Directive (EU) 2019/878 of the European Parliament and of the Council of 20 May 2019 amending Directive 2013/36/EU as regards exempted entities, financial holding companies, mixed financial holding companies, remuneration, supervisory measures and powers and capital conservation measures (Text with EEA relevance)

DIRECTIVE (EU) 2019/878 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

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(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[(1)],

Having regard to the opinion of the European Economic and Social Committee[(2)],

Acting in accordance with the ordinary legislative procedure[(3)],

Whereas:

(1) Directive 2013/36/EU of the European Parliament and of the Council[(4)] and Regulation (EU) No 575/2013 of the European Parliament and of the Council[(5)] were adopted in response to the financial crises that unfolded in 2007-2008. Those legislative measures have substantially contributed to strengthening the financial system in the Union and rendered institutions more resilient to possible future shocks. Although extremely comprehensive, those measures did not address all identified weaknesses affecting institutions. In addition, some of the initially proposed measures were subject to review clauses or were not sufficiently detailed to allow for their smooth implementation.

(2) This Directive aims to address issues raised in relation to the provisions of Directive 2013/36/EU that proved not to be sufficiently clear and have therefore been subject to divergent interpretations or that have been found to be overly burdensome for certain institutions. It also contains adjustments to Directive 2013/36/EU that are necessary following either the adoption of other relevant Union legal acts, such as Directive 2014/59/EU of the European Parliament and of the Council[(6)] or the changes proposed in parallel to Regulation (EU) No 575/2013. Finally, the amendments proposed better align

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the current regulatory framework to international developments in order to promote consistency and comparability among jurisdictions.

(3) Financial holding companies and mixed financial holding companies can be parent undertakings of banking groups and the application of prudential requirements is required on the basis of the consolidated situation of such holding companies. As the institution controlled by such holding companies is not always able to ensure compliance with the requirements on a consolidated basis throughout the group, it is necessary that certain financial holding companies and mixed financial holding companies be brought under the direct scope of supervisory powers pursuant to Directive 2013/36/EU and Regulation (EU) No 575/2013 to ensure compliance on a consolidated basis. Therefore, a specific approval procedure and direct supervisory powers over certain financial holding companies and mixed financial holding companies should be provided for in order to ensure that such holding companies can be held directly responsible for ensuring compliance with consolidated prudential requirements, without subjecting them to additional prudential requirements on an individual basis.

(4) The approval and supervision of certain financial holding companies and mixed financial holding companies should not prevent groups from deciding on the specific internal arrangements and distribution of tasks within the group as they see fit to ensure compliance with consolidated requirements, and should not prevent direct supervisory action on those institutions within the group that are engaged in ensuring compliance with prudential requirements on a consolidated basis.

(5) Under specific circumstances, a financial holding company or mixed financial holding company that was set up for the purpose of holding participations in undertakings might be exempted from approval. Although it is recognised that an exempted financial holding company or mixed financial holding company might take decisions in the ordinary course of its business, it should not take management, operational or financial decisions affecting the group or those subsidiaries in the group that are institutions or financial institutions. When assessing compliance with that requirement, the competent authorities should take into account the relevant requirements under corporate law to which the financial holding company or mixed financial holding company is subject.

(6) The consolidating supervisor is entrusted with the main responsibilities as regards supervision on a consolidated basis. Therefore, it is necessary that the consolidating supervisor be appropriately involved in the approval and supervision of financial holding companies and mixed financial holding companies. Where the consolidating supervisor differs from the competent authority in the Member State where the financial holding company or the mixed financial holding company is established, approval should be granted through a joint decision of those two authorities. The European Central Bank, when performing its task to carry out supervision on a consolidated basis over credit institutions' parents pursuant to Council Regulation (EU) No 1024/2013[(7)], should also exercise its duties in relation to the approval and supervision of financial holding companies and mixed financial holding companies.

(7) The Commission's report of 28 July 2016 on the assessment of the remuneration rules under Directive 2013/36/EU and Regulation (EU) No 575/2013 (the 'Commission's report of 28 July 2016') revealed that, when applied to small institutions, some of the principles set out in Directive 2013/36/EU, namely the requirements on deferral and pay-out in instruments, are too burdensome and not commensurate with their prudential benefits. Similarly, it found that the cost of applying those requirements exceeds their prudential benefits in the case of staff with low levels of variable remuneration, since such levels of variable remuneration produce little or no incentive for staff to take excessive risk. Consequently, while all institutions should in general be required to apply all the principles to all of their staff whose professional activities have a material impact on the institution's risk profile, it is necessary to exempt small institutions and staff with low levels of variable remuneration from the principles on deferral and pay-out in instruments set out in Directive 2013/36/EU.

(8) Clear, consistent and harmonised criteria for identifying those small institutions as well as low levels of variable remuneration are necessary to ensure supervisory convergence and to foster a level playing field for institutions and the adequate protection of depositors, investors and consumers across the Union. At the same time, it is appropriate to offer some flexibility for Member States to adopt a stricter approach where they consider it necessary.

(9) The principle of equal pay for male and female workers for equal work or work of equal value is laid down in Article 157 of the Treaty on the Functioning of the European Union (TFEU). That principle needs to be applied in a consistent manner by institutions. Therefore, they should operate a gender neutral remuneration policy.

(10) The purpose of the remuneration requirements is to promote sound and effective risk management of institutions by aligning the long-term interests of both institutions and their staff whose professional activities have a material impact on the institution's risk profile (material risk takers). At the same time, subsidiaries which are not institutions, and therefore not subject to Directive 2013/36/EU on an individual basis, might be subject to other remuneration requirements pursuant to the relevant sector-specific legal acts which should prevail. Therefore, as a rule, remuneration requirements set out in this Directive should not apply on a consolidated basis to such subsidiaries. However, to prevent possible arbitrage, the remuneration requirements set out in this Directive should apply on a consolidated basis to staff that are employed in subsidiaries that provide specific services, such as asset management, portfolio management or execution of orders, whereby such staff is mandated, regardless of the form such mandate might take, to perform professional activities which qualify them as material risk takers at the level of the banking group. Such mandates should include delegation or outsourcing arrangements concluded between the subsidiary employing the staff and another institution in the same group. Member States should not be prevented from applying the remuneration requirements set out in this Directive on a consolidated basis to a broader set of subsidiary undertakings and their staff.

(11) Directive 2013/36/EU requires that a substantial portion, and in any event at least 50 %, of any variable remuneration, consist of a balance of shares or equivalent ownership

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interests, subject to the legal structure of the institution concerned, or share-linked instruments or equivalent non-cash instruments, in the case of a non-listed institution; and, where possible, of alternative Tier 1 or Tier 2 instruments which meet certain conditions. That principle limits the use of share-linked instruments to non-listed institutions and requires listed institutions to use shares. The Commission's report of 28 July 2016 found that the use of shares can lead to considerable administrative burdens and costs for listed institutions. At the same time, equivalent prudential benefits can be achieved by allowing listed institutions to use share-linked instruments that track the value of shares. The possibility of using share-linked instruments should therefore be extended to listed institutions.

(12) The supervisory review and evaluation should take into account the size, the structure and the internal organisation of institutions and the nature, scope and complexity of their activities. Where different institutions have similar risk profiles, for instance because they have similar business models or geographical location of exposures or they are affiliated to the same institutional protection scheme, competent authorities should be able to tailor the methodology for the review and evaluation process to capture the common characteristics and risks of institutions with such same risk profile. Such tailoring should, however, neither prevent competent authorities from duly taking into account the specific risks affecting each institution nor alter the institution-specific nature of the measures imposed.

(13) The additional own funds requirement imposed by competent authorities is an important driver of an institution's overall level of own funds and is relevant for market participants since the level of additional own funds requirement imposed impacts the trigger point for restrictions on dividend payments, bonus pay-outs and the payments on Additional Tier 1 instruments. A clear definition of the conditions under which the additional own funds requirement is to be imposed should be provided to ensure that rules are consistently applied across Member States and to ensure the proper functioning of the internal market.

(14) The additional own funds requirement to be imposed by competent authorities should be set in relation to the specific situation of an institution and should be duly justified. Additional own funds requirements can be imposed to address risks or elements of risk explicitly excluded or not explicitly covered by the own funds requirements laid down in Regulation (EU) No 575/2013 only to the extent that this is considered necessary in light of the specific situation of an institution. Those requirements should be positioned in the relevant stacking order of own funds requirements above the relevant minimum own funds requirements and below the combined buffer requirement or the leverage ratio buffer requirement, as relevant. The institution-specific nature of additional own funds requirements should prevent their use as a tool to address macroprudential or systemic risks. However, that should not preclude competent authorities from addressing, including by means of additional own funds requirements, the risks incurred by individual institutions due to their activities, including those reflecting the impact of certain economic and market developments on the risk profile of an individual institution.

(15) The leverage ratio requirement is a parallel requirement to the risk-based own funds requirements. Therefore, any additional own funds requirements imposed by competent authorities to address the risk of excessive leverage should be added to the minimum leverage ratio requirement and not to the minimum risk-based own funds requirement. Furthermore, institutions should also be able to use any Common Equity Tier 1 capital that they use to meet their leverage-related requirements to meet their risk-based own funds requirements, including the combined buffer requirement.

(16) It should be possible for competent authorities to communicate to an institution in the form of guidance any adjustment to the amount of capital in excess of the relevant minimum own funds requirements, the relevant additional own funds requirement and, as relevant, the combined buffer requirement or the leverage ratio buffer requirement that they expect such an institution to hold in order to deal with forward looking stress scenarios. Since such guidance constitutes a capital target, it should be regarded as positioned above the relevant minimum own funds requirements, the relevant additional own funds requirement and the combined buffer requirement or leverage buffer requirement, as relevant. The failure to meet such a target should not trigger the restrictions on distributions provided for in Directive 2013/36/EU. Given that the guidance on additional own funds reflects supervisory expectations, Directive 2013/36/EU and Regulation (EU) No 575/2013 should neither set out mandatory disclosure obligations for the guidance nor prohibit competent authorities from requesting disclosure of the guidance. Where an institution repeatedly fails to meet the capital target, the competent authority should be entitled to take supervisory measures and, where appropriate, to impose additional own funds requirements.

(17) The provisions of Directive 2013/36/EU on interest rate risk arising from non-trading book activities are linked to the relevant provisions of Regulation (EU) No 575/2013 which require a longer implementation period for institutions. In order to align the application of provisions on interest rate risk arising from non-trading book activities, the provisions necessary to comply with the relevant provisions of this Directive should apply from the same date as the relevant provisions of Regulation (EU) No 575/2013.

(18) In order to harmonise the calculation of the interest rate risk arising from non-trading book activities when the institutions' internal systems for measuring that risk are not satisfactory, the Commission should be empowered to adopt regulatory technical standards developed by the European Supervisory Authority (European Banking Authority) (EBA), established by Regulation (EU) No 1093/2010 of the European Parliament and of the Council[8] in respect of developing a standardised methodology for the purpose of evaluating such risk. The Commission should adopt those regulatory technical standards by means of delegated acts pursuant to Article 290 TFEU and in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010.

(19) In order to improve the competent authorities' identification of those institutions which might be subject to excessive losses in their non-trading book activities as a result of potential changes in interest rates, the Commission should be empowered to adopt regulatory technical standards developed by EBA. Those regulatory technical standards should specify: the six supervisory shock scenarios that all institutions have