioned in Article 128.
2. In the circumstances mentioned in point (a) of Article 128, 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 sub-paragraph, 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 risk exposure amount referred to in Article 87(3) of Regulation [inserted by OP] of institutions that have credit exposures in that third country.

4. Where a relevant third country authority sets a countercyclical buffer rate for a third pursuant to paragraph 2 or 3 which increases the existing applicable countercyclical buffer rate, it 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 must be justified by 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 mentioned 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 130*

#### *Calculation of Institution Specific Countercyclical Capital Buffer*

1. The institution specific Countercyclical Capital Buffer 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 129(2) or (3).

Member States shall require institutions, in order to calculate the weighted average referred to in the first sub-paragraph, to apply to each applicable countercyclical buffer rate its total own funds requirements for credit risk, determined in accordance with Part Three, Title II of Regulation [inserted by OP] 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 126(5), a designated authority sets a countercyclical buffer rate in excess of 2.5% of total risk exposure amount referred to in Article 87(3) of Regulation [inserted by OP], Member States shall ensure that the following buffer rates apply to relevant credit exposures located in the Member State of that designated authority (hereafter, '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;
  - (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 127(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 that buffer rate in accordance with Article 127.

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 referred to in Article 87(3) of Regulation [inserted by OP], 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 127(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 that buffer rate in accordance with Article 127.
4. Relevant credit exposures shall include all those exposure classes, other than those mentioned in points (a), (b), (d), (e) and (f) of Article 107 of Regulation [inserted by OP], 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 5b 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 6.
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 126(8)(e) or 127(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 129(2) or (3), or recognises the countercyclical buffer rate for a third country pursuant to Article 127, that buffer rate shall apply from the date specified in the information published in accordance with Article 129(5)(c) or Article 127 (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.

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.

Powers are 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.

EBA shall submit the draft regulatory standards to the Commission by 31 December 2014.

### **SECTION III**

#### **CAPITAL CONSERVATION MEASURES**

##### *Article 131*

##### *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 not 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.

Where the first sub-paragraph applies, Member State 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 mentioned in points (a) to (c) of paragraph 2.
4. Member States shall require institutions to calculate the MDA by multiplying the sum calculated in accordance with point (a) by the factor determined in accordance with point (b). The MDA shall be reduced by any of the actions referred to in points (a), (b) or (c) of paragraph 2.
- (a) The sum to be multiplied shall consist of:
    - (i) interim profits not included in Common Equity Tier 1 pursuant to Article 24(2) of Regulation [inserted by OP] that have been generated since the most recent decision on the distribution of profits or any of the actions referred to in points (a), (b) or (c) of paragraph 2;

plus

    - (ii) year-end profits not included in Common Equity Tier 1 pursuant to Article 24(4) of Regulation [inserted by OP] that have been generated since the most recent decision on the distribution of profits or any of the actions referred to in points (a), (b) or (c) of paragraph 2;

minus

    - (iii) amounts which would be payable by tax if the items specified in (i) and (ii) were to be retained.
  - (b) The factor shall be determined as follows:
    - (i) where the Common Equity Tier 1 capital maintained by the institution which is not used to meet the own funds requirement under Article 87(1)(c) of Regulation [inserted by OP], expressed as a percentage of the total risk exposure amount within the meaning of Article 87(3) of that Regulation, is within the first (that is, the lowest) quartile of the combined buffer requirement, the factor shall be 0;
    - (ii) where the Common Equity Tier 1 capital maintained by the institution which is not used to meet the own funds requirement under Article 87(1)(c) of Regulation [inserted by OP], expressed as a percentage of the total risk exposure amount within the meaning of Article 87(3) of that Regulation, is within the second quartile of the combined buffer requirement, the factor shall be 0.2;
    - (iii) where the Common Equity Tier 1 capital maintained by the institution which is not used to meet the own funds requirement under Article 87(1)(c) of Regulation [inserted by OP], expressed as a percentage of the total risk exposure amount within the meaning of Article 87(3) of that

Regulation, is within the third quartile of the combined buffer requirement, the factor shall be 0.4;

- (iv) where the Common Equity Tier 1 capital maintained by the institution which is not used to meet the own funds requirement under Article 87(1)(c) of Regulation [inserted by OP], expressed as a percentage of the total risk exposure amount within the meaning of Article 87(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:

$$\text{Lower bound of quartile} = \frac{2,5\% + ISCCB}{4} \times (Q_n - 1)$$

$$\text{Upper bound of quartile} = \frac{2,5\% + ISCCB}{4} \times Q_n$$

"ISCCB" means "Institution specific countercyclical capital buffer" and "Qn" indicates the ordinal number of the quartile concerned.

- 5. 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.
- 6. 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) to (c) 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) 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.
7. 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.
  8. 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 mentioned in Article 24(1)(a) of Regulation [inserted by OP];
    - (c) a redemption or purchase by an institution of its own shares or other capital instruments mentioned in Article 24(1)(a) of that Regulation;
    - (d) a repayment of amounts paid up in connection with capital instruments mentioned in Article 24(1)(a) of that Regulation;
    - (e) a distribution of items referred to in points (b) to (e) of Article 24(1) of that Regulation.

*Article 132*  
*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 5 working days after it identified that it was failing to meet that requirement.
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 the competent authority deems necessary to carry out the assessment required by paragraph 3.
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 measures:
  - (a) require the institution to increase own funds to specified levels within specified periods;
  - (b) exercise its powers under Article 99 to impose more stringent restrictions on distributions than those required by Article 131.

## **Title VIII**

### **Disclosure by competent authorities**

#### *Article 133*

##### *General requirements*

1. Competent authorities shall publish the following information:
  - (a) the texts of laws, regulations, administrative rules and general guidance adopted in their Member State in the field of prudential regulation;
  - (b) the manner of exercise of the options and discretions available in Union legislation;
  - (c) the general criteria and methodologies they use in the review and evaluation referred to in Article 92;
  - (d) without prejudice to the provisions laid down in Title VII, Chapter 1, Section II of this Directive and Articles 54 and 58 of Directive 2004/39/EC, aggregate statistical data on key aspects of the implementation of the prudential framework in each Member State, including the number and nature of supervisory measures taken in accordance with Article 99.
2. The information published according to paragraph 1 shall be sufficient to enable a meaningful comparison of the approaches adopted by the competent authorities of the different Member States. The disclosures shall be published following a common format, and updated regularly. The disclosures shall be accessible at a single electronic location.
3. EBA shall develop draft implementing technical standards to determine the format, structure, contents list and annual publication date of the information listed in paragraph 1.

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

#### *Article 134*

##### *Specific disclosure requirements*

1. For the purpose of Part Six of Regulation [inserted by OP], competent authorities shall publish the following information:

- (a) the general criteria and methodologies adopted to review the compliance with Article 394 of Regulation [inserted by OP];
  - (b) without prejudice to the provisions laid down in Title VII, Chapter 1, Section II, a summary description of the outcome of the supervisory review and description of the measures imposed in cases of non-compliance with Article 394 of Regulation [inserted by OP] identified on an annual basis.
2. The competent authority of the Member States exercising the discretion laid down in Article 6 (3) of Regulation [inserted by OP] shall publish all the following:
- (a) criteria it applies to determine that there is no current or foreseen material practical or legal impediment to the prompt transfer of own funds or repayment of liabilities;
  - (b) the number of parent institutions which benefit from the exercise of the discretion laid down in Article 6 (3) of Regulation [inserted by OP] and the number of these which incorporate subsidiaries in a third country;
  - (c) on an aggregate basis for the Member State:
    - (i) the total amount of own funds on the consolidated basis of the parent institution in a Member State, which benefits from the exercise of the discretion laid down in Article 6 (3) of that Regulation, which are held in subsidiaries in a third country;
    - (ii) the percentage of total own funds on the consolidated basis of parent institutions in a Member State which benefits from the exercise of the discretion laid down in Article 6 (3) of that Regulation, represented by own funds which are held in subsidiaries in a third country;
    - (iii) the percentage of total own funds required under Article 87 of Regulation [inserted by OP] on the consolidated basis of parent institutions in a Member State, which benefits from the exercise of the discretion laid down in Article 6 (3) of Regulation [inserted by OP], represented by own funds which are held in subsidiaries in a third country.
3. The competent authority which exercises the discretion laid down in Article 8 (1) of Regulation [inserted by OP] shall publish all the following:
- (a) the criteria it applies to determine that there is no current or foreseen material practical or legal impediment to the prompt transfer of own funds or repayment of liabilities;
  - (b) the number of parent institutions which benefit from the exercise of the discretion laid down in Article 8 (1) of Regulation [inserted by OP] and the number of these which incorporate subsidiaries in a third country;
  - (c) on an aggregate basis for the Member State

- (i) the total amount of own funds of parent institutions which benefit from the exercise of the discretion laid down in Article 8 (1) of Regulation [inserted by OP] which are held in subsidiaries in a third country;
- (ii) the percentage of total own funds of parent institutions which benefit from the exercise of the discretion laid down in Article 8 (1) of Regulation [inserted by OP] represented by own funds which are held in subsidiaries in a third country;
- (iii) the percentage of total own funds required under Article 87 of Regulation [inserted by OP] of parent institutions which benefit from the exercise of the discretion laid down in Article 8 (1) of that Regulation represented by own funds which are held in subsidiaries in a third country.

# **Title IX**

## **Delegated and implementing acts**

### *Article 135*

#### *Delegated Acts*

The Commission shall be empowered to adopt delegated acts in accordance with Article 138 concerning the following aspects:

- (a) clarification of the definitions referred to in Article 4 and Article 122 to ensure uniform application of this Directive;
- (b) clarification of the definitions referred to in Article 4 and Article 122 in order to take account, in the application of this Directive, of developments on financial markets;
- (c) the alignment of terminology on, and the framing of definitions referred to in Article 4 in accordance with subsequent acts on institutions and related matters;
- (d) expansion of the content of the list referred to in Articles 33 and 34 and set out in Annex I to this Directive or adaptation of the terminology used in that list to take account of developments on financial markets;
- (e) the areas in which the competent authorities shall exchange information as listed in Article 51;
- (f) adjustment of the provisions in Articles 75 to 86 and 94 in order to take account of developments on financial markets (in particular new financial products) or in accounting standards or requirements which take account of Union legislation, or with regard to the convergence of supervisory practices;
- (g) adjustments of the criteria set out in Article 23(1), in order to take account of future developments and to ensure the uniform application of this Directive.

### *Article 136*

#### *Implementing Acts*

The following measures shall be adopted as implementing acts in accordance with the examination procedure referred to in Article 137(2):

- (a) technical adjustments to the list in Article 2;
- (b) alteration of the amount of initial capital prescribed in Article 12 and Title IV to take account of developments in the economic and monetary field.



## *Article 137*

### *European Banking Committee*

1. For the adoption of implementing acts, the Commission shall be assisted by the European Banking Committee established by Commission Decision 2004/10/EC. That committee shall be a committee within the meaning of Article 3(2) of Regulation (EU) No 182/2011.
2. Where reference is made to this paragraph, Article 5 of Regulation (EU) No. 182/2011 shall apply.

## *Article 138*

### *Exercise of the delegation*

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.
2. The delegation of power referred to in Article 135 shall be conferred for an indeterminate period of time from the date referred to in Article 153.
3. The delegation of powers referred to in Article 135 may be revoked at any time by the European Parliament or by the Council. A decision of revocation shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the Official Journal of the European Union or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.
4. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.
5. A delegated act adopted pursuant to Article 135 shall enter into force only if no objection has been expressed either by the European Parliament or the Council within a period of 2 months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by 2 months at the initiative of the European Parliament or the Council.

## **Title X**

### **Amendments of Directive 2002/87/EC**

#### *Article 139*

##### *Amendment of Directive 2002/87/EC*

1. In Article 21a(2), point (a) is deleted.
2. After Article 21a(2a), the following paragraph is inserted:

"(3) In order to ensure consistent harmonisation of the calculation methods listed in Annex I part II in conjunction with Article 45 (2) of Regulation [inserted by OP] and Article 228(1) of Directive 2009/138/EC, but without prejudice to Article 6(4), EBA, EIOPA and ESMA shall, through the Joint Committee, develop draft regulatory technical standards with regard to Article 6(2).

ESA shall submit those draft regulatory technical standards to the Commission by 1 January 2013.

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

# **Title XI**

## **Transitional and final provisions**

### **Chapter 1**

#### **Transitional provisions on the supervision of credit institutions exercising the freedom of establishment and the freedom to provide services**

##### *Article 140*

###### *Scope*

1. The provisions in this chapter shall apply instead of Articles 40, 41, 43, 51 and 52 until 1 January 2015 and, where the Commission has adopted a delegated act in accordance with paragraph 2, for an additional period of up to 2 years.
2. In order to ensure that the phasing in of supervisory arrangements for liquidity is fully aligned with the development of uniform liquidity rules, the Commission shall be empowered to adopt delegated acts in accordance with Article 135 postponing the date referred to in paragraph 1 by up to 2 years, where uniform liquidity rules have not been introduced in the Union because international standards on liquidity supervision have not yet been agreed upon at the date referred to in the first subparagraph.

##### *Article 141*

###### *Reporting requirements*

Host Member States may, for statistical purposes, require that all credit institutions having branches within their territories shall report periodically on their activities in those host Member States to the competent authorities of those host Member States.

In discharging the responsibilities imposed on them in Article 145 of this Directive, host Member States may require that branches of credit institutions from other Member States provide the same information as they require from national credit institutions for that purpose.

## *Article 142*

### *Measures taken by the competent authorities of the home Member State in relation to activities carried out in the host Member State*

1. Where the competent authorities of a host Member State ascertain that a credit institution having a branch or providing services within its territory is not complying with the legal provisions adopted in that State pursuant to the provisions of this Directive involving powers of the host Member State's competent authorities, those authorities shall require the credit institution concerned to put an end to that irregular situation.
2. If the credit institution concerned fails to take the necessary steps, the competent authorities of the host Member State shall inform the competent authorities of the home Member State accordingly.
3. The competent authorities of the home Member State shall, at the earliest opportunity, take all appropriate measures to ensure that the credit institution concerned puts an end to that irregular situation. The nature of those measures shall be communicated to the competent authorities of the host Member State.
4. If, despite the measures taken by the home Member State or because such measures prove inadequate or are not available in the Member State in question, the credit institution persists in violating the legal rules referred to in paragraph 1 in force in the host Member State, the latter State may, after informing the competent authorities of the home Member State, take appropriate measures to prevent or to punish further irregularities and, in so far as is necessary, to prevent that credit institution from initiating further transactions within its territory. The Member States shall ensure that within their territories it is possible to serve the legal documents necessary for these measures on credit institutions.

## *Article 143*

### *Precautionary measures*

Before following the procedure provided for in Article 142, the competent authorities of the host Member State may, in emergencies, take any precautionary measures necessary to protect the interests of depositors, investors and others to whom services are provided. The Commission and the competent authorities of the other Member States concerned shall be informed of such measures at the earliest opportunity.

The Commission may, after consulting the competent authorities of the Member States concerned, decide that the Member State in question shall amend or abolish those measures.

## *Article 144*

### *Responsibility*

1. The prudential supervision of a credit institution, including that of the activities it carries on accordance with Articles 33 and 34, shall be the responsibility of the

competent authorities of the home Member State, without prejudice to those provisions of this Directive which give responsibility to the competent authorities of the host Member State.

2. Paragraph 1 shall not prevent supervision on a consolidated basis pursuant to this Directive.
3. The competent authorities in one Member State shall, in the exercise of their general duties, duly consider the potential impact of their decisions on the stability of the financial system in all other Member States concerned and, in particular, in emergency situations, based on the information available at the relevant time.

#### *Article 145*

##### *Liquidity supervision*

Host Member States shall, pending further coordination, retain responsibility in cooperation with the competent authorities of the home Member State for the supervision of the liquidity of the branches of credit institutions.

Without prejudice to the measures necessary for the reinforcement of the European Monetary System, host Member States shall retain complete responsibility for the measures resulting from the implementation of their monetary policies.

Such measures may not provide for discriminatory or restrictive treatment based on the fact that a credit institution is authorised in another Member State.

#### *Article 146*

##### *Collaboration concerning supervision*

The competent authorities of the Member States concerned shall collaborate closely in order to supervise the activities of credit institutions operating, in particular through a branch, in one or more Member States other than that in which their head offices are situated. They shall supply one another with all information concerning the management and ownership of such credit institutions that is likely to facilitate their supervision and the examination of the conditions for their authorisation, and all information likely to facilitate the monitoring of such institutions, in particular with regard to liquidity, solvency, deposit guarantees, the limiting of large exposures, administrative and accounting procedures and internal control mechanisms.

#### *Article 147*

##### *Significant branches*

1. The competent authorities of a host Member State may make a request to the consolidating supervisor where Article 107(1) applies or to the competent authorities of the home Member State, for a branch of a credit institution to be considered as significant.

2. That request shall provide reasons for considering the branch to be significant with particular regard to the following:
  - (a) whether the market share of the branch of a credit institution in terms of deposit exceeds 2 % in the host Member State;
  - (b) the likely impact of a suspension or closure of the operations of the credit institution on market liquidity and the payment and clearing and settlement systems in the host Member State;
  - (c) the size and the importance of the branch in terms of number of clients within the context of the banking or financial system of the host Member State.

The competent authorities of the home and host Member States, and the consolidating supervisor where Article 107(1) applies, shall do everything within their power to reach a joint decision on the designation of a branch as being significant.

If no joint decision is reached within two months of receipt of a request under the first subparagraph, the competent authorities of the host Member State shall take their own decision within a further period of two months on whether the branch is significant. In taking their decision, the competent authorities of the host Member State shall take into account any views and reservations of the consolidating supervisor or the competent authorities of the home Member State.

The decisions referred to in the third and fourth subparagraph shall be set out in a document containing the fully reasoned decision and transmitted to the competent authorities concerned, and shall be recognised as determinative and applied by the competent authorities in the Member States concerned.

The designation of a branch as being significant shall not affect the rights and responsibilities of the competent authorities under this Directive.

3. The competent authorities of the home Member State shall communicate to the competent authorities of a host Member State where a significant branch is established the information referred to in Article 112(1)(c) and (d) and carry out the tasks referred to in Article 107(1)(c) in cooperation with the competent authorities of the host Member State.
4. If a competent authority of a home Member State becomes aware of an emergency situation within a credit institution as referred to in Article 109(1), it shall alert as soon as practicable the authorities referred to in the fourth paragraph of Article 59 and in Article 60.
5. Where Article 111 does not apply, the competent authorities supervising a credit institution with significant branches in other Member States shall establish and chair a college of supervisors to facilitate the cooperation under paragraph 2 of this Article and Article 61. The establishment and functioning of the college shall be based on written arrangements determined, after consultation with competent authorities concerned, by the competent authority of the home Member State. The competent authority of the home Member State shall decide which competent authorities participate in a meeting or in an activity of the college.

6. The decision of the competent authority of the home Member State shall take account of the relevance of the supervisory activity to be planned or coordinated for those authorities, in particular the potential impact on the stability of the financial system in the Member States concerned referred to in Article 144(3) and the obligations referred to in paragraph 2 of this Article.
7. The competent authority of the home Member State shall keep all members of the college fully informed, in advance, of the organisation of such meetings, the main issues to be discussed and the activities to be considered. The competent authority of the home Member State shall also keep all the members of the college fully informed, in a timely manner, of the actions taken in those meetings or the measures carried out.

#### *Article 148*

##### *On-the-spot verifications*

1. Host Member States shall provide that, where a credit institution authorised in another Member State carries on its activities through a branch, the competent authorities of the home Member State may, after having first informed the competent authorities of the host Member State, carry out themselves or through the intermediary of persons they appoint for that purpose on-the-spot verification of the information referred to in Article 52.
2. The competent authorities of the home Member State may also, for purposes of the verification of branches, have recourse to one of the other procedures laid down in Article 113.
3. Paragraphs 1 and 2 shall not affect the right of the competent authorities of the host Member State to carry out, in the discharge of their responsibilities under this Directive, on-the-spot verifications of branches established within their territory.

## **Chapter 2**

### **Transitional provision on capital buffers**

#### *Article 149*

##### *Transitional provisions for capital buffer*

1. This Article modifies the requirements of Articles 122 and 123 for a transitional period between 1 January 2016 and 31 December 2018.
2. For the period from 1 January 2016 until 31 December 2016:
  - (a) the Capital Conservation Buffer shall consist of common equity Tier 1 equivalent to 0.625% of the total of the risk-weighted exposure amounts of the institution calculated in accordance with Article 87 (3) of Regulation [inserted by OP];

- (b) the institution specific Countercyclical Capital Buffer shall be no more than 0.625% of that total, with the result that the combined buffer requirement shall be between 0.625% and 1.25% of the total of the risk-weighted exposure amounts of the institutions.
- 3. For the period from 1 January 2017 until 31 December 2017:
  - (a) the Capital Conservation Buffer shall consist of common equity Tier 1 equivalent to 1.25% of the total of the risk-weighted exposure amounts of the institution calculated in accordance with Article 87 (3) of Regulation [inserted by OP];
  - (b) the institution specific Countercyclical Capital Buffer shall be no more than 1.25% of that total, with the result that the combined buffer requirement shall be between 1.25% and 2.50% of the total of the risk-weighted exposure amounts of the institutions.
- 4. For the period from 1 January 2018 until 31 December 2018:
  - (c) the Capital Conservation Buffer shall consist of common equity Tier 1 equivalent to 1.875% of the total of the risk-weighted exposure amounts of the institution calculated in accordance with Article 87 (3) of Regulation [inserted by OP];
  - (d) the institution specific Countercyclical Capital Buffer shall be no more than 1.875% of that total with the result that the combined buffer requirement shall be between 1.875% and 3.750% of the total of the risk-weighted exposure amounts of the institutions.
- 5. The requirement for a capital conservation plan and the restrictions on distributions referred to in Article 131 and Article 132 shall apply during the transitional period between 1 January 2016 and 31 December 2018 where institutions fail to meet the modified requirements set out in paragraphs 2 to 4.
- 6. Member States may impose a shorter transitional period than that specified in paragraph 1 where that is justified by excessive credit growth at any time during that period. Where a Member States does so, the shorter period shall apply only for the purposes of the calculation of the institution specific Countercyclical Capital Buffer by institutions that are authorised in the Member State for which the designated authority is responsible.



## Chapter 3

### Final provisions

#### *Article 150*

##### *Review*

1. By 1 April 2013 the Commission shall review and report on the provisions on remuneration in this Directive and Regulation [inserted by OP], with particular regard to their efficiency, implementation and enforcement, taking into account international developments. That review shall identify any lacunae arising from the application of the principle of proportionality to those provisions. The Commission shall submit its report to the European Parliament and the Council, and, if appropriate, a legislative proposal.

The Commission's periodic review of the application of this Directive shall ensure that the way it is applied does not result in manifest discrimination between institutions on the basis of their legal structure or ownership model.

2. From 2014 onwards, EBA shall, in cooperation with EIOPA and ESMA, biannually publish a report about the extent legislation of Member States refers to external ratings and about steps taken by Member States to reduce such references. This report shall also outline how competent authorities meet their obligations set out in in Article 76(1) and (2) and in Article 77(1)(b). This report shall also outline the degree of supervisory convergence in this regard.
3. By 31 December 2013, the Commission shall review and report on the application of Articles 103 and 104 and shall submit this report to the European Parliament and the Council, and if appropriate, a legislative proposal.
4. By 31 December 2016, the Commission shall review and report on the results achieved under Article 87(4), including the appropriateness of benchmarking diversity practices, and, shall submit this report to the European Parliament and the Council, and, if appropriate, a legislative proposal.

#### *Article 151*

##### *Transposition*

1. By 31 December 2012 Member States shall adopt and publish the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.

Member states shall apply those provisions from 1 January 2013.

2. By way of derogation from paragraph 1, Title VII, Chapter 4 shall apply from 1 January 2016.
3. When Member States adopt the provisions referred to in paragraphs 1 and 2, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. They shall also include a statement that references in existing laws, regulations and administrative provisions to the Directives repealed by this Directive shall be construed as references to this Directive. Member States shall determine how such reference is to be made and how that statement is to be formulated.
4. Member States shall communicate to the Commission and to EBA the text of the main provisions of national law which they adopt in the field covered by this Directive.

#### *Article 152*

##### *Repeal*

Directives 2006/48/EC and 2006/49/EC together with their successive amendments, are repealed with effect from 1 January 2013.

References to the repealed Directives shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex II.

#### *Article 153*

##### *Entry into force*

This Directive shall enter into force on the 20th day following that of its publication in the Official Journal of the European Union.

#### *Article 154*

##### *Addressee*

This Directive is addressed to Member States.

## Annex I

### List of activities subject to mutual recognition

1. Acceptance of deposits and other repayable funds.
2. Lending including, inter alia: consumer credit, credit agreements relating to immovable property, factoring, with or without recourse, financing of commercial transactions (including forfeiting).
3. Financial leasing.
4. Payment services as defined in Article 4(3) of Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market<sup>42</sup>.
5. Issuing and administering other means of payment (e.g. travellers' cheques and bankers' drafts) insofar as this activity is not covered by point 4.
6. Guarantees and commitments.
7. Trading for own account or for account of customers in any of the following:
  - (a) money market instruments (cheques, bills, certificates of deposit, etc.);
  - (b) foreign exchange;
  - (c) financial futures and options;
  - (d) exchange and interest-rate instruments;
  - (e) transferable securities.
8. Participation in securities issues and the provision of services related to such issues.
9. Advice to undertakings on capital structure, industrial strategy and related questions and advice as well as services relating to mergers and the purchase of undertakings.
10. Money broking.
11. Portfolio management and advice.
12. Safekeeping and administration of securities.
13. Credit reference services.
14. Safe custody services.
15. Issuing electronic money.

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<sup>42</sup> OJ L 319, 5.12.2007, p. 1

The services and activities provided for in Sections A and B of Annex I to Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments<sup>43</sup>, when referring to the financial instruments provided for in Section C of Annex I of that Directive, are subject to mutual recognition according to this Directive.

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<sup>43</sup> OJ L 145, 30.4.2004, p. 1.

## Annex II

### Correlation Table

<b>This Directive</b>	<b>Directive 2006/48/EC</b>	<b>Directive 2006/49/EC</b>
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Article 3	Article 5	
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Article 4(2)(c)		
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Article 8	Article 40(3)	
Article 9(1)	Article 6(1)	
Article 9(2)	Article 6(2)	
Article 9(3)	Article 6(3) 1. subparagraph	
Article 9(4)	Article 6(3) 2. subparagraph	
Article 10	Article 7	
Article 11	Article 8	
Article 12(1)	Article 9(1) 1. subparagraph	

Article 12(2)	Article 9(1) 2. subparagraph	
Article 12(3)	Article 9(1) 3. subparagraph	
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Article 22(7)	Article 19(7)	
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Article 23(2)	Article 19a(2)	
Article 23(3)	Article 19a(3)	
Article 23(4)	Article 19a(4)	
Article 23(5)	Article 19a(5)	
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Article 24(2)	Article 19b(2)	
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Article 26(2)	Article 21(2)	
Article 27	Article 21(3)	
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Article 29(3)		Article 5(3)
Article 29(4)		Article 5(2)
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Article 32(1)		Article 10(1)
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Article 150(2)		
Article 151(1)	Article 157(1)	
Article 151(2)		
Article 151(3)	Article 157(2)	
Article 151(4)	Article 157(2)	
Article 152	Article 158	
Article 153	Article 159	
Article 154	Article 160	
Annex I	Annex I	