COMMISSION DELEGATED REGULATION (EU) 2021/2154

of 13 August 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/EU ([1]), 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 Council ([2]) and of Titles VII and VIII of Directive 2013/36/EU of the European Parliament and of the Council ([3]), in accordance with Article 1(2) and (5) of Regulation (EU) 2019/2033 of the European Parliament and of the Council ([4]), are subject to Commission Delegated Regulation (EU) 2021/923 ([5]), 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 members of the management body in its supervisory function who oversee the decision-making process and challenge decisions made.

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

([2]) 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).

([3]) 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).

([4]) 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).

([5]) Commission Delegated Regulation (EU) 2021/923 of 25 March 2021 supplementing Directive 2013/36/EU of the European Parliament and of the Council with regard to regulatory technical standards setting out the criteria to define managerial responsibility, control functions, material business units and a significant impact on a material business unit's risk profile, and setting out criteria for identifying staff members or categories of staff whose professional activities have an impact on the institution's risk profile that is comparably as material as that of staff members or categories of staff referred to in Article 92(3) of that Directive (OJ L 203, 9.6.2021, p. 1).

(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 Council [6],

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.

[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).

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.

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 Council [7];

(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/EU, 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) 2017/565 [8].

[7] 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).

[8] 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).

(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;

(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 August 2021.

For the Commission
The President
Ursula VON DER LEYEN