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Opinion of the European Banking Authority on the interaction of Pillar 1, Pillar 2 and combined buffer requirements and restrictions on distributions

Introduction and legal basis

1. The European Banking Authority's (EBA's) competence to deliver an opinion is based on Articles 29(1)(a) and 34(1) of Regulation (EU) No 1093/2010,[1] as the consistent application of capital requirements, the combined buffer requirement, and the capital conservation measures relate to the EBA's area of competence.

2. In accordance with Article 14(5) on the Rules of Procedure of the Board of Supervisors,[2] the Board of Supervisors has adopted this Opinion.

3. This Opinion is addressed to competent authorities as defined in point (40) of Article 4(1) of Regulation (EU) No 575/2013[3] (Capital Requirements Regulation CRR), including the European Central Bank with regard to matters relating to the tasks conferred on it by Regulation (EU) No 1024/2013,[4] and to the Commission.

[1] Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ L 331, 15.12.2010, p. 1).

[2] Decision adopting the Rules of Procedure of the EBA Board of Supervisors of 27 November 2014 (EBA/DC/2011/01 Rev4).

[3] Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on the prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p. 1).

[4] Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ L 287, 29.10.2013, p. 63).

The background

Pillar 1, Pillar 2 and the combined buffer requirements

4. Part Two of the CRR establishes the own funds requirements (Pillar 1 capital requirements) with which institutions are required to comply.

5. In accordance with Article 104(1)(a) of Directive 2013/36/EU5 (Capital Requirements Directive CRD), Member States must ensure that competent authorities are empowered, *inter alia*, to require institutions to hold additional own funds requirements (Pillar 2 capital requirements).

6. In addition to having this general power to impose Pillar 2 capital requirements, the CRD specifies a number of circumstances in which competent authorities must impose them. In accordance with Article 104(2)(b) of the CRD, those circumstances include where risks or elements of risks are not covered by Pillar 1 capital requirements or by the combined buffer requirement in the CRD.

7. In parallel with the quantitative calculation of the Pillar 1 capital requirements and the combined buffer requirements, competent authorities carry out their Supervisory Review and Evaluation Process (SREP) to assess:

    a. the appropriate institution-specific level of own funds on an individual and consolidated basis in accordance with Chapter 2, Title VII of the CRD; and

    b. the consequent need to impose additional Pillar 2 capital requirements as discussed above.

8. The EBA SREP Guidelines[6], issued on the basis of Article 107(3) of the CRD and 16 of the EBA Regulation, provide clear guidance on how the SREP should be conducted, how the adequacy of capital should be assessed, how risks (or elements of risks) that are not covered by own funds requirements should be identified, and how the need for Pillar 2 capital requirements should be assessed. All competent authorities responsible for supervising institutions under the CRD and the CRR have informed the EBA that they comply or intend to comply with the SREP Guidelines.

9. Where the SREP for an institution identifies risks or elements of risk that are not covered by the Pillar 1 capital requirements or the combined buffer requirement, competent authorities shall determine the appropriate level of the institution's own funds in accordance with Article

[5] Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338).

[6] EBA/GL/2014/13 available at: https://www.eba.europa.eu/documents/10180/935249/EBA-GL-2014-13+(Guidelines+on+SREP+methodologies+and+processes).pdf

104(3) of the CRD and assess whether additional own funds shall be imposed in accordance with Article 104(1)(a) and (2)(b) of the CRD.

10. Further, in accordance with the following provisions, relevant authorities must, or may, take measures where the institution fails to maintain its ongoing capital requirements:

    a. Article 102 of the CRD requires competent authorities to take the necessary measures at an early stage to address relevant problems when the institution does not meet the requirements of the CRD or the CRR, including own funds requirements and combined buffer requirements, and when there is evidence that the institution is likely to breach those requirements within the following 12 months;

    b. Article 18(d) of the CRD provides that authorisation may be withdrawn when an institution no longer meets its Pillar 1 or Pillar 2 capital requirements;

    c. Article 27 of Directive 2014/59/EC[7] (Bank Recovery and Resolution Directive - BRRD) establishes early intervention powers that must be available to competent authorities when an institution infringes or is likely in the near future to infringe the CRD or CRR requirements;

    d. Article 32(4)(a) of the BRRD provides that an institution shall be deemed to be failing or likely to fail if it infringes or may in the near future infringe the requirements for continuing authorisation in a way that would justify the withdrawal of the authorisation by the competent authority; and

    e. Article 78 of the CRR provides that competent authorities shall grant permission for the reduction, repurchase or redemption of own funds only when the institution holds funds in excess of its Pillar 1 capital requirements, its combined buffer requirement, and the Pillar 2 capital requirement assessed on the basis of Article 104(3) of the CRD.

11. Competent authorities have wide supervisory powers at their disposal in the CRD and BRRD to take appropriate supervisory measures in a range of circumstances, including when institutions breach the combined buffer. Notably, if the minimum Pillar 1 and Pillar 2 capital requirements are no longer met, the CRD and the BRRD ensure that additional intervention powers are available to competent authorities (these additional measures may also be taken by competent authorities prior to a failure to meet minimum requirements). These include: withdrawal of authorisation, early intervention measures, and resolution actions. Such actions

[7] Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014, p. 190).

are not automatic and competent authorities will always need to ensure that the measures taken are proportionate to the circumstances and their judgement of how the situation will develop. Nevertheless, the combined powers in the CRD and BRRD envisage an enhanced level of supervisory intervention where Pillar 1 and Pillar 2 capital requirements are not met, which differs from a situation where the combined buffer is not met.

12. This enhanced intervention is also reflected in the provisions in Articles 129, 130, 131 and 133 of the CRD, under which institutions must maintain Common Equity Tier1 (CET1) capital, in addition to the CET1 capital that is maintained to meet Pillar 1 and Pillar 2 capital requirements, to meet the combined buffer requirement. Cognisant that the CRD bestows on supervisors a range of powers in a going concern situation, the failure of an institution to meet its combined buffer requirement has at least the consequence of triggering the mandatory application of the capital conservation measures in Section III of Title VII of the CRD. Competent authorities can take additional supervisory measures where necessary, including before breaching the combined buffers.

13. In this context, Pillar 1 and Pillar 2 capital requirements should be a minimum to be preserved at all times based on an institution-specific assessment of the risks not covered, or fully covered, by Pillar 1 capital requirements. The EBA's SREP Guidelines also request that competent authorities use stress testing (the institution's own and/or supervisory testing) to determine the impact of a baseline and adverse scenarios on available own funds and whether these are sufficient to cover Overall Capital Requirements (OCR) and Total SREP Capital Requirements (TSCR) during the stress period. Where, using hypothetical scenarios, supervisors identify that an institution would not be able to meet Pillar 1 and Pillar 2 capital requirements (TSCR) at all times, this leads into requesting a credible capital plan and may lead to other supervisory measures, as specified in Section 7.7 of the SREP Guidelines, or supervisory monitoring.

Maximum distributable amount

14. Article 141(1) of the CRD prevents institutions that meet the combined buffer requirement from making distributions in connection with CET1 capital to an extent that would decrease their CET1 capital to a level where the combined buffer requirement is no longer met.

15. According to Article 141(2) to (6) of the CRD, institutions that fail to meet the combined buffer requirements are required to calculate the Maximum Distributable Amount (MDA) and are prohibited, before the calculation of the MDA, from (i) making a distribution in connection with CET1 capital; (ii) creating 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; and (iii) making payments on Additional Tier 1 (AT1) instruments.

16. In particular, Article 141(4) of the CRD provides that the MDA is calculated by multiplying the sum of interim year-end profits not yet included in CET1, calculated in accordance with Article

141(5), by the factor (0, 0.2, 0.4 or 0.6) determined in accordance with Article 141(6). The factor is determined by a quartile of the combined buffer requirement, considering the CET1 capital of the credit institution that is not used to meet 'the own funds requirements under Article 92(1)(c) of Regulation (EU) No 575/2013' (i.e. Pillar 1 capital requirements). The effect of Article 141(5) is that, when the sum of interim or year-end profits not yet included in CET1 is zero, any breach of the combined buffers will entail an MDA of zero no matter how much CET1 capital the institution holds in excess of its Pillar 1 capital requirement. Where an institution fails to meet in full its combined buffer requirement, it should be subject to measures designed to ensure that it restores its levels of own funds in a timely manner. Recital 89 of the CRD explains:

a. the institution should be subject to measures designed to ensure that it restores its levels of own funds in a timely manner;

b. 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.

17. Timely and full capital restoration is precisely what is pursued by the calculation of the MDA in Article 141(6) of the CRD and, therefore, the prima facie narrow reference to only Article 92(1)(c) of the CRR should be seen in this light. Therefore, in the EBA's view, the MDA factor should be calculated with the CET1 capital held in excess of CET1 capital held to meet both Pillar 1 and 2 capital requirements.

18. This view is consistent not only with the policy objectives of the different capital requirements, but also with their stacking order as described above, since failure to maintain the Pillar 2 capital required may raise several concerns (see paragraphs 9 to 13).

19. The EBA recognises the value of Article 141 of the CRD as a capital conservation measure; it appreciates that this provision, along with the capital restoration plan referred to in Article 142 of the CRD, provides some flexibility for institutions while restricting the making of distributions. Nonetheless, some review may be warranted of the distribution prohibition that applies in all cases when no profits are made. Any possible changes to this provision should apply only in exceptional circumstances when additional flexibility in distributions is necessary in order to support the implementation of a capital conservation plan, and should not be used to undermine the timely restoration of an institution's capital position, or to enable distributions that would be likely to trigger the use of early intervention measures. Such a review should also not be seen to undermine the clear policy objective, supported by the EBA, that distributions on AT1 instruments should be fully discretionary.

Disclosure

20. In accordance with Article 438(b) of the CRR, upon demand from the relevant competent authority, institutions are required to disclose the SREP results, including the composition of the additional own funds requirements. Disclosure requirements (commonly known as Pillar 3

requirements) are, in general, a cornerstone of banking supervision entrenched in Basel principles. Further, for the purposes of the most effective and transparent application of Article 141 of the CRD on the MDA, it is imperative that the appropriate degree of disclosure of the institutions' own funds requirements is achieved. Lastly, those institutions that have publicly traded securities are subject to Directive 2003/6/EC[8] (Market Abuse Directive), and so are expected to evaluate whether Pillar 2 capital requirements meet the criteria of inside information and should be publicly disclosed.

21. Ensuring the consistency and convergence of the disclosure of Pillar 2 capital requirements is, therefore, key for institutions' stable funding, for financial stability, and for market transparency. The equal treatment of supervised entities, the supply of an adequate level of information to the market, and safeguarding supervisory flexibility and discretion are therefore key parameters for the consistent and effective application of Article 438(b) of the CRR across the Union.

Opinion to competent authorities

22. On the basis of the stacking order described above, and illustrated in the Annex, and for the purposes of the application of Article 141(6) of the CRD, in the EBA's Opinion competent authorities should ensure that the CET1 capital to be taken into account for the MDA calculation is limited to the amount not used to meet the Pillar 1 and 2 own funds requirements of the institution.

23. When competent authorities are notified of an institution's distribution plan in accordance with Article 141(8) of the CRD, they should have regard for the institution's capital conservation plan and their overall powers referred to in Article 104 (1) of the CRD with a view to ensuring that the allocation supports capital restoration, also having regard to the general principles established by Article 48 of BRRD, and safeguarding the funding continuity of the institution concerned. This should be without prejudice to Article 141(3) of the CRD.

24. Competent authorities should consider using the provisions of Article 438(b) of the CRR to require institutions to disclose MDA-relevant capital requirements (e.g. the TSCR and the corresponding minimum CET1 capital) as determined in accordance with Title 7 of the SREP Guidelines, or should at least not prevent or dissuade any institution from disclosing this information. This disclosure should be without prejudice to the restrictions on distributions that can be imposed as a supervisory measure by competent authorities.

[8] Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) (OJ L 96, 12.4.2003, p. 16).

Opinion to the Commission

25. In the view of the EBA, the Commission should:

   a. review Article 141 of the CRD with a view to avoiding differing interpretations of Article 141(6) and thus ensuring greater consistency of the MDA framework with the stacking order described in this Opinion and in the SREP Guidelines; and

   b. review the prohibition on distribution, notably in so far as it relates to AT1 instruments, in all circumstances when no profits are made in any given year.

This Opinion will be published on the EBA's website.

Done at London, 16 December 2015

Andrea Enria

Chairperson
For the Board of Supervisors

Annex

Annex – Section 7.4 and 7.7 of SREP Guidelines

7.2 Determining additional own funds requirements

324. Competent authorities should determine additional own funds requirements, covering:

    a. the risk of unexpected losses, and of expected losses insufficiently covered by provisions, over a 12-month period (except where otherwise specified in Regulation (EU) 575/2013) ('unexpected losses');

    b. the risk of underestimation of risk due to model deficiencies as assessed in the context of Article 101 of Directive 2013/36/EU; and

    c. the risk arising from deficiencies in internal governance, including internal control, arrangements and other deficiencies.

7.2.1 Determining additional own funds to cover unexpected losses

325. Competent authorities should set additional own funds requirements to cover the risk of unexpected losses, and these should be met by the institution at all times. Competent authorities should determine additional own funds requirements on a risk-by-risk basis, using supervisory judgment supported by the following sources of information:

    a. the ICAAP calculations;

    b. the outcome of supervisory benchmark calculations; and

    c. other relevant inputs, including those arising from interaction and dialogue with the institution.

326. The ICAAP calculations – where deemed reliable or partially reliable – should be the starting point for the determination, supplemented by the outcome of supervisory benchmarks and other relevant inputs as appropriate. Where an ICAAP calculation is not deemed reliable, the outcome of the supervisory benchmarks should be the starting point for the determination, supplemented by other relevant inputs as appropriate.

327. Competent authorities should not allow own funds held pursuant to Article 92 of Regulation (EU) 575/2013 to be used to meet or offset additional own funds requirements both on aggregate and on a risk-by-risk basis.

328. For the purposes of Article 98(1)(f) of Directive 2013/36/EU and the determination of additional own funds requirements, competent authorities should assess and consider diversification effects arising from geographical, sectoral or any other relevant drivers within each material risk category (intra-risk diversification). For each of the risks to capital covered by Regulation (EU) 575/2013, such diversification effects should not reduce the minimum own funds requirements calculated in accordance with Article 92 of Regulation (EU) No 575/2013.

329. However, diversification between risks in different categories, including those covered by Regulation (EU) 575/2013 (inter-risk diversification) should not be considered as part of the determination of additional own funds requirements.

330. Competent authorities should ensure that the additional own funds requirements set for each risk ensure sound coverage of the risk. To this end, competent authorities should:

a. clearly justify any additional own funds requirements that differ significantly from the outcomes of reliable ICAAP calculations or the benchmark calculations; and

b. apply additional own funds requirements in a consistent manner – where they are not based on institution-specific considerations –to ensure broad consistency of prudential outcomes across institutions.

331. In determining additional own funds, competent authorities should consider the outcomes of dialogue and interaction with the institution.

7.4 Determining the TSCR

347. Competent authorities should determine the TSCR as the sum of:

a. the own funds requirement pursuant to Article 92 of Regulation (EU) 575/2013; and

b. the sum of the additional own funds requirements (determined in accordance with the criteria specified above) and any additional own funds determined to be necessary to cover material inter-risk concentrations.

348. Competent authorities should set a composition requirement for the additional own funds requirements to cover the following risk types of at least 56% Common Equity Tier 1 (CET1) and at least 75% Tier 1 (T1):

c. elements of credit, market and operational risk (not covered by Regulation (EU) 575/2013);

d. credit concentration risk and IRRBB;

e. the risk from model deficiencies that are likely to lead to underestimation of the appropriate level of own funds, where additional own funds requirements are used to cover this risk.

349. Competent authorities should determine the composition of additional own funds to cover other risk types at their discretion but should aim to ensure sound coverage of the risk posed.

350. Competent authorities should not consider items and instruments other than those eligible for the determination of own funds (as defined in Part Two of Regulation (EU) 575/2013) in the assessment/calculation of the TSCR.

7.5 Articulation of own funds requirements

351. Competent authorities should ensure there is consistency in setting additional own funds requirements and communicating them to the institution and/or, where relevant, other competent authorities. As a minimum, this should involve communication of the institution's TSCR as a proportion (ratio) of the TREA, broken down in terms of the composition of the requirement.

352. To communicate the TSCR as a ratio, competent authorities should express it using the following formula (i.e. as a multiple of the 8% TREA requirement specified in Regulation (EU) No 575/2013):

353. Competent authorities should, where appropriate, make the necessary adjustments to the above to incorporate additional own funds requirements set to cover risk exposures not linked to the total balance sheet, and/or to ensure that the additional own funds requirements do not fall below a nominal floor (e.g. as a result of deleveraging), which may be expressed separately.

354. Competent authorities may further express the TSCR by breaking down the additional own funds requirements on a risk-by-risk basis, in addition to the overall requirement.

Example of TSCR

As of DATE and until otherwise directed, INSTITUTION is required to hold a TSCR of X% of the TREA:

- 8% (comprising at least x% CET1 and x% T1) represents own funds requirements specified in Article 92 of Regulation (EU) No 575/2013;

- X% represents additional own funds in excess of the requirements specified in Article 92 of Regulation (EU) No 575/2013, of which X% (comprising at least x% CET1 and x% T1) is to cover unexpected losses identified through the SREP and X% (comprising at least x% CET1 and x% T1%) is to cover OTHER [e.g. governance concerns] identified through the SREP.

355. To achieve further consistency, competent authorities may additionally communicate to institutions and/or, where relevant, other competent authorities the OCR and its component parts – the TSCR, the CRD buffer requirements and additional own funds requirements to cover macro-prudential risks – as a proportion (ratio) of the TREA, broken down in terms of the composition of the requirement.

<u>Example of OCR articulation</u>

As of DATE and until otherwise directed, INSTITUTION is required to hold an overall capital requirement (OCR) of X% of the TREA, of which at least X% should be CET1 and at least X% should be T1.

Of this X% OCR:

- ***X% represents the total SREP capital requirement (TSCR), which must be met at all times, of which:***

- 8% (comprising at least x% CET1 and x% T1) represents own funds requirements specified in Article 92 of Regulation (EU) No 575/2013;

- X% represents additional own funds in excess of the requirements specified in Article 92 of Regulation (EU) No 575/2013, of which X% (comprising at least x% CET1 and x% T1) is to cover unexpected losses identified through the SREP and X% (comprising at least x% CET1 and x% T1) is to cover OTHER [e.g. governance concerns] identified through the SREP.

- ***X% represents the combined Directive 2013/36/EU capital buffer (100% CET1) requirement applicable to INSTITUTION, of which:***

- 2.5% represents the capital conservation buffer requirement;

- X% represents the OTHER [e.g. counter-cyclical capital buffer (CyCB) and O-SII] requirement.

7.7 Meeting requirements over the economic cycle

358. Competent authorities should determine the adequacy of the institution's own funds (quantity and composition) to cover volatility over the economic cycle and whether measures are required to address potential inadequacies.

359. To do so, competent authorities should use stress testing (the institution's own and/or supervisory testing) to determine the impact of a baseline and adverse scenarios on available own funds and whether these are sufficient to cover capital requirements (OCR and TSCR) or any other relevant target ratio set by competent authorities for system-wide stress tests. Competent authorities should also consider the impact of stress tests on the institution's leverage ratio.

360. Competent authorities should make this determination by analysing stress tests conducted by the institution in its ICAAP and supervisory stress testing, specifically:

a. the outcome of stress tests run by the institution as part of its ICAAP on the basis of a plausible but severe stress relevant to its business model and risk profile pursuant to the EBA guidelines for stress testing and suitably challenged by the competent authorities; and/or

b. the outcomes of the supervisory stress tests carried out by the competent authorities pursuant to Article 100 of Directive 2013/36/EU, taking into account the EBA guidelines issued in accordance with that Article, and ranging from, for example:

c. prescribing specific 'anchor' scenarios/assumptions to be implemented by institutions; to

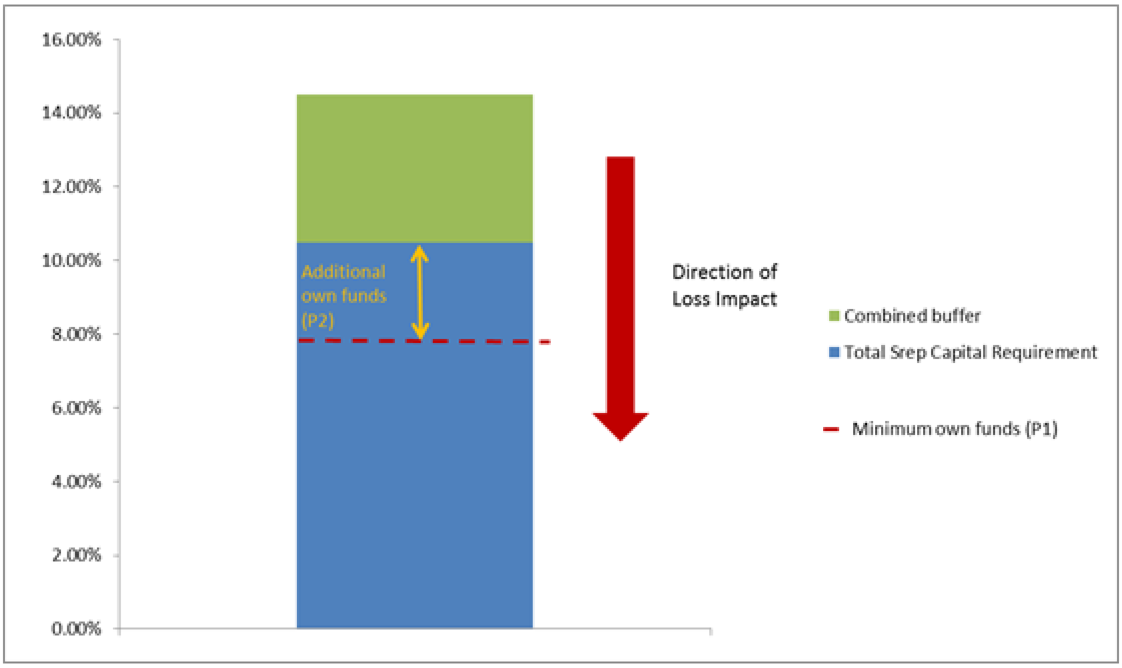
d. conducting system-wide stress tests using consistent methodologies and scenarios run either by institutions or by supervisors.

361. On the basis of establishing a proportionate approach, competent authorities may consider applying a narrower range of stress testing for non-Category 1 institutions.

362. Competent authorities should analyse outcomes of stress tests covering a future period as specified in the EBA guidelines for stress testing. The starting point for resources should be the institution's available own funds at the start of the stress.

363. To identify a breach of the OCR, any assumptions with regard to macro-prudential requirements (e.g. changes in the level of requirements or which buffers can be used) over the scenario horizon should be agreed with the macro-prudential (designated) authority, with the requirements stacked in the order shown in the chart below.

Figure 3.Stacking order of own funds requirements



364. Taking into account outcomes of the stress tests, competent authorities should consider whether and which measures are necessary, in accordance with the criteria specified in paragraphs 365 to 366, depending on the scenarios and types of stress tests (institutions' ICAAP or supervisory stress tests), to address any breaches of the requirements or any other relevant target ratio set by competent authorities for system-wide stress tests. In any case, competent authorities should require the institution to submit a credible capital plan, ensuring that it is able to meet its TSCR or any other relevant target ratio set by competent authorities for system-wide stress tests over the assumed time horizon.

365. In the analysis of the capital plan, competent authorities should review and consider the appropriateness of credible mitigating management actions that an institution indicates it would take. Competent authorities should assess these in the context of the legal and reputational constraints of the institution, noting the extent to which they are already stated in public documents (e.g. dividend policies) and the institution's business plan and risk appetite statements. Competent authorities should also assess the credibility of mitigating actions in the context of broader macro-economic considerations.

366. In addition, competent authorities should, where relevant, consider the additional measures specified in Section 10.3. [*reference is made to dividend to distribution restrictions*] When determining these measures, competent authorities should consider:

a. the time horizon when the breach occurs compared to the starting point of stress tests;

b. the magnitude of the breach compared to the starting point of stress tests;

c. the magnitude of the absolute and relative decrease of resources compared to the starting point of stress tests;

d. the institution's strategy and financial plans and outcomes of the assessment performed under the BMA as specified in Title 4;

e. the position of the macro-prudential (designated) authority on a requirement to hold own funds to meet CRD capital buffers other than the Capital Conservation Buffer (e.g. counter-cyclical buffer, O-SII buffer) under the assumed stressed conditions; and

f. the change in macro-economic conditions, the actual level of own funds and the TREA from the starting point of stress tests to the point when the assessment is made.

367. If, according to the outcomes of the stress tests and taking into account the current macro-economic environment, there is an imminent risk that the institution will not be able to meet its TSCR, competent authorities should consider determining additional own funds requirements, resulting in the review of the TSCR determined pursuant to the provisions specified in Section 7.4 (see Figure 4).

Figure 4. Illustrative example of changes in capital resources (CET1) over the economic cycle and breach of TSCR