



Council of the
European Union

Brussels, 1 September 2021
(OR. en)

11512/21

EF 264
ECOFIN 822
DELECT 194

COVER NOTE

From: Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director

date of receipt: 23 August 2021

To: Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union

No. Cion doc.: C(2021) 5949 final

Subject: COMMISSION DELEGATED REGULATION (EU) .../... of 13.8.2021 supplementing Directive (EU) 2019/2034 of the European Parliament and of the Council with regard to regulatory technical standards specifying appropriate criteria to identify categories of staff whose professional activities have a material impact on the risk profile of an investment firm or of the assets that it manages

Delegations will find attached document C(2021) 5949 final.

Encl.: C(2021) 5949 final



Brussels, 13.8.2021
C(2021) 5949 final

COMMISSION DELEGATED REGULATION (EU) .../...

of 13.8.2021

supplementing Directive (EU) 2019/2034 of the European Parliament and of the Council with regard to regulatory technical standards specifying appropriate criteria to identify categories of staff whose professional activities have a material impact on the risk profile of an investment firm or of the assets that it manages

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

Article 30 (4) of Directive (EU) No 2019/2034 ('the Directive') empowers the Commission to adopt, following submission of draft standards by the European Banking Authority (EBA), and in accordance with Articles 10 to 14 of Regulation No (EU) 1093/2010, delegated acts specifying appropriate criteria to identify categories of staff whose professional activities have a material impact on an investment firm's risk profile or assets it manages referred to in Article 30 (1) of that Directive.

In accordance with Article 10(1) of Regulation No (EU) 1093/2010 establishing the EBA, the Commission shall decide within three months of receipt of the draft standards whether to endorse the drafts submitted. The Commission may also endorse the draft standards in part only, or with amendments, where the Union's interests so require, having regard to the specific procedure laid down in those Articles.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

In accordance with the third subparagraph of Article 10(1) of Regulation No (EU) 1093/2010, the EBA has carried out a public consultation on the draft technical standards submitted to the Commission in accordance with Article 30 (4) of Directive (EU) No 2019/2034 ('the Directive'). A consultation paper was published on the EBA internet site on 4 June 2020, and the consultation closed on 4 September 2020. Moreover, the EBA invited the EBA's Banking Stakeholder Group set up in accordance with Article 37 of Regulation No (EU) 1093/2010 to provide advice on them. Together with the draft technical standards, the EBA has submitted an explanation on how the outcome of these consultations has been taken into account in the development of the final draft technical standards submitted to the Commission.

Together with the draft technical standards, and in accordance with the third subparagraph of Article 10(1) of Regulation No (EU) 1093/2010, the EBA has submitted its Impact Assessment, including its analysis of the costs and benefits, related to the draft technical standards submitted to the Commission. This analysis is available at: <https://www.eba.europa.eu/regulation-and-policy/remuneration/regulatory-technical-standards-criteria-identify-material-risk-takers-under-investment-firms>

3. LEGAL ELEMENTS OF THE DELEGATED ACT

Article 30 (4) of the Directive mandates the EBA to develop draft regulatory technical standards to specify appropriate criteria to identify categories of staff whose professional activities have a material impact on an investment firm's risk profile or assets it manages referred to in Article 30 (1) of that Directive.

Articles 1 of the draft technical standards set out criteria to define managerial responsibility, control functions and business unit.

Article 2 of the draft technical standards specifies that the provisions apply on a consolidated, and individual basis. When applying the criteria on a consolidated basis, the consolidating firm shall base the criteria, on the impact on the consolidated risk profile.

Articles 3 and 4 specify that investment firms shall identify staff members or categories of staff as having an impact on a firm's risk profile or assets it manages where those staff members or categories of staff meet any of the qualitative or quantitative criteria.

The qualitative criteria identify staff with material managerial responsibilities and staff with decision-making powers who have a material impact on an investment firm's risk profile or assets it manages.

The quantitative criteria defined in Article 4 of the present draft technical standards aim to ensure that a sufficient level of scrutiny by investment firms and competent authorities are applied when identifying staff whose professional activities have a material impact on an investment firm's risk profile or assets it manages. It is presumed that staff with a high level of total remuneration have a higher impact on an investment firm's risk profile or assets it manages than staff with significantly lower remuneration levels.

The quantitative criteria specified in the draft technical standards are subject to additional conditions under which investment firms can demonstrate that members of staff who would be identified only under the quantitative criteria do in fact have no material impact on the investment firm's risk profile or assets it manages and are therefore not to be considered as identified staff. If investment firms aim to exclude staff, they are required to submit the relevant assessments to the competent authorities for prior approval under specific conditions to ensure that there is sufficient supervisory scrutiny. For staff receiving EUR 1 000 000 or more (high earners), exclusions can be approved only in well-justified exceptional circumstances, and competent authorities need to inform the EBA about any such exclusions before they are approved to ensure their consistent application. The draft technical standards set out criteria for the assessment of such exceptional circumstances to ensure the consistent application of such exclusions.

The result of the application of all the qualitative and quantitative criteria should be documented by investment firms so that competent authorities can ensure that investment firms have applied the criteria in line with the regulation.

Article 5 of the draft technical standards specifies the calculation of amounts for quantitative criteria within the technical standards and the Directive in order to ensure their consistent application.

COMMISSION DELEGATED REGULATION (EU) .../...

of 13.8.2021

supplementing Directive (EU) 2019/2034 of the European Parliament and of the Council with regard to regulatory technical standards specifying appropriate criteria to identify categories of staff whose professional activities have a material impact on the risk profile of an investment firm or of the assets that it manages

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive (EU) 2019/2034 of the European Parliament and of the Council of 27 November 2019 on the prudential supervision of investment firms and amending Directives 2002/87/EC, 2009/65/EC, 2011/61/EU, 2013/36/EU, 2014/59/EU and 2014/65/EU¹, and in particular Article 30(4), third subparagraph, thereof,

Whereas:

- (1) While investment firms falling within the scope of Regulation (EU) No 575/2013 of the European Parliament and of the Council² and of Titles VII and VIII of Directive 2013/36/EU of the European Parliament and of the Council³, in accordance with Article 1(2) and (5) of Regulation (EU) 2019/2033 of the European Parliament and of the Council⁴, are subject to Commission Delegated Regulation (EU) 2021/923⁵, investment firms falling within the scope of Directive (EU) 2019/2034 of the European Parliament and of the Council are required to apply specific requirements to the variable remuneration of all members of staff whose professional activities have a material impact on the risk profile of the investment firm or of the assets that it manages. It is necessary to lay down appropriate criteria to identify those staff members. Those criteria should take into account the authority and responsibilities of such staff members, the investment firm's risk profile or that of the assets it manages and performance indicators, the investment firm's internal organisation, and the nature, scope and complexity of the firm concerned. Those criteria should also enable investment firms to set proper incentives in their remuneration policies to ensure that the staff members concerned act prudently when performing their tasks. Lastly, those criteria should reflect the level of risk of different activities within the investment firm.
- (2) Members of the management body have the ultimate responsibility for the investment firm, its strategy and activities, and therefore should always be considered to have a material impact on the investment firm's risk profile. This applies both to the members of the management body in its management function who take decisions and to the

¹ OJ L 314, 5.12.2019, p. 64.

² OJ L 176 27.6.2013, p. 1

³ OJ L 176 27.6.2013, p. 338

⁴ OJ L 314 5.12.2019, p. 1

⁵ OJ L 203, 9.6.2021, p. 1–7

members of the management body in its supervisory function who oversee the decision-making process and challenge decisions made.

- (3) Some staff members are responsible for providing internal support that is crucial to the operation of an investment firm's business activities. Their activities and decisions can also have a material impact on an investment firm's risk profile or that of the assets it manages because their activities and decisions may expose the investment firm to material operational and other risks.
- (4) The professional activities of staff members with managerial responsibility can have a material impact on the investment firm's risk profile or that of the assets it manages because they can make strategic or other fundamental decisions that have an impact on the investment firm's business activities or on the control functions applied. Such control functions include, typically, risk management, compliance and internal audit. The risks taken by the business units and the way those business units are managed are the most important factors for an investment firm's risk profile or that of the assets it manages. Certain business activities create higher risks than others and therefore the nature of the business activities should be taken into account.
- (5) Appropriate qualitative criteria should ensure that staff members are identified as having a material impact where they are responsible for groups of staff whose activities could have a material impact on the investment firm's risk profile or of the assets that it manages. This includes situations where the activities of individual staff members under their management do not individually have a material impact on the investment firm's risk profile but the overall scale of their activities could have such an impact.
- (6) The total remuneration of staff members depends typically on the contribution that those staff members make to the successful achievement of the investment firm's business objectives. That remuneration thus depends on the responsibilities, duties, abilities and skills of staff members and on the performance of staff members and the investment firm. Where a staff member is awarded a total remuneration which exceeds a certain threshold, it is reasonable to presume that such remuneration is linked to that staff member's contribution to the investment firm's business objectives and is therefore related to the impact of the staff member's professional activities on the risk profile of the investment firm or of the assets that it manages. It is therefore appropriate to apply quantitative criteria related to the total remuneration of a staff member, both in absolute and relative terms, to other members of staff within the same investment firm to determine whether the professional activities of such staff member could have a material impact on the investment firm's risk profile or that of the assets it manages.
- (7) Clear and appropriate thresholds should be established to identify staff members whose professional activities have a material impact on the investment firm's risk profile or of the assets that it manages. Investment firms should be expected to apply the quantitative criteria in a timely manner. Quantitative criteria should follow developments in remuneration to be realistic. A first method to follow such developments is to base quantitative criteria on the total remuneration awarded in the preceding performance year, which includes the fixed remuneration paid for that performance year and the variable remuneration awarded in that performance year. A second method to follow such developments is to base quantitative criteria on the total remuneration awarded for the preceding performance year, which includes the fixed remuneration paid for that performance year and the variable remuneration awarded in

the current performance year for the preceding financial year. The second method provides for a better alignment of the identification process with the actual remuneration awarded for a performance period but can only be applied where a timely calculation for the application of the quantitative criteria is possible. Where such timely calculation is no longer possible, the first method should be used. Under either method, the variable remuneration can include amounts that are awarded based on performance periods that are longer than one year, depending on the performance criteria used by the investment firm.

- (8) A quantitative threshold of EUR 500 000 should be set for the identification of staff members whose professional activities have a material impact on the risk profile of the investment firm or of the assets that it manages. Remuneration above that quantitative threshold or amounting to one of the highest remunerations within the investment firm thus establishes a strong presumption that the activities of staff members receiving such remuneration have a material impact on the investment's risk profile or that of the assets it manages, in which case more supervisory scrutiny should be applied to establish whether the professional activities of such staff members have a material impact on the investment firm's risk profile or that of the assets it manages.
- (9) However, such presumptions based on quantitative criteria should not apply where investment firms establish on the basis of additional objective criteria that such staff members do not in fact have a material impact on the investment firm's risk profile or of the assets that it manages, taking into account all risks to which the investment firm is or may be exposed. To ensure an effective and consistent application of those objective criteria, competent authorities should approve the exclusion of the highest earning staff members identified or those staff members with a remuneration awarded of more than EUR 750 000. For staff members who are awarded more than EUR 1 000 000 (high earners), competent authorities should inform the European Banking Authority (EBA) before approving exclusions so that the EBA can ensure the consistent application of those criteria.
- (10) Being in the same remuneration bracket as senior management or risk takers may also be an indicator that the staff member's professional activities have a material impact on the investment firm's risk profile or that of the assets it manages. For that purpose, the remuneration paid to staff in control functions, support functions and members of the management body in its supervisory function should not be taken into account. In the application of this quantitative criterion, the fact that payment levels differ across jurisdictions should be also taken into account. Investment firms should be allowed to demonstrate that staff members who fall within the remuneration bracket, but do not meet any of the qualitative or other quantitative criteria, do not have a material impact on the investment firm's risk profile or that of the assets it manages, taking into account all risks to which the investment firm is or may be exposed.
- (11) In order for competent authorities and auditors to be able to review the assessments carried out by investment firms to identify staff members whose professional activities have a material impact on the risk profile of the investment firm or of the assets that it manages, it is critical that investment firms keep records of the assessments made and their results, including of staff members who have been identified under criteria based on their total remuneration but whose professional activities are assessed as not having a material impact on the investment firm's risk profile or of the assets that it manages.

- (12) This Regulation is based on the draft regulatory technical standards submitted to the Commission by the EBA after having consulted the European Securities and Markets Authority.
- (13) The EBA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based and analysed the potential related costs and benefits and requested the advice of the Banking Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1093/2010 of the European Parliament and of the Council⁶,

HAS ADOPTED THIS REGULATION:

Article 1 **Definitions**

For the purposes of this Regulation, the following definitions shall apply:

- (1) ‘managerial responsibility’ means a situation in which a staff member heads a business unit or a control function and is directly accountable to the management body as a whole or to a member of the management body or to the senior management;
- (2) ‘control function’ means a function that is independent from the business unit it controls and that is responsible for providing an objective assessment of the investment firm’s risks, review or report on those, including, but not limited to, the risk management function, the compliance function and the internal audit function;
- (3) ‘business unit’ means a business unit as defined in Article 142(1), point (3), of Regulation (EU) No 575/2013 of the European Parliament and of the Council⁷.

Article 2 **Application of criteria**

1. Where this Regulation is applied on an individual basis in accordance with Article 25 of Directive (EU) 2019/2034, compliance with the criteria set out in Articles 3 and 4 of this Regulation shall be assessed against the investment firm’s individual risk profile.
2. Where this Regulation is applied on a consolidated basis in accordance with Article 25 of Directive (EU) 2019/2034, compliance with the criteria set out in Articles 3 and 4 of this Regulation shall be assessed against the risk profile of the investment firm on a consolidated basis.
3. Where Article 4(1), point (a), is applied on an individual basis, the remuneration awarded by the investment firm shall be considered.
4. Where Article 4(1), point (a), is applied on a consolidated basis, the consolidating investment firm shall consider the remuneration awarded by any entity that falls within the scope of consolidation.

⁶ 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. 12).

⁷ Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p. 1).

5. Article 4(1), point (b), shall only apply on an individual basis.
6. Article 4(1), point (c), shall apply on an individual and consolidated basis.

Article 3
Qualitative criteria

Staff members shall be deemed to have a material impact on an investment firm's risk profile or that of the assets it manages where one or more of the following qualitative criteria are met:

- (a) the staff member is a member of the management body in its management function;
- (b) the staff member is a member of the management body in its supervisory function;
- (c) the staff member is a member of the senior management;
- (d) in investment firms with a total balance sheet equal to or more than EUR 100 million, staff members with managerial responsibility for business units that are providing at least one of the services that require authorisation listed under points (2) to (7) of Annex I, Section A, to Directive 2014/65/EU of the European Parliament and of the Council⁸;
- (e) the staff member has managerial responsibilities for the activities of a control function;
- (f) the staff member has managerial responsibilities for the prevention of money laundering and terrorist financing;
- (g) the staff member is responsible for managing a material risk as referred to in Article 28(3) of Directive (EU) 2019/2034 within the investment firm or is a voting member of a committee responsible for managing a material risk to which the investment firm is exposed;
- (h) in an investment firm that is authorised for providing at least one of the services listed under points (2) to (7) of Annex I, Section A to Directive 2014/65/EC, the staff member is responsible for managing one of the following activities:
 - (i) economic analysis;
 - (ii) information technology;
 - (iii) information security;
 - (iv) outsourcing arrangements of critical or important functions as referred to in Article 30(1) of Commission Delegated Regulation (EU) 2017/565⁹.
- (i) the staff member meets either of the following criteria with regard to decisions for approving or vetoing the introduction of new products:
 - (i) the staff member has authority to take such decisions;

⁸ Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.6.2014, p. 349).

⁹ Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive (OJ L 87, 31.3.2017, p. 1).

- (ii) the staff member is a voting member of a committee which has authority to take such decisions.

Article 4

Quantitative criteria

1. Subject to paragraphs 2 to 5, a staff member shall be deemed to have a material impact on an investment firm's risk profile or that of the assets it manages where any one of the following quantitative criteria is met:
 - (a) the staff member has been awarded a total remuneration which is equal to or greater than EUR 500 000 in or for the preceding financial year;
 - (b) where the investment firm has over 1 000 staff members, the staff member is within the 0,3 % of staff, rounded to the next higher integral figure, who has, within the investment firm, been awarded the highest total remuneration in or for the preceding financial year;
 - (c) the staff member was in or for the preceding financial year awarded total remuneration that is equal to or greater than the lowest total remuneration awarded in that financial year to a member of staff who meets one or more of the criteria set out in Article 3, points (a), (c), (d), (h) or (i).
2. The criteria laid down in paragraph 1 shall not apply where the investment firm determines that the staff member, or the category of staff to which the staff member belongs, has no material impact on the risk profile of the investment firm or of the assets it manages.
3. The condition of paragraph 2 of this Article shall be assessed on the basis of objective criteria which take into account all relevant risk and performance indicators used by the investment firm to identify, manage and monitor risks in accordance with Article 28 of Directive (EU) 2019/2034 and on the basis of the duties and authorities of the staff member or categories of staff and their impact on the investment firm's risk profile or that of the assets it manages, when compared with the impact of the professional activities of staff members identified in accordance with Article 3 of this Regulation.
4. The application of paragraph 2 by an investment firm, in respect of a staff member referred to in paragraph 1, point (b), or a staff member who was awarded a total remuneration of EUR 750 000 or more in or for the preceding financial year, shall be subject to the prior approval of the competent authority responsible for the prudential supervision of that investment firm.

The competent authority shall only give its prior approval where the investment firm can demonstrate that the condition set out in paragraph 2 is satisfied, having regard to the assessment criteria set out in paragraph 3.
5. Where the staff member was awarded total remuneration of EUR 1 000 000 or more in or for the preceding financial year, the competent authority shall only give its prior approval under paragraph 4 in exceptional circumstances. In order to ensure the consistent application of this paragraph, the competent authority shall inform the EBA before giving its approval in respect of such a staff member.

The existence of exceptional circumstances shall be demonstrated by the investment firm and assessed by the competent authority. Exceptional circumstances shall be

situations that are unusual, very infrequent or far beyond what is usual. The exceptional circumstances shall relate to the staff member concerned.

Article 5

Calculation of the total remuneration awarded

1. All amounts of the variable and fixed remuneration shall be calculated gross and on a full-time equivalent basis.
2. Investment firms' remuneration policies shall set out the reference year for the variable remuneration taken into account when calculating the total remuneration. That reference year shall be either the year preceding the financial year in which the variable remuneration is awarded or the year preceding the financial year for which the variable remuneration is awarded.

Article 6

Entry into force

This Regulation shall enter into force on the fifth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 13.8.2021

For the Commission
The President
Ursula VON DER LEYEN