

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 (Text with EEA relevance)

TITLE IV

PRUDENTIAL SUPERVISION

CHAPTER 2

Review process

Section 4

Supervisory measures and powers

Article 38

Supervisory measures

Competent authorities shall require investment firms to take, at an early stage, the measures necessary to address the following problems:

- (a) an investment firm does not meet the requirements of this Directive or of Regulation (EU) 2019/2033;
- (b) competent authorities have evidence that an investment firm is likely to breach the national provisions transposing this Directive or the provisions of Regulation (EU) 2019/2033 within the next 12 months.

Article 39

Supervisory powers

1 Member States shall ensure that competent authorities have the necessary supervisory powers to intervene in the exercise of their functions into the activity of investment firms in an effective and proportionate way.

2 For the purposes of Article 36, Article 37(3) and Article 38 and of the application of Regulation (EU) 2019/2033, competent authorities shall have the following powers:

- a to require investment firms to have own funds in excess of the requirements set out in Article 11 of Regulation (EU) 2019/2033, under the conditions laid down in Article 40 of this Directive, or to adjust the own funds and liquid assets required in case of material changes in the business of those investment firms;
- b to require the reinforcement of the arrangements, processes, mechanisms and strategies implemented in accordance with Articles 24 and 26;

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- c to require investment firms to present, within one year, a plan to restore compliance with supervisory requirements pursuant to this Directive and to Regulation (EU) 2019/2033, to set a deadline for the implementation of that plan and require improvements to that plan regarding scope and deadline;
 - d to require investment firms to apply a specific provisioning policy or treatment of assets in terms of own funds requirements;
 - e to restrict or limit the business, operations or network of investment firms or to request the divestment of activities that pose excessive risks to the financial soundness of an investment firm;
 - f to require the reduction of the risk inherent in the activities, products and systems of investment firms, including outsourced activities;
 - g to require investment firms to limit variable remuneration as a percentage of net revenues where that remuneration is inconsistent with the maintenance of a sound capital base;
 - h to require investment firms to use net profits to strengthen own funds;
 - i to restrict or prohibit distributions or interest payments by an investment firm to shareholders, members or holders of Additional Tier 1 instruments where that restriction or prohibition does not constitute an event of default of the investment firm;
 - j to impose additional or more frequent reporting requirements to those set out in this Directive and Regulation (EU) 2019/2033, including reporting on capital and liquidity positions;
 - k to impose specific liquidity requirements in accordance with Article 42;
 - l to require additional disclosures;
 - m to require investment firms to reduce the risks posed to the security of investment firms' network and information systems to ensure confidentiality, integrity and availability of their processes, data and assets;
- 3 For the purposes of point (j) of paragraph 2, competent authorities may only impose additional or more frequent reporting requirements on investment firms where the information to be reported is not duplicative and one of the following conditions is met:
- a one of the cases referred to in points (a) and (b) of Article 38 applies;
 - b the competent authority considers it to be necessary to gather the evidence referred to in point (b) of Article 38;
 - c the additional information is required for the purpose of the supervisory review and evaluation process referred to in Article 36.

Information shall be deemed to be duplicative where the competent authority already has the same or substantially the same information, where that information is capable of being produced by the competent authority or of being obtained by the same competent authority through other means than a requirement on the investment firm to report it. A competent authority shall not require additional information where the information is available to the competent authority in a different format or level of granularity than the additional information to be reported and that different format or granularity does not prevent it from producing substantially similar information.

Article 40

Additional own funds requirement

1 Competent authorities shall impose the additional own funds requirement referred to in point (a) of Article 39(2) only where, on the basis of the reviews carried out in accordance with Articles 36 and 37, they ascertain any of the following situations for an investment firm:

- a the investment firm is exposed to risks or elements of risks, or poses risks to others that are material and are not covered or not sufficiently covered by the own funds requirement, and especially K#factor requirements, set out in Part Three or Four of Regulation (EU) 2019/2033;
- b the investment firm does not meet the requirements set out in Articles 24 and 26 and other supervisory measures are unlikely to sufficiently improve the arrangements, processes, mechanisms and strategies within an appropriate timeframe;
- c the adjustments in relation to the prudent valuation of the trading book are insufficient to enable the investment firm to sell or hedge out its positions within a short period without incurring material losses under normal market conditions;
- d the review carried out in accordance with Article 37 shows that non#compliance with the requirements for the application of the permitted internal models will likely lead to inadequate levels of capital;
- e the investment firm repeatedly fails to establish or maintain an adequate level of additional own funds as set out in Article 41.

2 For the purposes of point (a) of paragraph 1 of this Article, risks or elements of risks shall be considered not to be covered or to be insufficiently covered by the own funds requirements set out in Parts Three and Four of Regulation (EU) 2019/2033 only where the amounts, types and distribution of capital considered adequate by the competent authority following the supervisory review of the assessment carried out by investment firms in accordance with Article 24(1) of this Directive are higher than the investment firm's own funds requirement set out in Part Three or Four of Regulation (EU) 2019/2033.

For the purposes of the first subparagraph, the capital considered to be adequate may include risks or elements of risks that are explicitly excluded from the own funds requirement set out in Part Three or Four of Regulation (EU) 2019/2033.

3 Competent authorities shall determine the level of the additional own funds required pursuant to point (a) of Article 39(2) as the difference between the capital considered adequate pursuant to paragraph 2 of this Article and the own funds requirement set out in Part Three or Four of Regulation (EU) 2019/2033.

4 Competent authorities shall require investment firms to meet the additional own funds requirement referred to in point (a) of Article 39(2) with own funds subject to the following conditions:

- a at least three quarters of the additional own funds requirement is met with Tier 1 capital;
- b at least three quarters of the Tier 1 capital is composed of Common Equity Tier 1 capital;
- c those own funds are not used to meet any of the own funds requirements set out in points (a), (b) and (c) of Article 11(1) of Regulation (EU) 2019/2033.

5 Competent authorities shall substantiate in writing their decision to impose an additional own funds requirement as referred to in point (a) of Article 39(2) by giving a clear account of the full assessment of the elements referred to in paragraphs 1 to 4 of this Article. That includes, in the case set out in point (d) of paragraph 1 of this Article, a specific statement

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of why the level of capital established in accordance with Article 41(1) is no longer considered sufficient.

6 EBA, in consultation with ESMA, shall develop draft regulatory technical standards to specify how the risks and elements of risks referred to in paragraph 2 are to be measured, including risks or elements of risks that are explicitly excluded from the own funds requirements set out in Part Three or Four of Regulation (EU) 2019/2033.

EBA shall ensure that the draft regulatory technical standards include indicative qualitative metrics for the amounts of additional own funds referred to in point (a) of Article 39(2), taking into account the range of different business models and legal forms that investment firms may take, and are proportionate in light of:

- a the implementation burden on investment firms and competent authorities;
- b the possibility that the higher level of own funds requirements that apply where investment firms do not use internal models justifies the imposition of lower own funds requirements when assessing risks and elements of risks in accordance with paragraph 2.

EBA shall submit those draft regulatory technical standards to the Commission by 26 June 2021.

Power is delegated to the Commission to supplement this Directive by adopting the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010.

7 Competent authorities may impose an additional own funds requirement in accordance with paragraphs 1 to 6 on investment firms that meet the conditions for qualifying as small and non#interconnected investment firms set out in Article 12(1) of Regulation (EU) 2019/2033 on the basis of a case#by#case assessment and where the competent authority deems it to be justified.

Article 41

Guidance on additional own funds

1 Taking into account the principle of proportionality and commensurate with the size, systemic importance, nature, scale and complexity of activities of investment firms that do not meet the conditions for qualifying as small and non#interconnected investment firms set out in Article 12(1) of Regulation (EU) 2019/2033, competent authorities may require such investment firms to have levels of own funds which, based on Article 24, are sufficiently above the requirements set out in Part Three of Regulation (EU) 2019/2033 and in this Directive, including the additional own funds requirements referred to in point (a) of Article 39(2), to ensure that cyclical economic fluctuations do not lead to a breach of those requirements or threaten the ability of the investment firm to wind down and cease activities in an orderly manner;

2 Competent authorities shall, where appropriate, review the level of own funds that has been set by each investment firm that does not meet the conditions for qualifying as a small and non#interconnected investment firm set out in Article 12(1) of Regulation (EU) 2019/2033, in accordance with paragraph 1 of this Article and, where relevant, shall communicate the conclusions of that review to the investment firm concerned, including any expectation for adjustments to the level of own funds established in accordance with paragraph 1 of this Article. Such a communication shall include the date by which the competent authority requires the adjustment to be completed.

Article 42

Specific liquidity requirements

1 Competent authorities shall impose the specific liquidity requirements referred to in point (k) of Article 39(2) of this Directive only where, on the basis of the reviews carried out in accordance with Articles 36 and 37 of this Directive, they conclude that an investment firm that does not meet the conditions for qualifying as a small and non#interconnected investment firm set out in Article 12(1) of Regulation (EU) 2019/2033 or that meets the conditions set out in Article 12(1) of Regulation (EU) 2019/2033 but has not been exempted from liquidity requirement in accordance with Article 43(1) of Regulation (EU) 2019/2033 is in one of the following situations:

- a the investment firm is exposed to liquidity risk or elements of liquidity risk that are material and are not covered or not sufficiently covered by the liquidity requirement set out in Part Five of Regulation (EU) 2019/2033;
- b the investment firm does not meet the requirements set out in Articles 24 and 26 of this Directive and other administrative measures are unlikely to sufficiently improve the arrangements, processes, mechanisms and strategies within an appropriate timeframe.

2 For the purposes of point (a) of paragraph 1 of this Article, liquidity risk or elements of liquidity risk shall be considered not to be covered or to be insufficiently covered by the liquidity requirement set out in Part Five of Regulation (EU) 2019/2033 only where the amounts and types of liquidity considered adequate by the competent authority following the supervisory review of the assessment carried out by investment firms in accordance with Article 24(1) of this Directive are higher than the investment firm's liquidity requirement set out in Part Five of Regulation (EU) 2019/2033.

3 Competent authorities shall determine the level of the specific liquidity required pursuant to point (k) of Article 39(2) of this Directive as the difference between the liquidity considered adequate pursuant to paragraph 2 of this Article and the liquidity requirement set out in Part Five of Regulation (EU) 2019/2033.

4 Competent authorities shall require investment firms to meet the specific liquidity requirements referred to in point (k) of Article 39(2) of this Directive with liquid assets as set out in Article 43 of Regulation (EU) 2019/2033.

5 Competent authorities shall substantiate in writing their decision to impose a specific liquidity requirement as referred to in point (k) of Article 39(2) by giving a clear account of the full assessment of the elements referred to in paragraphs 1 to 3 of this Article.

6 EBA, in consultation with ESMA, shall develop draft regulatory technical standards to specify in a manner that is appropriate to the size, the structure and the internal organisation of investment firms and the nature, scope and complexity of their activities how the liquidity risk and elements of liquidity risk referred to in paragraph 2 are to be measured.

EBA shall submit those draft regulatory technical standards to the Commission by 26 June 2021.

Power is delegated to the Commission to supplement this Directive by adopting the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010.

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Article 43

Cooperation with resolution authorities

Competent authorities shall notify the relevant resolution authorities of any additional own funds requirement imposed pursuant to point (a) of Article 39(2) of this Directive for an investment firm that falls under the scope of Directive 2014/59/EU and about any expectation for adjustments as referred to in Article 41(2) of this Directive in respect to such investment firm.

Article 44

Publication requirements

Member States shall ensure that the competent authorities have the power to:

- (a) require investment firms that do not meet the conditions for qualifying as small and non#interconnected investment firms set out in Article 12(1) of Regulation (EU) 2019/2033 and investment firms referred to in Article 46(2) of Regulation (EU) 2019/2033 to publish the information referred to in Article 46 of that Regulation more than once a year and to set deadlines for that publication;
- (b) require investment firms that do not meet the conditions for qualifying as small and non#interconnected investment firms set out in Article 12(1) of Regulation (EU) 2019/2033 and investment firms referred to in Article 46(2) of Regulation (EU) 2019/2033 to use specific media and locations, in particular the investment firms' websites, for publications other than the financial statements;
- (c) require parent undertakings to publish annually, either in full or by way of references to equivalent information, a description of their legal structure and governance and organisational structure of the investment firm group in accordance with Article 26(1) of this Directive and with Article 10 of Directive 2014/65/EU.

Article 45

Obligation to inform EBA

- 1 Competent authorities shall inform EBA of:
 - a their review and evaluation process referred to in Article 36;
 - b the methodology used for decisions referred to in Articles 39, 40 and 41;
 - c the level of administrative sanctions laid down by Member States, referred to in Article 18.

EBA shall transmit the information referred to in this paragraph to ESMA.

- 2 EBA, in consultation with ESMA, shall assess the information provided by competent authorities to develop consistency in the supervisory review and evaluation process. To complete its assessment, EBA, after consulting ESMA, may request additional information from competent authorities on a proportional basis and in accordance with Article 35 of Regulation (EU) No 1093/2010.

EBA shall publish on its website the aggregated information referred to in point (c) of the first subparagraph of paragraph 1.

EBA shall report to the European Parliament and to the Council on the degree of convergence of the application of this Chapter among Member States. EBA shall conduct peer reviews in accordance with Article 30 of Regulation (EU) No 1093/2010 where necessary. It shall inform ESMA of such peer reviews.

EBA and ESMA shall issue guidelines for the competent authorities in accordance with Article 16 of Regulation (EU) No 1093/2010 and Article 16 of Regulation (EU) No 1095/2010, as applicable, to further specify, in a manner that is appropriate to the size, the structure and the internal organisation of investment firms and the nature, scope and complexity of their activities, the common procedures and methodologies for the supervisory review and evaluation process referred to in paragraph 1 and the assessment of the treatment of the risks referred to in Article 29 of this Directive.