

Question ID	2021_5801
Status	Final Q&A
Legal act	Directive 2013/36/EU (CRD)
Topic	Other issues
Article	133
Paragraph	10,11,12
Subparagraph	-
COM Delegated or Implementing Acts/RTS/ITS/GLs/Recommendations	Not applicable
Article/Paragraph	Not applicable
Date of submission	05/04/2021
Published as Final Q&A	18/03/2022
Disclose name of institution / entity	Yes
Name of institution / submitter	Banco de España
Country of incorporation / residence	Spain
Type of submitter	Competent authority
Subject matter	Application of the provisions described in paragraphs 10 to 12 of Article 133 (systemic risk buffer, SyRB)
Question	How do the provisions described in paragraphs 10 to 12 of Article 133 of Directive 2013/36/EU (CRD) apply when a Member State (MS) sets a domestic systemic risk buffer (SyRB) rate on all or some of the relevant exposures of that MS and, additionally, wants to recognize a SyRB rate activated by another MS, which applies to the same exposures (or some of them)?
Background on the question	Paragraphs 10 to 12 of Article 133 define different procedures that a Member State has to follow when it decides to set or reset a SyRB rate or rates on any set or subset of exposures, depending on the level of the resulting combined SyRB rate for any of those exposures. Briefly, if the combined SyRB rate for any of those exposures is not higher than 3%, the relevant authority has to notify the ESRB (Article (133(10) CRD); if it falls

between 3% and 5%, the relevant authority has to request an opinion from the Commission (Article 133(11) CRD); and finally, if it is above 5%, the relevant authority has to seek the Commission's authorisation (Article 133(12) CRD). Only Article 133(10) states that, for the purposes of the application of that specific paragraph, the recognition of a SyRB rate set by another MS shall not count towards the threshold (3%). This statement is not included in paragraphs 11 and 12, which can lead to doubts about how to apply these provisions. In our opinion, there could be cases where more than one of paragraphs 10 to 12 could be deemed to apply simultaneously. For instance, it is unclear whether it is necessary to ask for the Commission's opinion if a MS has set a domestic SyRB rate of 2,5% on a set of exposures and, additionally, it wants to recognise a 1% SyRB rate activated by another MS which applies to the same exposures (or some of them) or whether it is necessary to request the Commission's authorisation when, for example, a MS has set a 2,5% SyRB rate on a set of exposures and wants to recognise a 3% SyRB rate set by another MS which applies to the same exposures (or some of them).

- Article 133(10) applies, as the combined SRB rate is lower than 3%, and the recognition of the SyRB rate set by another MS shall not count towards the 3% threshold. Therefore, it could be argued that only a notification to the ESRB is required.
- Article 133(11) could also apply, as the combined SRB rate, if the other MS's SyRB rate is recognised, would rise to 3,5%. As Article 133(11) does not stipulate that the recognition of the SyRB rate set by another MS should not be taken into account for the purposes of the threshold, in our view an opinion from the Commission should therefore also be required. The same situation could arise when a domestic SyRB rate of 2,5% is set on certain exposures, which is increased to above 5% on some of those exposures due to recognition of a SyRB rate set by another Member State. In this case, paragraphs 10 and 12 of Article 133 could apply simultaneously. Our understanding is that only Article 133(10) should be applied in the two cases described, and that the level of the domestically-initiated combined SyRB rate is the first question to consider in order to decide which of the provisions described in Article 133, paragraphs 10 to 12 must be applied.

Final answer

A domestically-initiated systemic risk buffer (SyRB) can be used to target different sets or subsets of exposures (as listed in Article 133(5) CRD) or combinations thereof.

Article 133(10)-(12) CRD clarify that the relevant rate for meeting the thresholds is the 'combined' SyRB rate to which any given set or subset of exposures is subject.

The second subparagraph of Article 133(10) CRD allows for the recognition of any SyRB rate set by another Member State without requiring an opinion, recommendation or authorisation as long as the domestically-initiated combined SyRB rate does not exceed 3% for the exposures subject to reciprocation. This is the case irrespective of the level of the foreign SyRB

rate, as the foreign-initiated SyRB rate must be disregarded for the purposes of calculating whether the 'combined' SyRB rate exceeds 3%.

This also holds true if the reciprocating Member State has a domestically-initiated combined SyRB rate higher than 3% on another set or subset of exposures, as long as the domestically-initiated combined systemic risk buffer rate on the exposures subject to reciprocation is not higher than 3%.

If the set or subset of exposures subject to reciprocation are already subject to a domestically-initiated combined SyRB rate above 3%, the procedures specified in Article 133(11)-(12) CRD apply.

If a domestically-initiated combined SyRB rate higher than 3% applies to the exposures subject to reciprocation, and this is increased to up to 5% due to the recognition of a SyRB rate set by another Member State, the authority recognising the measure needs, in accordance with Article 133(11) CRD, to request either an opinion from the Commission or - if an institution to which the SyRB rate applies is a subsidiary of a parent established in another Member State - a recommendation by the Commission and the ESRB.

If a domestically-initiated combined SyRB rate higher than 3% (or higher than 5%) applies to the exposures subject to reciprocation, and this is increased to above 5% due to the recognition of a SyRB rate set by another Member State, the authority recognising the measure needs, in accordance with Article 133(12) CRD, to seek the authorisation of the Commission before reciprocating the SyRB rate.

Disclaimer:

The answers clarify provisions already contained in the applicable legislation. They do not extend in any way the rights and obligations deriving from such legislation nor do they introduce any additional requirements for the concerned operators and competent authorities. The answers are merely intended to assist natural or legal persons, including competent authorities and Union institutions and bodies in clarifying the application or implementation of the relevant legal provisions. Only the Court of Justice of the European Union is competent to authoritatively interpret Union law. The views expressed in the internal Commission Decision cannot prejudge the position that the European Commission might take before the Union and national courts.

Link

https://www.eba.europa.eu/single-rule-book-qa/qna/view/publicId/2021_5801