COMMISSION DELEGATED REGULATION (EU) 2021/2155

of 13 August 2021

supplementing Directive (EU) 2019/2034 of the European Parliament and of the Council with regard to regulatory technical standards specifying the classes of instruments that adequately reflect the credit quality of the investment firm as a going concern and possible alternative arrangements that are appropriate to be used for the purposes of variable remuneration

(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/EU ([1]), and in particular Article 32(8), third subparagraph, thereof,

Whereas:

(1) Variable remuneration awarded in instruments should promote sound and effective risk management and should not encourage risk-taking that exceeds the level of risk appetite of the investment firm. Therefore, classes of instruments which can be used for the purposes of variable remuneration should align the interests of staff with the longer-term interests of the investment firm, its shareholders, creditors, clients and other stakeholders by providing incentives for staff to act in the longer-term interest of the investment firm.

(2) In order to ensure that there is a strong link to the credit quality of an investment firm as a going concern, instruments used for the purposes of variable remuneration should contain appropriate trigger events for write-down or conversion which reduce the value of the instruments in situations where the credit quality of the investment firm as a going concern has deteriorated. The trigger events used for remuneration purposes should not change the level of subordination of the instruments and therefore should not lead to a disqualification of Additional Tier 1 or Tier 2 instruments as own funds instruments.

(3) While the conditions which apply to Additional Tier 1 and Tier 2 instruments are specified in Article 9 of Regulation (EU) 2019/2033 of the European Parliament and of the Council ([2]) in conjunction with Part Two, Title 1, Chapters 3 and 4 of Regulation (EU) No 575/2013 of the European Parliament and of the Council ([3]), the Other Instruments referred to in Article 32(1), point (j)(iii), of Directive (EU) 2019/2034 ('Other Instruments') which can be fully converted to Common Equity Tier 1 instruments or written down, are not subject to specific conditions pursuant to those Regulations as they are not classified as own funds instruments for prudential purposes. Specific requirements should therefore be set for different classes of instruments to ensure that they are appropriate to be used for the purposes of variable remuneration, taking account of the different nature of the instruments. The use of instruments for the purposes of variable remuneration should not in itself prevent instruments from qualifying as own funds of an investment firm as long as the conditions laid down in Regulation (EU) 2019/2033 are met. Nor should such use in itself be understood as providing an incentive to redeem the instrument, as after deferral and retention periods staff members are, in general, able to receive liquid funds by other means than redemption.

([1]) OJ L 314, 5.12.2019, p. 64.

([2]) Regulation (EU) 2019/2033 of the European Parliament and of the Council of 27 November 2019 on the prudential requirements of investment firms and amending Regulations (EU) No 1093/2010, (EU) No 575/2013, (EU) No 600/2014 and (EU) No 806/2014 (OJ L 314, 5.12.2019, p. 1).

([3]) 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).

(4) Other Instruments are not limited to the financial instruments specified in Section C of Annex I to Directive 2014/65/EU of the European Parliament and of the Council ([4]). To reduce the administrative burden for the creation of such instruments, those instruments should also allow for the use of other contractual arrangements between staff members and investment firms. To ensure that those Other Instruments reflect the credit quality of an investment firm as a going concern, appropriate requirements should ensure that such instruments are written down or converted before an investment firm fails to meet its own funds requirements.

(5) When instruments used for the purposes of variable remuneration are called, redeemed, repurchased or converted, in general such transactions should not increase the value of the remuneration awarded by paying out amounts that are higher than the value of the instrument or by converting into instruments which have a higher value than the instrument initially awarded. The replacement of instruments at the same value should ensure that remuneration is not paid through vehicles or methods that facilitate non-compliance with Directive (EU) 2019/2034 or Regulation (EU) 2019/2033.

(6) When awarding variable remuneration and when instruments used for variable remuneration are redeemed, called, repurchased or converted, those transactions should be based on values that have been established in accordance with the applicable accounting standard at the point of time of the transaction, thus ensuring that the correct amount of variable remuneration is awarded and not unduly altered when the instrument is redeemed, called, repurchased or converted.

(7) Article 54 of Regulation (EU) No 575/2013 sets out the write-down and conversion mechanisms for Additional Tier 1 instruments. Additionally, Article 32(1), point (j)(iii), of Directive (EU) 2019/2034 requires that Other Instruments can be fully converted into Common Equity Tier 1 instruments or written down. As the economic outcome of a conversion or write-down of Other Instruments is the same as for Additional Tier 1 instruments, write-down or conversion mechanisms for Other Instruments should take into account the mechanisms that apply to Additional Tier 1 instruments, with adaptations to take account of the fact that Other Instruments do not qualify as own fund instruments from a prudential perspective. Tier 2 instruments are not subject to regulatory requirements regarding write-down and conversion under Regulation (EU) No 575/2013. To ensure that the value of all such instruments, when used for variable remuneration, is reduced when the credit quality of the investment firm deteriorates, the situations in which a write-down or conversion of the instrument is necessary should be specified. The write-down, write-up and conversion mechanisms for Tier 2 and Other Instruments should be specified to ensure consistent application.

(8) Distributions arising from instruments can take various forms. They can be variable or fixed and can be paid periodically or at the final maturity of an instrument. To promote sound and effective risk management, no distributions should be paid to staff during deferral periods. Staff members should only receive the distributions in respect of periods which follow the vesting of the instrument, after which staff becomes its legal owner. Therefore, only instruments with distributions which are paid periodically to the owner of the instrument are appropriate for use as variable remuneration. Zero coupon bonds or instruments which retain earnings should not be part of remuneration which must consist of any of the instruments referred to inArticle 32(1), point (j), of Directive (EU) 2019/2034. This is because staff would benefit during the deferral period from increasing values, which can be understood as equivalent to receiving distributions.

(9) Very high distributions can reduce the long-term incentive for prudent risk-taking as they effectively increase the variable part of the remuneration. In particular, distributions should not be paid out at intervals of longer than one year, as this would lead to distributions effectively accumulating during deferral periods and being paid out once the variable remuneration vests. Accumulation of distributions would circumvent the principle laid down in Article 32(3) of Directive (EU) 2019/2034 that remuneration payable under deferral arrangements vests no faster than on a *pro rata* basis. Article 32(2), point (b), of Directive (EU) 2019/2034 requires that variable remuneration is not to be paid through financial vehicles or methods that facilitate the non-compliance with that Directive or Regulation (EU) 2019/2033. Therefore, distributions made after the instrument has vested should not exceed market rates for such instruments issued by other investment firms or institutions of comparable credit quality. This should be ensured by requiring instruments used for variable remuneration, or the instruments to which they are linked, to be issued mainly to other investors, or by requiring such instruments to be subject to a cap on distributions.

([4]) 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).

(10) Deferral and retention requirements which apply to awards of variable remuneration pursuant to Article 32(1), point (l), and Article 32(3) of Directive (EU) 2019/2034 have to be met at all relevant times, including when instruments used for variable remuneration are called, redeemed, repurchased or converted. In such situations, instruments should therefore be replaced with Additional Tier 1, Tier 2 and Other Instruments which reflect the credit quality of the investment firm as a going concern, have features equivalent to those of the instrument initially awarded, and are of the same value, taking into account any amounts which have been written down. Where instruments other than Additional Tier 1 instruments have a fixed maturity date, minimum requirements should be set for the remaining maturity of such instruments when they are awarded in order to ensure that they are consistent with requirements regarding the deferral and retention periods for variable remuneration.

(11) Directive (EU) 2019/2034 does not limit the classes of instruments that can be used for variable remuneration to a specific class of financial instruments. It should therefore be possible to use synthetic instruments or contracts between staff members and investment firms which are linked to Additional Tier 1 instruments and Tier 2 instruments which can be fully converted or written down. This allows for the introduction of specific conditions in the terms of such instruments which apply only to instruments awarded to staff, without the need to impose such conditions on other investors.

(12) In a group context, issuances may be managed centrally within a parent undertaking, including situations where the parent undertaking is subject to Directive 2013/36/EU of the European Parliament and of the Council ([5]) or Directive 2019/2034. Investment firms within a group may not always themselves issue instruments which are appropriate to be used for the purpose of variable remuneration. Regulation (EU) 2019/2033 in conjunction with Regulation (EU) No 575/2013 enables Additional Tier 1 and Tier 2 instruments issued through an entity within the scope of consolidation to form part of an investment firm's own funds subject to certain conditions. Therefore, it should also be possible to use such instruments for the purpose of variable remuneration, provided that there is a clear link between the credit quality of the investment firm using those instruments for the purpose of variable remuneration and the credit quality of the issuer of the instrument. Such a link can usually be assumed to be the case between a parent undertaking and a subsidiary. Instruments other than Additional Tier 1 instruments and Tier 2 instruments that are not issued directly by an investment firm should also be capable of being used for variable remuneration, subject to equivalent conditions. Instruments that are linked to reference instruments issued by parent undertakings in third countries and that are otherwise equivalent to Additional Tier 1 instruments or Tier 2 instruments should be eligible to be used for the purposes of variable remuneration where the trigger event refers to the investment firm using such a synthetic instrument.

(13) Article 32(1), point (k), of Directive (EU) 2019/2034, enables investment firms that do not issue any of the instruments referred to in Article 32(1), point (j), of that Directive, to use alternative arrangements, provided that the competent authority approves such use and provided that such arrangements fulfil the same objectives as the instruments referred to in Article 32(1), point (j), of that Directive. To fulfil the same objectives, such alternative arrangements should thus ensure that the variable remuneration awarded is subject to implicit risk adjustments. The value of such alternative arrangements should thus decrease whenever there is an adverse effect on the performance of the investment firm concerned or the assets it manages. Furthermore, where the investment firm is subject to the requirement to defer variable remuneration under Article 32(1), point (l), of Directive (EU) 2019/2034, the alternative arrangements should also be consistent with the requirement to defer variable remuneration, and with the application of *malus* or clawback arrangements and retention periods to variable remuneration paid in instruments.

(14) This Regulation is based on the draft regulatory technical standards submitted to the Commission by the European Banking Authority after having consulted the European Securities and Markets Authority.

(15) The European Banking Authority has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, 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 Council ([6]),

([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, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176 27.6.2013, p. 338).

([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).

HAS ADOPTED THIS REGULATION:

Article 1

Classes of instruments that adequately reflect the credit quality of an investment firm as a going concern and are appropriate to be used for the purposes of variable remuneration

1. The following shall be the classes of instruments that satisfy the conditions laid down in Article 32(1), point (j)(iii), of Directive (EU) 2019/2034:

(a) classes of Additional Tier 1 instruments where those classes fulfil the conditions referred to in paragraph 2 of this Article and Article 2, and comply with Article 5(9) and Article 5(13), point (c);

(b) classes of Tier 2 instruments where those classes fulfil the conditions referred to in paragraph 2 of this Article and Article 3, and comply with Article 5;

(c) classes of instruments which can be fully converted to Common Equity Tier 1 instruments or written down and which are neither Additional Tier 1 instruments nor Tier 2 instruments ('Other Instruments') in the cases referred to in Article 4 where those classes fulfil the conditions referred to in paragraph 2 of this Article and comply with Article 5.

2. The classes of instruments referred to in paragraph 1 shall fulfil the following conditions:

(a) instruments shall not be secured or subject to a guarantee that enhances the seniority of the claims of the holder;

(b) where the provisions governing an instrument allow its conversion, that instrument shall only be used for the purposes of awarding variable remuneration where the rate or range of conversion is set at a level that ensures that the value of the instrument into which the instrument initially awarded is converted is not higher than the value of the instrument initially awarded at the time it was awarded as variable remuneration;

(c) the provisions governing convertible instruments which are used for the sole purpose of variable remuneration shall ensure that the value of the instrument into which the instrument initially awarded is converted is not higher than the value, at the time of that conversion, of the instrument initially awarded;

(d) the provisions governing the instrument shall provide that any distributions are paid on at least an annual basis and are paid to the holder of the instrument;

(e) instruments shall be priced at their value at the time the instrument is awarded, in accordance with the applicable accounting standard;

(f) the provisions governing the instruments issued for the sole purpose of variable remuneration shall require a valuation to be carried out in accordance with the applicable accounting standard in the event that the instrument is redeemed, called, repurchased or converted.

For the purposes of point (e), the valuation shall be subject to independent review.

Article 2

Conditions for classes of Additional Tier 1 instruments

Classes of Additional Tier 1 instruments shall comply with the following conditions:

(a) the provisions governing the instrument shall specify a trigger event for the purpose of Article 9(2), point (e)(iii), of Regulation (EU) 2019/2033;

(b) the trigger event referred to in point (a) occurs when the Common Equity Tier 1 capital ratio of the investment firm issuing the instrument falls below either of the following:

(i) 7 % of the product of 12,5 multiplied by the own funds requirements calculated in accordance with Article 11(1) of Regulation (EU) 2019/2033;

(ii) a level higher than the one specified in point (i), where determined by the investment firm or institution issuing the instrument and specified in the provisions governing the instrument;

(c) one of the following requirements is met:

(i) the instruments are issued for the sole purpose of being awarded as variable remuneration and the provisions governing the instrument ensure that any distributions are paid at a rate which is consistent with market rates for similar instruments issued either by the investment firm or by investment firms or institutions of comparable credit quality and which in any case is, at the time the remuneration is awarded, no higher than 8 percentage points above the annual average rate of change for the Union as published by the Commission (Eurostat) in its Harmonised Indices of Consumer Prices published pursuant to Article 11 of Council Regulation (EC) No 2494/95 ([7]);

(ii) at the time of the award of the instruments as variable remuneration, at least 60 % of the instruments in issuance were issued other than as an award of variable remuneration and are not held by one of the following or by any undertaking that has close links with one of the following:

the investment firm or its subsidiaries;

— the parent undertaking of the investment firm or its subsidiaries;

— the parent financial holding company of the investment firm or its subsidiaries;

— the mixed activity holding company of the investment firm or its subsidiaries;

— the mixed financial holding company of the investment firm and its subsidiaries.

For the purposes of point (i), where the instruments are awarded to staff members who perform the predominant part of their professional activities outside of the Union and instruments are denominated in a currency issued by a third country, investment firms may use a similar independently-calculated index of consumer prices produced in respect of that third country.

Article 3

Conditions for classes of Tier 2 instruments

Classes of Tier 2 instruments shall comply with the following conditions:

(a) at the time of the award of the instruments as variable remuneration, the remaining period before maturity of the instruments shall be equal to or exceed the sum of the deferral periods and retention periods that apply to variable remuneration in respect of the award of those instruments;

(b) the provisions governing the instrument provide that, upon the occurrence of a trigger event, the principal amount of the instruments shall be written down on a permanent or temporary basis or the instrument shall be converted to Common Equity Tier 1 instruments;

(c) the trigger event referred to in point (b) occurs where the Common Equity Tier 1 capital ratio of the investment firm issuing the instrument falls below either of the following:

(i) 7 % of the product of 12,5 multiplied by the own funds requirements calculated in accordance with Article 11(1) of Regulation (EU) 2019/2033;

(ii) a level higher than the one specified in point (i), where determined by the investment firm or institution issuing the instrument and specified in the provisions governing the instrument;

(d) one of the requirements laid down in Article 2, point (c) is met.

([7]) Council Regulation (EC) No 2494/95 of 23 October 1995 concerning harmonized indices of consumer prices (OJ L 257, 27.10.1995, p. 1).

Article 4

Conditions for classes of Other Instruments

1. Under the conditions laid down in Article 1(1), point (c) of this Regulation, Other Instruments satisfy the conditions laid down in Article 32(1), point (j)(iii), of Directive (EU) 2019/2034 in each of the following cases:

(a) the Other Instruments fulfil the conditions laid down in paragraph 2 of this Article;

(b) the Other Instruments are linked to an Additional Tier 1 instrument or Tier 2 instrument and fulfil the conditions laid down in paragraph 3 of this Article;

(c) the Other Instruments are linked to an instrument which would be an Additional Tier 1 instrument or Tier 2 instrument but for the fact that it is issued by a parent undertaking of the investment firm which is outside the scope of consolidation pursuant to Part One, Title II, Chapter 2, of Regulation (EU) No 575/2013 and the Other Instruments fulfil the conditions laid down in paragraph 4.

2. The conditions referred to in paragraph 1, point (a), are the following:

(a) the Other Instruments shall be issued directly or through an investment firm, institution or financial institution included in the consolidation scope pursuant to Part One, Title II, Chapter 2, of Regulation (EU) No 575/2013 or Article 7 of Regulation (EU) 2019/2033, provided that a change to the credit quality of the issuer of the instrument can reasonably be expected to lead to a similar change to the credit quality of the investment firm using the Other Instruments for the purpose of variable remuneration;

(b) the provisions governing the Other Instruments do not give the holder the right to accelerate the scheduled payment of distributions or principal other than in the case of the insolvency or liquidation of the institution or investment firm issuing that instrument;

(c) at the time of the award of the Other Instruments as variable remuneration the remaining period before maturity of the Other Instruments is equal to or exceeds the sum of the deferral periods and retention periods that apply in respect of the award of those instruments;

(d) the provisions governing the instrument provide that, upon the occurrence of a trigger event, the principal amount of the instruments shall be written down on a permanent or temporary basis or the instrument shall be converted to Common Equity Tier 1 instruments;

(e) the trigger event referred to in point (d) occurs when the Common Equity Tier 1 capital ratio of the institution or investment firm issuing the instrument falls below either of the following:

   (i) in case of an investment firm issuing the instruments, 7 % of the product of 12,5 multiplied by the own funds requirements calculated in accordance with Article 11(1) of Regulation (EU) 2019/2033;

   (ii) in case of an institution issuing the instruments, 7 % of the Common Equity Tier 1 capital ratio of the institution issuing the instrument;

   (iii) a level higher than specified in points (i) or (ii), where determined by the investment firm or institution issuing the instrument and specified in the provisions governing the instrument;

(f) one of the requirements in Article 2, point (c), is met.

3. The conditions referred to in paragraph 1, point (b), are the following:

(a) the Other Instruments fulfil the conditions of paragraph 2, points (a) to (e);

(b) the Other Instruments are linked to an Additional Tier 1 or Tier 2 instrument issued through an entity within the scope of consolidation pursuant to Part One, Title II, Chapter 2, of Regulation (EU) No 575/2013 or Article 7 of Regulation (EU) 2019/2033 (the 'reference instrument');

(c) the reference instrument fulfils the conditions of paragraph 2, points (c) and (f), at the time that the instrument is awarded as variable remuneration;

(d) the value of an Other Instrument is linked to the reference instrument such that it is at no time more than the value of the reference instrument;

(e) the value of any distributions paid after the Other Instrument has vested is linked to the reference instrument such that distributions paid are at no time more than the value of any distributions paid under the reference instrument;

(f) the provisions governing the Other Instruments provide that if the reference instrument is called, converted, repurchased or redeemed within the deferral or retention period the Other Instruments shall be linked to an equivalent reference instrument which fulfils the conditions in this Article such that the total value of the Other Instruments does not increase.

4. The conditions referred to in paragraph 1, point (c), are the following:

(a) the competent authorities have determined for the purpose of Article 55 of Directive (EU) 2019/2034 or Article 127 of Directive 2013/36/EU that the investment firm or institution that issues the instrument to which the Other Instruments are linked is subject to consolidated supervision by a third-country supervisory authority which is equivalent to that governed by the principles set out in Directive (EU) 2019/2034 in the case that the issuer is an investment firm located in a third country or Directive 2013/36/EU in the case that the issuer is an institution located in a third country and the requirements of Part One, Title II, Chapter 2 of Regulation (EU) No 575/2013;

(b) the Other Instruments fulfil the conditions referred to in paragraph 3, point (a) and points (c) to (f).

Article 5

Write-down, write-up and conversion procedures

1. For the purpose of Article 3, point (b), and Article 4(2), point (d), the provisions governing Tier 2 instruments and Other Instruments shall comply with the procedures and timing laid down in paragraphs 2 to 14 of this Article for calculating the Common Equity Tier 1 capital ratio and the amounts to be written down, written up or converted. The provisions governing Additional Tier 1 instruments shall comply with the procedures laid down in paragraph 9 and paragraph 13, point (c) of this Article in respect of amounts to be written down, written up or converted.

2. Where the provisions governing Tier 2 and Other Instruments require the instruments to be converted into Common Equity Tier 1 instruments upon the occurrence of a trigger event, those provisions shall specify either of the following:

(a) the rate of that conversion and a limit on the permitted amount of conversion;

(b) a range within which the instruments will convert into Common Equity Tier 1 instruments.

3. Where the provisions governing the instruments provide that their principal amount shall be written down upon the occurrence of a trigger event, the write-down shall permanently or temporarily reduce all the following:

(a) the claim of the holder of the instrument in the insolvency or liquidation of the institution or investment firm issuing the instrument;

(b) the amount to be paid in the event of the call or redemption of the instrument;

(c) the distributions made on the instrument.

4. Any distributions payable after a write-down shall be based on the reduced amount of the principal.

5. Write-down or conversion of the instruments shall, under the applicable accounting framework, generate items that qualify as Common Equity Tier 1 items.

6. Where the investment firm or institution issuing the instrument has established that the Common Equity Tier 1 ratio has fallen below the level that activates conversion or write-down of the instrument, the management body or any other relevant body of the investment firm or institution issuing the instrument shall be required to determine without delay that a trigger event has occurred and there shall be an irrevocable obligation to write-down or convert the instrument.

7. The aggregate amount of instruments that are required to be written down or converted upon the occurrence of a trigger event shall be no less than the lower of the following:

(a) the amount required to fully restore the Common Equity Tier 1 ratio of the investment firm or institution issuing the instrument to the percentage set as the trigger event in the provisions governing the instrument;

(b) the full principal amount of the instrument.

8. Where a trigger event occurs:

(a) the investment firm shall inform the staff members who have been awarded the instruments as variable remuneration and the persons who continue to hold such instruments;

(b) the investment firm or institution issuing the instrument shall write down the principal amount of the instruments, or convert the instruments into Common Equity Tier 1 instruments as soon as possible and within a maximum period of one month in accordance with the requirements laid down in this Article.

9. Where Additional Tier 1 instruments, Tier 2 instruments and Other Instruments include an identical trigger level, the principal amount shall be written down or converted on a pro rata basis to all holders of such instruments which are used for the purposes of variable remuneration.

10. The amount of the instrument to be written-down or converted shall be subject to independent review. That review shall be completed as soon as possible and shall not create impediments to write-down or convert the instrument.

11. An investment firm or institution issuing instruments that convert to Common Equity Tier 1 on the occurrence of a trigger event shall be required to ensure that its authorised share capital is at all times sufficient to convert all such convertible instruments into shares if a trigger event occurs. The investment firm or institution shall be required to maintain at all times the necessary prior authorisation to issue the Common Equity Tier 1 instruments into which such instruments would convert upon the occurrence of a trigger event.

12. An investment firm or institution issuing instruments that convert to Common Equity Tier 1 on the occurrence of a trigger event shall be required to ensure that there are no procedural impediments to that conversion by virtue of its incorporation or statutes or contractual arrangements.

13. In order for the write-down of an instrument to be considered temporary, all of the following conditions shall be met:

(a) write-ups shall be based on profits after the issuer of the instrument has taken a formal decision confirming the final profits;

(b) any write-up of the instrument or payment of coupons on the reduced amount of the principal shall be operated at the full discretion of the investment firm or institution issuing the instrument subject to the conditions set out in points (c), (d) and (e) and the investment firm or institution shall not be obliged to operate or accelerate a write-up under specific circumstances;

(c) a write-up shall be operated on a pro rata basis among Additional Tier 1 instruments, Tier 2 instruments and Other Instruments used for the purpose of variable remuneration that have been subject to a write-down;

(d) the maximum amount to be attributed to the sum of the write-up of Tier 2 and Other Instruments together with the payment of coupons on the reduced amount of the principal shall be equal to the profit of the investment firm or institution issuing the instrument multiplied by the amount obtained by dividing the amount determined in point (i) by the amount determined in point (ii):

   (i) the sum of the nominal amount of all Tier 2 instruments and Other Instruments of the investment firm before write-down that have been subject to a write-down;

   (ii) the sum of own funds and of the nominal amount of Other Instruments used for the purpose of variable remuneration of the investment firm;

(e) the sum of any write-up amounts and payments of coupons on the reduced amount of the principal shall be treated as a payment that results in a reduction of Common Equity Tier 1 and shall be:

   (i) consistent with the maintenance of a sound capital base of an investment firm,

   (ii) where applicable, consistent with its timely exit from extraordinary public financial support, and

   (iii) where applicable, limited to a portion of net revenue when the investment firm benefits from extraordinary public financial support.

14. For the purposes of paragraph 13, point (d), the calculation shall be made at the moment when the write-up is operated.

Article 6

Alternative arrangements

Alternative arrangements that may be used by investment firms for the pay-out of variable remuneration under Article 32(1), point (k), of Directive (EU) 2019/2034, subject to the approval of the competent authority, shall comply with all of the following conditions:

(a) the alternative arrangement contributes to the alignment of the variable remuneration with the long-term interests of the investment firm, its creditors and clients;

(b) the alternative arrangement is subject to a retention policy designed to align the incentives of the individual with the longer-term interests of the investment firm, its creditors and clients, the retention period shall be at least six months;

(c) the amount received under an alternative arrangement and the applicable conditions are well documented and transparent to the staff member receiving variable remuneration under such an arrangement;

(d) for amounts received under deferral and retention arrangements the alternative arrangement ensures that staff cannot access, transfer or redeem the deferred part of variable remuneration during such periods;

(e) the alternative arrangement does not provide for the increase of the value of the variable remuneration received during deferral periods by interest payments or other similar arrangements other than by arrangements that fulfil the conditions laid down in point (f);

(f) where the alternative arrangement allows for predetermined changes of the value received as variable remuneration during deferral and retention periods, based on the performance of the investment firm or the managed assets, the following conditions shall be met:

  (i) the change of the value is based on predefined performance indicators that are based on the credit quality of the investment firm or the performance of the managed assets;

  (ii) where deferral and retention have to be applied, value changes should be calculated at least annually and at the end of the retention period;

  (iii) the rate of possible positive and negative value changes should equally be based on the level of positive or negative credit quality changes or performance measured;

  (iv) where the value change under point (i) is based on the performance of assets managed, the percentage of value change is limited to the percentage of value change of the managed assets;

  (v) where the value change under point (i) is based on the credit quality of the investment firm, the percentage of value change is limited to the percentage of the annual total gross revenue in relation to the investment firms total own funds;

(g) the alternative arrangement does not hinder the application of Article 32(1), point (m), of Directive (EU) 2019/2034.

Article 7

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 August 2021.

For the Commission

The President

Ursula VON DER LEYEN