

Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (Text with EEA relevance)

TITLE V

PROVISIONS CONCERNING THE FREEDOM OF ESTABLISHMENT AND THE FREEDOM TO PROVIDE SERVICES

CHAPTER 1

General Principles

Article 33

Credit institutions

Member States shall provide that the activities listed in Annex I may be carried out 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 establishing a branch or by providing 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 Member States shall provide that the activities listed in Annex I may be carried out 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 establishing a branch or by providing 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 out of those activities and which fulfils each of the following conditions:

- a the parent undertaking or undertakings are authorised as credit institutions in the Member State by the law of which the financial institution is governed;
- b the activities in question are actually carried out within the territory of the same Member State;
- c the parent undertaking or undertakings holds 90 % or more of the voting rights attaching to shares in the capital of the financial institution;
- d the parent undertaking or undertakings satisfies the competent authorities regarding the prudent management of the financial institution and has 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 is effectively included, for the activities in question in particular, in the consolidated supervision of the parent undertaking, or of each of the parent

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undertakings, in accordance with Title VII, Chapter 3 of this Directive and Part One, Title II, Chapter 2 of Regulation (EU) No 575/2013, in particular for the purposes of the own funds requirements set out in Article 92 of that Regulation, for the control of large exposures provided for in Part Four of that Regulation and for the purposes of the limitation of holdings provided for in Articles 89 and 90 of that Regulation.

The competent authorities of the home Member State shall check compliance with the conditions set out in the first subparagraph and 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 competent authorities of the home Member State shall notify the competent authorities of the host Member State and the activities carried out by that financial institution in the host Member State shall become subject to the law 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 Article 92 of Regulation (EU) No 575/2013 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

calculated in accordance with Article 92(3) and (4) of Regulation (EU) No 575/2013 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 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 interests of the general good, those activities shall be carried out 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 information 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 in order to enable the competent authorities of the home Member State to take a decision following a notification under 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 procedures set out 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 and 52 and Chapter 4.

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Article 37

Information about refusals

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(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 out 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 which it intends to carry out.

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 shall only be required for information or statistical purposes, for the application of Article 51(1), or for supervisory purposes in accordance with this Chapter. They shall be subject to professional secrecy requirements at least equivalent to those referred to in Article 53(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 in accordance with Article 51(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 on the basis of information received from the competent authorities of the home Member State under Article 50 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 transposing this Directive or with Regulation (EU) No 575/2013;
- b there is a material risk that the credit institution will not comply with the national provisions transposing this Directive or with Regulation (EU) No 575/2013.

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The competent authorities of the home Member State shall, without delay, take all appropriate measures to ensure that the credit institution concerned remedies its non-compliance or takes measures to avert the risk of non-compliance. The competent authorities of the home Member State shall communicate those measures to the competent authorities of the host Member State without delay.

2 Where the competent authorities of the host Member State consider that the competent authorities of the home Member State have not fulfilled their obligations or will not fulfil their obligations pursuant to the second subparagraph of paragraph 1, they may refer the matter to EBA and request its assistance in accordance with Article 19 of Regulation (EU) No 1093/2010. Where EBA acts in accordance with that Article, it shall take any decision under Article 19(3) of that Regulation within 24 hours. EBA may also assist the competent authorities in reaching an agreement on its own initiative in accordance with the second subparagraph of Article 19(1) of that Regulation.

Article 42

Reasons and communication

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

Article 43

Precautionary measures

1 Before following the procedure set out 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 3 of Directive 2001/24/EC, take any precautionary measures necessary to protect against financial instability that would seriously threaten the collective interests of depositors, investors and clients in the host Member State.

2 Any precautionary measures under paragraph 1 shall be proportionate to their purpose to protect against financial instability that would seriously threaten collective interests of depositors, investors and clients in the host Member State. Such precautionary 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 Any precautionary measure under paragraph 1 shall cease to have effect when the administrative or judicial authorities of the home Member State take reorganisation measures under Article 3 of Directive 2001/24/EC.

4 The competent authorities of the host Member State shall terminate precautionary measures where they consider those measures to have become obsolete under Article 41, unless they cease to have effect in accordance with paragraph 3 of this Article.

5 The Commission, EBA and the competent authorities of the other Member States concerned shall be informed of precautionary measures taken under paragraph 1 without undue delay.

Where the competent authorities of the home Member State or of any other affected Member State object to 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. Where EBA acts in accordance with that Article, it shall take any decision under Article 19(3) of that Regulation within 24 hours. EBA may also assist the competent authorities in reaching an agreement on its own initiative in accordance with the second subparagraph of Article 19(1) of that Regulation.

Article 44

Powers of host Member States

Host Member States may, notwithstanding Articles 40 and 41, exercise the powers conferred on them under this Directive to take appropriate measures to prevent or to punish breaches committed within their territories of the 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 withdrawal of authorisation

In the event of withdrawal of authorisation, the competent authorities of the home Member State shall inform the competent authorities of the host Member State without delay. The competent authorities of the host Member State 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.