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 1

Principles of prudential supervision

Section 1

Competences and duties of home and host Member States

Article 12

Competence of the competent authorities of the home and host Member State

The prudential supervision of investment firms shall be the responsibility of the competent authorities of the home Member State, without prejudice to those provisions of this Directive which confer responsibility on the competent authorities of the host Member State.

Article 13

Cooperation between competent authorities of different Member States

1 Competent authorities of different Member States shall cooperate closely for the purposes of their duties pursuant to this Directive and to Regulation (EU) 2019/2033, in particular by exchanging information about investment firms without delay, including the following:

a information about the management and ownership structure of the investment firm;

b information about compliance with own funds requirements by the investment firm;

c information about compliance with the concentration risk requirements and liquidity requirements of the investment firm;

d information about the administrative and accounting procedures and internal control mechanisms of the investment firm;

e any other relevant factors that may influence the risk posed by the investment firm.

2 The competent authorities of the home Member State shall immediately provide the competent authorities of the host Member State with any information and findings about any potential problems and risks posed by an investment firm to the protection of clients or the stability of the financial system in the host Member State which they have identified when supervising the activities of an investment firm.

3 The competent authorities of the home Member State shall act upon information provided by the competent authorities of the host Member State by taking all measures necessary to avert or remedy potential problems and risks as referred to in paragraph 2. Upon request, the competent authorities of the home Member State shall explain in detail to the competent authorities of the host Member State how they have taken into account the information and findings provided by the competent authorities of the host Member State.

4 Where, following the communication of the information and findings referred to in paragraph 2, the competent authorities of the host Member State consider that the competent authorities of the home Member State have not taken the necessary measures referred to in paragraph 3, the competent authorities of the host Member State may, after having informed the competent authorities of the home Member State, EBA and ESMA, take appropriate measures to protect clients to whom services are provided or to protect the stability of the financial system.

The competent authorities may refer to EBA cases in which a request for collaboration, in particular a request to exchange information, has been rejected or has not been acted upon within a reasonable time. With regard to such cases, EBA may, without prejudice to Article 258 TFEU, act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1093/2010. EBA may also assist the competent authorities in reaching an agreement on the exchange of information under this Article on its own initiative in accordance with the second subparagraph of Article 19(1) of that Regulation.

5 Competent authorities of the home Member State that disagree with the measures of the competent authorities of the host Member State may refer the matter to EBA, which shall act in accordance with the procedure laid down in Article 19 of Regulation (EU) No 1093/2010. Where EBA acts in accordance with that Article, it shall adopt its decision within one month.

6 For the purpose of assessing the condition in point (c) of the first subparagraph of Article 23(1) of Regulation (EU) 2019/2033, the competent authority of an investment firm's home Member State may request the competent authority of a clearing member's home Member State to provide information relating to the margin model and parameters used for the calculation of the margin requirement of the relevant investment firm.

7 EBA, in consultation with ESMA, shall develop draft regulatory technical standards to specify requirements for the type and nature of the information referred to in paragraphs 1 and 2 of this Article.

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.

8 EBA, in consultation with ESMA, shall develop draft implementing technical standards to establish standard forms, templates and procedures for the information sharing requirements for the purpose of facilitating the supervision of investment firms.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1093/2010.

9 EBA shall submit the draft technical standards referred to in paragraphs 7 and 8 to the Commission by 26 June 2021.

Article 14

On#the#spot checking and inspection of branches established in another Member State

1 Host Member States shall provide that, where an investment firm authorised in another Member State carries out its activities through a branch, the competent authorities of the home Member State may, after having informed the competent authorities of the host Member State, carry out, themselves or through intermediaries that they appoint for that purpose, on#the#spot checks of the information referred to in Article 13(1) and inspect such branches.

2 The competent authorities of the host Member State shall, for supervisory purposes and where they consider it to be relevant for reasons of stability of the financial system in the host Member State, have the power to carry out, on a case#by#case basis, on#the#spot checks and inspections of the activities carried out by branches of investment firms on their territory and require information from a branch about its activities.

Before carrying out such checks and inspections, the competent authorities of the host Member State shall, without delay, consult the competent authorities of the home Member State.

As soon as possible following the completion of those checks and inspections, the competent authorities of the host Member State shall communicate to the competent authorities of the home Member State the information obtained and findings that are relevant for the risk assessment of the investment firm concerned.

Section 2

Professional secrecy and duty to report

Article 15

Professional secrecy and exchange of confidential information

1 Member States shall ensure that competent authorities and all persons who work or who have worked for those competent authorities, including the persons referred to in Article 76(1) of Directive 2014/65/EU, are bound by the obligation of professional secrecy for the purposes of this Directive and of Regulation (EU) 2019/2033.

Confidential information which such competent authorities and persons receive in the course of their duties may be disclosed only in summary or aggregate form, provided that individual investment firms or persons cannot be identified, without prejudice to cases covered by criminal law.

Where the investment firm has been declared bankrupt or is being compulsorily wound up, confidential information which does not concern third parties may be disclosed in civil or commercial proceedings, where such disclosure is necessary for carrying out those proceedings.

2 Competent authorities shall use the confidential information collected, exchanged or transmitted pursuant to this Directive and to Regulation (EU) 2019/2033 only for the purpose of carrying out their duties, and in particular for the following purposes:

a to monitor the prudential rules set out in this Directive and in Regulation (EU) 2019/2033;

b to impose sanctions;

c in administrative appeals against decisions of the competent authorities;

d in court proceedings initiated under Article 23.

3 Natural and legal persons and other bodies, other than competent authorities, that receive confidential information pursuant to this Directive and to Regulation (EU) 2019/2033 shall use that information only for the purposes for which the competent authority expressly provides or in accordance with national law.

4 Competent authorities may exchange confidential information for the purposes of paragraph 2, may expressly state how that information is to be treated and may expressly restrict any further transmission of that information.

5 The obligation referred to in paragraph 1 shall not prevent competent authorities from transmitting confidential information to the Commission when that information is necessary for the exercise of the powers of the Commission.

6 Competent authorities may provide EBA, ESMA, the ESRB, central banks of the Member States, the European System of Central Banks (ESCB) and the European Central Bank in their capacity as monetary authorities, and, where appropriate, public authorities responsible for overseeing payment and settlement systems, with confidential information where that information is necessary for the performance of their tasks.

Article 16

Cooperation arrangements with third countries for the exchange of information

For the purpose of performing their supervisory tasks pursuant to this Directive or to Regulation (EU) 2019/2033, and for the purpose of exchanging information, competent authorities, EBA and ESMA in accordance with Article 33 of Regulation (EU) No 1093/2010 or Article 33 of Regulation (EU) No 1095/2010, as applicable, may conclude cooperation arrangements with third#country supervisory authorities as well as with third#country authorities or bodies responsible for the following tasks, provided that the information disclosed is subject to guarantees of professional secrecy that are at least equivalent to those laid down in Article 15 of this Directive:

(a) the supervision of financial institutions and financial markets, including the supervision of financial entities licensed to operate as central counterparties, where central counterparties have been recognised under Article 25 of Regulation (EU) No 648/2012 of the European Parliament and of the Council[(1)];

(b) the liquidation and bankruptcy of investment firms and similar procedures;

(c) oversight of the bodies involved in the liquidation and bankruptcy of investment firms and similar procedures;

(d) the carrying out of statutory audits of financial institutions or institutions which administer compensation schemes;

(e) oversight of persons charged with carrying out statutory audits of the accounts of financial institutions;

(f) oversight of persons active on emission allowance markets for the purpose of ensuring a consolidated overview of financial and spot markets;

(g) oversight of persons active on agricultural commodity derivatives markets for the purpose of ensuring a consolidated overview of financial and spot markets.

Article 17

Duties of persons responsible for the control of annual and consolidated accounts

Member States shall provide that any person who is authorised in accordance with Directive 2006/43/EC of the European Parliament and of the Council[(2)] and who performs in an investment firm the tasks described in Article 73 of Directive 2009/65/EC or in Article 34 of Directive 2013/34/EU, or any other statutory task, has a duty to report promptly to the competent authorities any fact or decision concerning that investment firm, or concerning an undertaking that has close links with that investment firm which:

(a) constitutes a material breach of the laws, regulations or administrative provisions laid down pursuant to this Directive;

(b) may affect the continuous functioning of the investment firm; or

(c) may lead to a refusal to certify the accounts or can lead to the expression of reservations.

Section 3

Sanctions, investigatory powers and right of appeal

Article 18

Administrative sanctions and other administrative measures

1 Without prejudice to the supervisory powers referred to in Section 4 of Chapter 2 of Title IV of this Directive, including investigatory powers and powers of competent authorities to impose remedies, and the right of Member States to provide for and impose criminal sanctions, Member States shall lay down rules on administrative sanctions and other administrative measures and ensure that their competent authorities have the power to impose such sanctions and measures in respect of breaches of national provisions transposing this Directive and of Regulation (EU) 2019/2033, including where an investment firm:

a fails to have in place internal governance arrangements as set out in Article 26;

b fails to report information or provides incomplete or inaccurate information on compliance with the obligation to meet own funds requirements set out in Article 11 of Regulation (EU) 2019/2033 to the competent authorities, in breach of point (b) of Article 54(1) of that Regulation;

c fails to report to the competent authorities, in breach of point (e) of Article 54(1) of Regulation (EU) 2019/2033, information about concentration risk or provides incomplete or inaccurate information;

d incurs a concentration risk in excess of the limits set out in Article 37 of Regulation (EU) 2019/2033, without prejudice to Articles 38 and 39 of that Regulation;

e repeatedly or persistently fails to hold liquid assets in breach of Article 43 of Regulation (EU) 2019/2033, without prejudice to Article 44 of that Regulation;

f fails to disclose information, or provides incomplete or inaccurate information, in breach of the provisions set out in Part Six of Regulation (EU) 2019/2033;

g makes payments to holders of instruments included in the own funds of the investment firm where Article 28, 52 or 63 of Regulation (EU) No 575/2013 prohibit such payments to holders of instruments included in own funds;

h is found liable for a serious breach of national provisions adopted pursuant to Directive (EU) 2015/849 of the European Parliament and of the Council[(3)];

i allows one or more persons that do not comply with Article 91 of Directive 2013/36/EU to become or remain a member of the management body.

Member States that do not lay down rules on administrative sanctions for breaches which are subject to national criminal law shall communicate to the Commission the relevant criminal law provisions.

The administrative sanctions and other administrative measures shall be effective, proportionate and dissuasive.

2 The administrative sanctions and other administrative measures referred to in the first subparagraph of paragraph 1 shall include the following:

a a public statement which identifies the natural or legal person, investment firm, investment holding company or mixed financial holding company responsible and the nature of the breach;

b an order requiring the natural or legal person responsible to cease the conduct and to desist from repeating that conduct;

c a temporary ban for members of the investment firm's management body or any other natural persons who are held responsible on exercising functions in investment firms;

d in case of a legal person, administrative pecuniary sanctions of up to 10 % of the total annual net turnover, including the gross income consisting of interest receivable and similar income, income from shares and other variable or fixed#yield securities, and commissions or fees of the undertaking in the preceding business year;

e in the case of a legal person, administrative pecuniary sanctions of up to twice the amount of the profits gained or losses avoided due to the breach where those profits or losses can be determined;

f in the case of a natural person, administrative pecuniary sanctions of up to EUR 5 000 000, or in the Member States whose currency is not the euro, the corresponding value in the national currency on 25 December 2019.

Where an undertaking referred to in point (d) of the first subparagraph is a subsidiary, the relevant gross income shall be the gross income resulting from the consolidated account of the ultimate parent undertaking in the preceding business year.

Member States shall ensure that where an investment firm is in breach of national provisions transposing this Directive or in breach of the provisions of Regulation (EU) 2019/2033, administrative sanctions may be applied by the competent authority to the members of the management body and to other natural persons who under national law are responsible for the breach.

3 Member States shall ensure that, when determining the type of administrative sanctions or other administrative measures referred to in paragraph 1 and the level of administrative pecuniary sanctions, competent authorities shall take into account all relevant circumstances, including, where appropriate:

a the gravity and the duration of the breach;
b the degree of responsibility of the natural or legal persons responsible for the breach;
c the financial strength of the natural or legal persons responsible for the breach, including the total turnover of legal persons or the annual income of natural persons;
d the importance of profits gained or losses avoided by the legal persons responsible for the breach;
e any losses incurred by third parties as a result of the breach;
f the level of cooperation with the relevant competent authorities;
g previous breaches by the natural or legal persons responsible for the breach;
h any potential systemic consequences of the breach.

Article 19

Investigatory powers

Member States shall ensure that competent authorities have all information#gathering and investigatory powers that are necessary for the exercise of their functions, including:

(a) the power to require information from the following natural or legal persons:

(i) investment firms established in the Member State concerned;

(ii) investment holding companies established in the Member State concerned;

(iii) mixed financial holding companies established in the Member State concerned;

(iv) mixed#activity holding companies established in the Member State concerned;

(v) persons belonging to the entities referred to in points (i) to (iv);

(vi) third parties to whom the entities referred to in points (i) to (iv) have outsourced operational functions or activities;

(b) the power to conduct all necessary investigations of any person referred to in point (a) that is established or located in the Member State concerned, including the right:

(i) to require the submission of documents by the persons referred to in point (a);

(ii) to examine the books and records of the persons referred to in point (a) and to make copies or extracts from those books and records;

(iii) to obtain written or oral explanations from the persons referred to in point (a) or from their representatives or staff;

(iv) to interview any other relevant person for the purpose of collecting information on the subject matter of an investigation;

(c) the power to conduct all necessary inspections at the business premises of the legal persons referred to in point (a) and any other undertakings included in the supervision of compliance with the group capital test, where the competent authority is the group supervisor, subject to the prior notification of other competent authorities concerned.

Article 20

Publication of administrative sanctions and other administrative measures

1 Member States shall ensure that competent authorities publish on their official website without undue delay any administrative sanctions and other administrative measures imposed in accordance with Article 18 and which have not been appealed or can no longer be appealed. That publication shall include information on the type and nature of the breach and the identity of the natural or legal person on whom the sanction is imposed or against whom the measure is taken. The information shall only be published after that person has been informed of those sanctions or measures and to the extent that the publication is necessary and proportionate.

2 Where Member States permit the publication of administrative sanctions or other administrative measures imposed in accordance with Article 18 against which there has been an appeal, competent authorities shall also publish on their official website information on the appeal status and on the outcome of the appeal.

3 Competent authorities shall publish the administrative sanctions or other administrative measures imposed in accordance with Article 18 on an anonymous basis in any of the following circumstances:

a the sanction or measure has been imposed on a natural person and publication of that person's personal data is found to be disproportionate;

b the publication would jeopardise an ongoing criminal investigation or the stability of financial markets;

c the publication would cause disproportionate damage to the investment firms or natural persons involved.

4 Competent authorities shall ensure that information published pursuant to this Article remains on their official website for at least five years. Personal data may only be retained on the official website of the competent authority where permitted by the applicable data protection rules.

Article 21

Reporting sanctions to EBA

Competent authorities shall inform EBA of administrative sanctions and other administrative measures imposed pursuant to Article 18, of any appeal against those sanctions and other administrative measures and of the outcome thereof. EBA shall maintain a central database of administrative sanctions and other administrative measures communicated to it solely for the purpose of exchanging information between competent authorities. That database shall be accessible only to competent authorities and ESMA and it shall be updated regularly, and at least annually.

EBA shall maintain a website with links to each competent authority's publication of administrative sanctions and other administrative measures imposed in accordance with Article 18 and shall state the period for which each Member State publishes administrative sanctions and other administrative measures.

Article 22

Reporting of breaches

1 Member States shall ensure that competent authorities establish effective and reliable mechanisms to enable prompt reporting of potential or actual breaches of national provisions transposing this Directive and of Regulation (EU) 2019/2033 to competent authorities.

Those mechanisms shall include the following:

a specific procedures for the reception, treatment and following up of such reports, including the establishment of secure communication channels;

b appropriate protection against retaliation, discrimination or other types of unfair treatment by the investment firm for employees of investment firms who report breaches committed within the investment firm;

c protection of personal data concerning both the person who reports the breach and the natural person who is allegedly responsible for that breach, in accordance with Regulation (EU) 2016/679;

d clear rules that ensure that confidentiality is guaranteed in all cases in relation to the person who reports the breaches committed within the investment firm, unless disclosure is required by national law in the context of further investigations or subsequent administrative or judicial proceedings.

2 Member States shall require investment firms to have in place appropriate procedures for their employees to report breaches internally through a specific independent channel. Those procedures may be provided for by the social partners provided that those procedures offer the same protection as the protection referred to in points (b), (c) and (d) of paragraph 1.

Article 23

Right of appeal

Member States shall ensure that decisions and measures taken pursuant to Regulation (EU) 2019/2033 or pursuant to laws, regulations and administrative provisions adopted in accordance with this Directive are subject to a right of appeal.

CHAPTER 2

Review process

Section 1

Internal capital adequacy assessment process and internal risk#assessment process

Article 24

Internal capital and liquid assets

1 Investment firms which 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 shall have in place sound, effective and comprehensive arrangements, strategies and processes to assess and maintain on an ongoing basis the amounts, types and distribution of internal capital and liquid assets that they consider adequate to cover the nature and level of risks which they may pose to others and to which the investment firms themselves are or might be exposed.

2 The arrangements, strategies and processes referred to in paragraph 1 shall be appropriate and proportionate to the nature, scale and complexity of the activities of the investment firm concerned. They shall be subject to regular internal review.

Competent authorities may request investment firms which meet the conditions for qualifying as small and non#interconnected investment firms set out in Article 12(1) of Regulation (EU) 2019/2033 to apply the requirements provided for in this Article to the extent that the competent authorities deem it to be appropriate.

Section 2

Internal governance, transparency, treatment of risks and remuneration

Article 25

Scope of application of this Section

1 This Section shall not apply where, on the basis of Article 12(1) of Regulation (EU) 2019/2033, an investment firm determines that it meets all of the conditions for qualifying as a small and non#interconnected investment firm set out therein.

2 Where an investment firm which has not met all of the conditions set out in Article 12(1) of Regulation (EU) 2019/2033 subsequently meets those conditions, this Section shall cease to apply after a period of six months from the date on which those conditions are met. This section shall cease to apply to an investment firm after that period only where the investment firm continued to meet the conditions set out in Article 12(1) of Regulation (EU) 2019/2033 without interruption during that period and where it notified the competent authority accordingly.

3 Where an investment firm determines that it no longer meets all of the conditions set out in Article 12(1) of Regulation (EU) 2019/2033, it shall notify the competent authority and comply with this Section within 12 months of the date on which that assessment took place.

4 Member States shall require investment firms to apply the provisions laid down in Article 32 to remuneration awarded for services provided or performance in the financial year following the financial year in which the assessment referred to in paragraph 3 took place.

Where this Section applies and Article 8 of Regulation (EU) 2019/2033 is applied, Member States shall ensure that this Section is applied to investment firms on an individual basis.

Where this Section applies and prudential consolidation as referred to in Article 7 of Regulation (EU) 2019/2033 is applied, Member States shall ensure that this Section is applied to investment firms on an individual and consolidated basis.

By way of derogation from the third subparagraph, this Section shall not apply to subsidiary undertakings included in a consolidated situation that are established in third countries, where the parent undertaking in the Union can demonstrate to the competent authorities that the application of this Section is unlawful under the laws of the third country where those subsidiary undertakings are established.

Article 26

Internal governance

1 Member States shall ensure that investment firms have robust governance arrangements, including all of the following:

a a clear organisational structure with well#defined, transparent and consistent lines of responsibility;

b effective processes to identify, manage, monitor and report the risks that investment firms are or might be exposed to, or the risks that they pose or might pose to others;

c adequate internal control mechanisms, including sound administration and accounting procedures;

d remuneration policies and practices that are consistent with and promote sound and effective risk management.

The remuneration policies and practices referred to in point (d) of the first subparagraph shall be gender neutral.

2 When establishing the arrangements referred to in paragraph 1, the criteria set out in Articles 28 to 33 shall be taken into account.

3 The arrangements referred to in paragraph 1 shall be appropriate and proportionate to the nature, scale and complexity of the risks inherent in the business model and the activities of the investment firm.

4 EBA, in consultation with ESMA, shall issue guidelines on the application of the governance arrangements referred to in paragraph 1.

EBA, in consultation with ESMA, shall issue guidelines in accordance with Article 16 of Regulation (EU) No 1093/2010 on gender neutral remuneration policies for investment firms.

Within two years of the date of publication of those guidelines, EBA shall issue a report on the application of gender neutral remuneration policies by investment firms based on the information collected by the competent authorities.

Article 27

Country#by#country reporting

1 Member States shall require investment firms that have a branch or subsidiary that is a financial institution as defined in point (26) of Article 4(1) of Regulation (EU) No 575/2013 in a Member State or in a third country other than that in which the authorisation of the investment firm was granted to disclose the following information by Member State and third country on an annual basis:

a the name, nature of activities and location of any subsidiaries and branches;

b turnover;

c the number of employees on a full time equivalent basis;

d profit or loss before tax;

e tax on profit or loss;

f the public subsidies received.

2 The information referred to in paragraph 1 of this Article shall be audited in accordance with Directive 2006/43/EC and, where possible, shall be annexed to the annual financial statements or, where applicable, to the consolidated financial statements of that investment firm.

Article 28

Role of the management body in risk management

1 Member States shall ensure that the management body of the investment firm approves and periodically reviews the strategies and policies on the risk appetite of the investment firm, and on managing, monitoring and mitigating the risks the investment firm is or may be exposed to, taking into account the macroeconomic environment and the business cycle of the investment firm.

2 Member States shall ensure that the management body devotes sufficient time to ensure proper consideration of the matters referred to in paragraph 1 and that it allocates adequate resources to the management of all material risks to which the investment firm is exposed.

3 Member States shall ensure that investment firms establish reporting lines to the management body for all material risks and for all risk management policies and any changes thereto.

4 Member States shall require all investment firms that do not meet the criteria set out in point (a) of Article 32(4) to establish a risk committee composed of members of the management body who do not perform any executive function in the investment firm concerned.

Members of the risk committee referred to in the first subparagraph shall have appropriate knowledge, skills and expertise to fully understand, manage and monitor the risk strategy and the risk appetite of the investment firm. They shall ensure that the risk committee advises the management body on the investment firm’s overall current and future risk appetite and strategy and assists the management body in overseeing the implementation of that strategy by senior management. The management body shall retain overall responsibility for the investment firm's risk strategies and policies.

5 Member States shall ensure that the management body in its supervisory function and the risk committee of that management body, where a risk committee has been established, have access to information on the risks to which the investment firm is or may be exposed.

Article 29

Treatment of risks

1 Competent authorities shall ensure that investment firms have robust strategies, policies, processes and systems for the identification, measurement, management and monitoring of the following:

a material sources and effects of risk to clients and any material impact on own funds;

b material sources and effects of risk to market and any material impact on own funds;

c material sources and effects of risk to the investment firm, in particular those which can deplete the level of own funds available;

d liquidity risk over an appropriate set of time horizons, including intra#day, so as to ensure that the investment firm maintains adequate levels of liquid resources, including in respect of addressing material sources of risks under points (a), (b) and (c).

The strategies, policies, processes and systems shall be proportionate to the complexity, risk profile, and scope of operation of the investment firm and risk tolerance set by the management body, and shall reflect the investment firm's importance in each Member State in which it carries out business.

For the purposes of point (a) of the first subparagraph and of the second subparagraph, competent authorities shall consider national law governing segregation applicable to client money.

For the purposes of point (a) of the first subparagraph, investment firms shall consider holding professional indemnity insurance as an effective tool in their management of risks.

For the purposes of point (c) of the first subparagraph, material sources of risk to the investment firm itself shall include, if relevant, material changes in the book value of assets, including any claims on tied agents, the failure of clients or counterparties, positions in financial instruments, foreign currencies and commodities, and obligations to defined benefit pension schemes.

Investment firms shall give due consideration to any material impact on own funds where such risks are not appropriately captured by the own funds requirements calculated under Article 11 of Regulation (EU) 2019/2033.

2 Where investment firms need to wind down or cease their activities, competent authorities shall require that investment firms, by taking into account the viability and sustainability of their business models and strategies, give due consideration to requirements and necessary resources which are realistic, in terms of timescale and maintenance of own funds and liquid resources, throughout the process of exiting the market.

3 By way of derogation from Article 25, points (a), (c) and (d) of paragraph 1 of this Article shall apply to 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.

4 The Commission is empowered to adopt delegated acts in accordance with Article 58 to supplement this Directive to ensure that the strategies, policies, processes and systems of

investment firms are robust. The Commission shall thereby take into account developments in financial markets, and in particular the emergence of new financial products, developments in accounting standards and developments that facilitate the convergence of supervisory practices.

Article 30

Remuneration policies

1 Member States shall ensure that investment firms, when establishing and applying their remuneration policies for categories of staff, including senior management, risk takers, staff engaged in control functions and any employees receiving overall remuneration equal to at least the lowest remuneration received by senior management or risk takers, whose professional activities have a material impact on the risk profile of the investment firm or of the assets that it manages, comply with the following principles:

a the remuneration policy is clearly documented and proportionate to the size, internal organisation and nature, as well as to the scope and complexity of the activities of the investment firm;

b the remuneration policy is a gender#neutral remuneration policy;

c the remuneration policy is consistent with and promotes sound and effective risk management;

d the remuneration policy is in line with the business strategy and objectives of the investment firm, and also takes into account long term effects of the investment decisions taken;

e the remuneration policy contains measures to avoid conflicts of interest, encourages responsible business conduct and promotes risk awareness and prudent risk taking;

f the investment firm's management body in its supervisory function adopts and periodically reviews the remuneration policy and has overall responsibility for overseeing its implementation;

g the implementation of the remuneration policy is subject to a central and independent internal review by control functions at least annually;

h staff engaged in control functions are independent from the business units they oversee, have appropriate authority, and are remunerated in accordance with the achievement of the objectives linked to their functions, regardless of the performance of the business areas they control;

i the remuneration of senior officers in the risk management and compliance functions is directly overseen by the remuneration committee referred to in Article 33 or, where such a committee has not been established, by the management body in its supervisory function;

j the remuneration policy, taking into account national rules on wage setting, makes a clear distinction between the criteria applied to determine the following:

(i) basic fixed remuneration, which primarily reflects relevant professional experience and organisational responsibility as set out in an employee's job description as part of his or her terms of employment;

(ii) variable remuneration, which reflects a sustainable and risk adjusted performance of the employee, as well as performance in excess of the employee's job description;

k the fixed component represents a sufficiently high proportion of the total remuneration so as to enable the operation of a fully flexible policy on variable remuneration components, including the possibility of paying no variable remuneration component.

2 For the purposes of point (k) of paragraph 1, Member States shall ensure that investment firms set the appropriate ratios between the variable and the fixed component of the total remuneration in their remuneration policies, taking into account the business activities of the investment firm and associated risks, as well as the impact that different categories of staff referred to in paragraph 1 have on the risk profile of the investment firm.

3 Member States shall ensure that investment firms establish and apply the principles referred to in paragraph 1 in a manner that is appropriate to their size and internal organisation and to the nature, scope and complexity of their activities.

4 EBA, in consultation with ESMA, shall develop draft regulatory technical standards to specify appropriate criteria to identify the categories of staff whose professional activities have a material impact on the risk profile of the investment firm as referred to in paragraph 1 of this Article. EBA and ESMA shall take due account of Commission Recommendation 2009/384/EC[(4)] as well as existing remuneration guidelines pursuant to Directives 2009/65/EC, 2011/61/EU and 2014/65/EU, and shall aim to minimise divergence from existing provisions.

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.

Article 31

Investment firms that benefit from extraordinary public financial support

Member States shall ensure that where an investment firm benefits from extraordinary public financial support as defined in point (28) of Article 2(1) of Directive 2014/59/EU:

(a) that investment firm does not pay any variable remuneration to members of the management body;

(b) where variable remuneration paid to staff other than members of the management body would be inconsistent with the maintenance of a sound capital base of an investment firm and its timely exit from extraordinary public financial support, variable remuneration shall be limited to a portion of net revenue.

Article 32

Variable remuneration

1 Member States shall ensure that any variable remuneration awarded and paid by an investment firm to categories of staff referred to in Article 30(1) complies with all of the following requirements under the same conditions as those set out in Article 30(3):

a where variable remuneration is performance related, the total amount of variable remuneration is based on a combination of the assessment of the performance of the individual, of the business unit concerned and of the overall results of the investment firm;

b when assessing the performance of the individual, both financial and non#financial criteria are taken into account;

c the assessment of the performance referred to in point (a) is based on a multi#year period, taking into account the business cycle of the investment firm and its business risks;

d the variable remuneration does not affect the investment firm's ability to ensure a sound capital base;

e there is no guaranteed variable remuneration other than for new staff only for the first year of employment of new staff and where the investment firm has a strong capital base;

f payments relating to the early termination of an employment contract reflect performance achieved over time by the individual and shall not reward failure or misconduct;

g remuneration packages relating to compensation or buy out from contracts in previous employment are aligned with the long#term interests of the investment firm;

h the measurement of performance used as a basis to calculate pools of variable remuneration takes into account all types of current and future risks and the cost of the capital and liquidity required in accordance with Regulation (EU) 2019/2033;

i the allocation of the variable remuneration components within the investment firm takes into account all types of current and future risks;

j at least 50 % of the variable remuneration consists of any of the following instruments:

(i) shares or equivalent ownership interests, subject to the legal structure of the investment firm concerned;

(ii) share#linked instruments or equivalent non#cash instruments, subject to the legal structure of the investment firm concerned;

(iii) Additional Tier 1 instruments or Tier 2 instruments or other instruments which can be fully converted to Common Equity Tier 1 instruments or written down and that adequately reflect the credit quality of the investment firm as a going concern;

(iv) non#cash instruments which reflect the instruments of the portfolios managed;

k by way of derogation from point (j), where an investment firm does not issue any of the instruments referred to in that point, competent authorities may approve the use of alternative arrangements fulfilling the same objectives;

l at least 40 % of the variable remuneration is deferred over a three# to five#year period as appropriate, depending on the business cycle of the investment firm, the nature of its business, its risks and the activities of the individual in question, except in the case of variable remuneration of a particularly high amount where the proportion of the variable remuneration deferred is at least 60 %;

m up to 100 % of the variable remuneration is contracted where the financial performance of the investment firm is subdued or negative, including through *malus* or clawback arrangements subject to criteria set by investment firms which in particular cover situations where the individual in question:

(i) participated in or was responsible for conduct which resulted in significant losses for the investment firm;

(ii) is no longer considered fit and proper;

n discretionary pension benefits are in line with the business strategy, objectives, values and long#term interests of the investment firm.

2 For the purposes of paragraph 1, Member States shall ensure the following:

a individuals referred to in Article 30(1) do not use personal hedging strategies or remuneration and liability#related insurances to undermine the principles referred to in paragraph 1;

b variable remuneration is not paid through financial vehicles or methods that facilitate non#compliance with this Directive or with Regulation (EU) 2019/2033.

3 For the purposes of point (j) of paragraph 1, the instruments referred to therein shall be subject to an appropriate retention policy designed to align the incentives of the individual with the longer#term interests of the investment firm, its creditors and clients. Member States or their competent authorities may place restrictions on the types and designs of those instruments or prohibit the use of certain instruments for variable remuneration.

For the purposes of point (l) of paragraph 1, the deferral of the variable remuneration shall vest no faster than on a pro#rata basis.

For the purposes of point (n) of paragraph 1, where an employee leaves the investment firm before retirement age, discretionary pension benefits shall be held by the investment firm for a period of five years in the form of instruments referred to in point (j). Where an employee reaches retirement age and retires, discretionary pension benefits shall be paid to the employee in the form of instruments referred to in point (j), subject to a five#year retention period.

4 Points (j) and (l) of paragraph 1 and the third subparagraph of paragraph 3 shall not apply to:

a an investment firm, where the value of its on and off#balance sheet assets is on average equal to or less than EUR 100 million over the four#year period immediately preceding the given financial year;

b an individual whose annual variable remuneration does not exceed EUR 50 000 and does not represent more than one fourth of that individual’s total annual remuneration.

5 By way of derogation from point (a) of paragraph 4, a Member State may increase the threshold referred to in that point, provided that the investment firm meets the following criteria:

a the investment firm is not, in the Member State in which it is established, one of the three largest investment firms in terms of total value of assets;

b the investment firm is not subject to obligations or is subject to simplified obligations in relation to recovery and resolution planning in accordance with Article 4 of Directive 2014/59/EU;

c the size of the investment firm’s on and off#balance sheet trading#book business is equal to or less than EUR 150 million;

d the size of the investment firm’s on and off#balance sheet derivative business is equal to or less than EUR 100 million;

e the threshold does not exceed EUR 300 million; and

f it is appropriate to increase the threshold, taking into account the nature and scope of the investment firm’s activities, its internal organisation, and, where applicable, the characteristics of the group to which it belongs.

6 By way of derogation from point (a) of paragraph 4, a Member State may lower the threshold referred to in that point, provided that it is appropriate to do so, taking into account the nature and scope of the investment firm’s activities, its internal organisation, and, where applicable, the characteristics of the group to which it belongs.

7 By way of derogation from point (b) of paragraph 4, a Member State may decide that staff members who are entitled to annual variable remuneration below the threshold and share referred to in that point shall not be subject to the exemption set out therein because of

national market specificities in terms of remuneration practices or because of the nature of the responsibilities and job profile of those staff members.

8 EBA, in consultation with ESMA, shall develop draft regulatory technical standards to specify the classes of instruments that satisfy the conditions set out in point (j)(iii) of paragraph 1 and to specify possible alternative arrangements set out in point (k) of paragraph 1.

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.

9 EBA, in consultation with ESMA, shall adopt guidelines facilitating the implementation of paragraphs 4, 5 and 6 and ensuring their consistent application.

Article 33

Remuneration committee

1 Member States shall ensure that investment firms which do not meet the criteria set out in point (a) of Article 32(4) establish a remuneration committee. That remuneration committee shall be gender balanced and shall exercise competent and independent judgment on remuneration policies and practices and the incentives created for managing risk, capital and liquidity. The remuneration committee may be established at group level.

2 Member States shall ensure that the remuneration committee is responsible for the preparation of decisions regarding remuneration, including decisions which have implications for the risk and risk management of the investment firm concerned and which are to be taken by the management body. The Chair and the members of the remuneration committee shall be members of the management body who do not perform any executive function in the investment firm concerned. Where employee representation in the management body is provided for by national law, the remuneration committee shall include one or more employee representatives.

3 When preparing the decisions referred to in paragraph 2, the remuneration committee shall take into account the public interest and the long#term interests of shareholders, investors and other stakeholders in the investment firm.

Article 34

Oversight of remuneration policies

1 Member States shall ensure that competent authorities collect the information disclosed in accordance with points (c) and (d) of the first subparagraph of Article 51 of Regulation (EU) 2019/2033 as well as the information provided by investment firms on the gender pay gap and use that information to benchmark remuneration trends and practices.

Competent authorities shall provide that information to EBA.

2 EBA shall use information received from the competent authorities in accordance with paragraphs 1 and 4 to benchmark remuneration trends and practices at Union level.

3 EBA, in consultation with ESMA, shall issue guidelines on the application of sound remuneration policies. Those guidelines shall take into account at least the requirements referred

to in Articles 30 to 33 and principles on sound remuneration policies set out in Recommendation 2009/384/EC.

4 Member States shall ensure that investment firms provide competent authorities with information on the number of natural persons per investment firm that are remunerated EUR 1 million or more per financial year, in pay brackets of EUR 1 million, including information on their job responsibilities, the business area involved and the main elements of salary, bonus, long#term award and pension contribution.

Member States shall ensure that investment firms provide competent authorities, upon demand, the total remuneration figures for each member of the management body or senior management.

Competent authorities shall forward the information referred to in the first and second subparagraphs to EBA, which shall publish it on an aggregate home Member State basis in a common reporting format. EBA, in consultation with ESMA, may issue guidelines to facilitate the implementation of this paragraph and to ensure the consistency of the information collected.

Article 35

EBA report on environmental, social, and governance risks

EBA shall prepare a report on the introduction of technical criteria related to exposures to activities associated substantially with environmental, social, and governance (ESG) objectives for the supervisory review and evaluation process, with a view to assessing the possible sources and effects of risks on investment firms, taking into account applicable Union legal acts in the field of ESG taxonomy.

The EBA report referred to in the first paragraph shall comprise at least the following:

(a) a definition of ESG risks, including physical risks and transition risks related to the transition to a more sustainable economy, and, with regard to transition risks, including risks related to the depreciation of assets due to regulatory change, qualitative and quantitative criteria and metrics relevant for assessing such risks, as well as a methodology for assessing the possibility of such risks arising in the short, medium, or long term and the possibility of such risks having a material financial impact on an investment firm;

(b) an assessment of the possibility of significant concentrations of specific assets increasing ESG risks, including physical risks and transition risks for an investment firm;

(c) a description of the processes by means of which an investment firm can identify, assess, and manage ESG risks, including physical risks and transition risks;

(d) the criteria, parameters and metrics by means of which supervisors and investment firms can assess the impact of short#, medium# and long#term ESG risks for the purposes of the supervisory review and evaluation process.

EBA shall submit the report on its findings to the European Parliament, to the Council, and to the Commission, by 26 December 2021.

On the basis of that report, EBA may, if appropriate, adopt guidelines to introduce criteria related to ESG risks for the supervisory review and evaluation process that take into account the findings of the EBA report referred to in this Article.

Section 3

Supervisory review and evaluation process

Article 36

Supervisory review and evaluation

1 Competent authorities shall review, to the extent relevant and necessary, taking into account the investment firm's size, risk profile and business model, the arrangements, strategies, processes and mechanisms implemented by investment firms to comply with this Directive and with Regulation (EU) 2019/2033 and evaluate the following as appropriate and relevant, so as to ensure a sound management and coverage of their risks:

a the risks referred to in Article 29;

b the geographical location of an investment firm's exposures;

c the business model of the investment firm;

d the assessment of systemic risk, taking into account the identification and measurement of systemic risk under Article 23 of Regulation (EU) No 1093/2010 or recommendations of the ESRB;

e 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;

f the exposure of investment firms to the interest rate risk arising from non#trading book activities;

g governance arrangements of investment firms and the ability of members of the management body to perform their duties.

For the purposes of this paragraph, competent authorities shall duly take into account whether investment firms hold a professional indemnity insurance.

2 Member States shall ensure that competent authorities establish the frequency and intensity of the review and evaluation referred to in paragraph 1, having regard to the size, nature, scale and complexity of the activities of the investment firms concerned and, where relevant, their systemic importance, and taking into account the principle of proportionality.

Competent authorities shall decide on a case#by#case basis whether and in which form the review and evaluation is to be carried out with regard to 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, only where they deem it to be necessary due to the size, nature, scale and complexity of the activities of those investment firms.

For the purposes of the first subparagraph, national law governing segregation applicable to client money held shall be considered.

3 When conducting the review and evaluation referred to in point (g) of paragraph 1, competent authorities shall have access to agendas, minutes and supporting documents for meetings of the management body and its committees, and the results of the internal or external evaluation of the performance of the management body.

4 The Commission is empowered to adopt delegated acts in accordance with Article 58 to supplement this Directive to ensure that the arrangements, strategies, processes and mechanisms of investment firms ensure a sound management and coverage of their risks. The Commission shall thereby take into account developments in financial markets, and in

particular the emergence of new financial products, developments in accounting standards and developments that facilitate the convergence of supervisory practices.

Article 37

Ongoing review of the permission to use internal models

1 Member States shall ensure that competent authorities review on a regular basis, and at least every three years, investment firms' compliance with the requirements for the permission to use internal models as referred to in Article 22 of Regulation (EU) 2019/2033. Competent authorities shall in particular have regard to changes in an investment firm's business and to the implementation of those internal models to new products, and review and assess whether the investment firm uses well#developed and up#to#date techniques and practices for those internal models. Competent authorities shall ensure that material deficiencies identified in the coverage of risk by an investment firm's internal models are rectified, or take steps to mitigate their consequences, including by imposing capital add#ons or higher multiplication factors.

2 Where, for internal risk#to#market models, numerous overshootings as referred to in Article 366 of Regulation (EU) No 575/2013 indicate that the internal models are not or are no longer accurate, competent authorities shall revoke the permission to use the internal models or impose appropriate measures to ensure that the internal models are improved promptly within a set timeframe.

3 Where an investment firm that has been granted permission to use internal models no longer meets the requirements for applying those internal models, competent authorities shall require the investment firm either to demonstrate that the effect of non#compliance is immaterial or to present a plan and a deadline to comply with those requirements. Competent authorities shall require improvements to the presented plan where that plan is unlikely to result in full compliance or where the deadline is inappropriate.

Where it is unlikely that the investment firm will comply by the prescribed deadline or has not satisfactorily demonstrated that the effect of non#compliance is immaterial, Member States shall ensure that competent authorities revoke the permission to use internal models or limit it to compliant areas or to those areas where compliance can be achieved by an appropriate deadline.

4 EBA shall analyse internal models across investment firms and shall analyse how investment firms using internal models treat similar risks or exposures. It shall inform ESMA thereof.

In order to promote consistent, efficient and effective supervisory practices, EBA shall, on the basis of that analysis and in accordance with Article 16 of Regulation (EU) No 1093/2010, develop guidelines with benchmarks on how investment firms are to use internal models and how those internal models are to be applied to similar risks or exposures.

Member States shall encourage competent authorities to take into account that analysis and those guidelines for the review referred to in paragraph 1.

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;

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 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.

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.

CHAPTER 3

Supervision of investment firm groups

Section 1

Supervision of investment firm groups on a consolidated basis and supervision of compliance with the group capital test

Article 46

Determination of the group supervisor

1 Member States shall ensure that, where an investment firm group is headed by a Union parent investment firm, supervision on a consolidated basis or supervision of compliance with the group capital test is exercised by the competent authority of that Union parent investment firm.

2 Member States shall ensure that, where the parent undertaking of an investment firm is a Union parent investment holding company or a Union parent mixed financial holding company, supervision on a consolidated basis or supervision of compliance with the group capital test is exercised by the competent authority of that investment firm.

3 Member States shall ensure that, where two or more investment firms authorised in two or more Member States have the same Union parent investment holding company or the same Union parent mixed financial holding company, supervision on a consolidated basis or supervision of compliance with the group capital test is exercised by the competent authority of the investment firm authorised in the Member State in which the investment holding company or mixed financial holding company is established.

4 Member States shall ensure that, where the parent undertakings of two or more investment firms authorised in two or more Member States comprise more than one investment holding company or mixed financial holding company with head offices in different Member States and where there is an investment firm in each of those Member States, supervision on a consolidated basis or supervision of compliance with the group capital test shall be exercised by the competent authority of the investment firm with the largest balance sheet total.

5 Member States shall ensure that, where two or more investment firms authorised in the Union have as their parent the same Union investment holding company or Union mixed financial holding company and none of those investment firms has been authorised in the Member State in which the investment holding company or mixed financial holding company was set up, supervision on a consolidated basis or supervision of compliance with the group capital test is exercised by the competent authority of the investment firm with the largest balance sheet total.

6 Competent authorities may, by common agreement, waive the criteria referred to in paragraphs 3, 4 and 5 where their application would not be appropriate for the effective supervision on a consolidated basis or supervision of compliance with the group capital test, taking into account the investment firms concerned and the importance of their activities in the relevant Member States, and designate a different competent authority to exercise supervision on a consolidated basis or supervision of compliance with the group capital test. In those cases, competent authorities shall, before adopting any such decision, give the Union parent investment holding company or Union parent mixed financial holding company or investment firm with the

largest balance sheet total, as appropriate, an opportunity to state its opinion on that intended decision. Competent authorities shall notify the Commission and EBA of any such decision.

Article 47

Information requirements in emergency situations

Where an emergency situation arises, including a situation as described in Article 18 of Regulation (EU) No 1093/2010 or a situation of adverse developments in markets, which potentially jeopardises the market liquidity and the stability of the financial system in any of the Member States where entities of an investment firm group have been authorised, the group supervisor determined pursuant to Article 46 of this Directive shall, subject to Section 2 of Chapter 1 of this Title, alert, as soon as practicable, EBA, ESRB and any relevant competent authorities and shall communicate all information essential for the performance of their tasks.

Article 48

Colleges of supervisors

1 Member States shall ensure that the group supervisor determined pursuant to Article 46 of this Directive may, if appropriate, establish colleges of supervisors to facilitate the exercise of the tasks referred to in this Article and to ensure coordination and cooperation with relevant third#country supervisory authorities in particular where this is needed for the purpose of applying point (c) of the first subparagraph of Article 23(1) and Article 23(2) of Regulation (EU) 2019/2033 to exchange and update relevant information on the margin model with the supervisory authorities of the qualifying central counterparties (QCCPs).

2 Colleges of supervisors shall provide a framework for the group supervisor, EBA and the other competent authorities to carry out the following tasks:

a the tasks referred to in Article 47;

b the coordination of information requests where this is necessary for facilitating supervision on a consolidated basis, in accordance with Article 7 of Regulation (EU) 2019/2033;

c the coordination of information requests, in cases where several competent authorities of investment firms that are part of the same group need to request either from the competent authority of a clearing member's home Member State or from the competent authority of the QCCP information relating to the margin model and parameters used for the calculation of the margin requirement of the relevant investment firms;

d the exchange of information between all competent authorities and with EBA in accordance with Article 21 of Regulation (EU) No 1093/2010 and with ESMA in accordance with Article 21 of Regulation (EU) No 1095/2010;

e reaching an agreement on the voluntary delegation between competent authorities of tasks and responsibilities, where appropriate;

f increasing the efficiency of supervision by seeking to avoid the unnecessary duplication of supervisory requirements.

3 Where appropriate, colleges of supervisors may also be established where subsidiaries of an investment firm group headed by an Union investment firm, Union parent investment holding company or Union parent mixed financial holding company are located in a third country.

4 EBA shall, in accordance with Article 21 of Regulation (EU) No 1093/2010, participate in the meetings of the colleges of supervisors.

5 The following authorities shall be members in the college of supervisors:

a the competent authorities responsible for the supervision of subsidiaries of an investment firm group headed by an Union investment firm, Union parent investment holding company or Union parent mixed financial holding company;

b where appropriate, third#country supervisory authorities, subject to confidentiality requirements that are equivalent in the opinion of all competent authorities to the requirements laid down in Section 2 of Chapter I of this Title.

6 The group supervisor determined pursuant to Article 46 shall chair the meetings of the college of supervisors and adopt decisions. That group supervisor shall keep all members of the college of supervisors fully informed in advance of the organisation of those meetings, of the main issues to be discussed and of the activities to be considered. The group supervisor shall also keep all the members of the college of supervisors fully informed, in a timely manner, of the decisions adopted in those meetings or the measures carried out.

The group supervisor shall take account of the relevance of the supervisory activity to be planned or coordinated by the authorities referred to in paragraph 5 when adopting decisions.

The establishment and functioning of the colleges of supervisors shall be formalised by means of written arrangements.

7 In the event of disagreement with a decision adopted by the group supervisor on the functioning of colleges of supervisors, any of the competent authorities concerned may refer the matter to EBA and request EBA's assistance in accordance with Article 19 of Regulation (EU) No 1093/2010.

EBA may also assist the competent authorities in the event of a disagreement concerning the functioning of colleges of supervisors under this Article on its own initiative in accordance with the second subparagraph of Article 19(1) of Regulation (EU) No 1093/2010.

8 EBA shall, in consultation with ESMA, develop draft regulatory technical standards to further specify the conditions under which the colleges of supervisors exercise their tasks referred to in paragraph 1.

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.

Article 49

Cooperation requirements

1 Member States shall ensure that the group supervisor and the competent authorities referred to in Article 48(5) shall provide each other with all relevant information as required, including the following:

a identification of the investment firm group's legal and governance structure, including its organisational structure, covering all regulated and non#regulated entities, non#

regulated subsidiaries and the parent undertakings, and of the competent authorities of the regulated entities in the investment firm group;

b procedures for the collection of information from the investment firms in an investment firm group, and the procedures for the verification of that information;

c any adverse developments in investment firms or in other entities of an investment firm group, which could seriously affect those investment firms;

d any significant sanctions and exceptional measures taken by competent authorities in accordance with national provisions transposing this Directive;

e the imposition of a specific own funds requirement under Article 39 of this Directive.

2 Competent authorities and the group supervisor may refer to EBA, in accordance with Article 19(1) of Regulation (EU) No 1093/2010, where relevant information has not been communicated pursuant to paragraph 1 without undue delay or where a request for cooperation, in particular to exchange relevant information, has been rejected or has not been acted upon within a reasonable period of time.

EBA may, in accordance with the second subparagraph of Article 19(1) of Regulation (EU) No 1093/2010 and on its own initiative assist competent authorities in developing consistent cooperation practices.

3 Member States shall ensure that competent authorities, before adopting a decision that may be important for other competent authorities' supervisory tasks, consult each other on the following:

a changes in the shareholder, organisational or management structure of investment firms in the investment firm group, which require the approval or authorisation of competent authorities;

b significant sanctions imposed on investment firms by competent authorities or any other exceptional measures taken by those authorities; and

c specific own funds requirements imposed in accordance with Article 39.

4 The group supervisor shall be consulted where significant sanctions are to be imposed or any other exceptional measures are to be taken by competent authorities as referred to in point (b) of paragraph 3.

5 By way of derogation from paragraph 3, a competent authority is not obliged to consult other competent authorities in cases of urgency or where such consultation could jeopardise the effectiveness of its decision, in which case the competent authority shall inform the other competent authorities concerned of that decision not to consult without delay.

Article 50

Verification of information concerning entities located in other Member States

1 Member States shall ensure that where a competent authority in one Member State needs to verify information about investment firms, investment holding companies, mixed financial holding companies, financial institutions, ancillary services undertakings, mixed# activity holding companies or subsidiaries that are located in another Member State, including subsidiaries which are insurance companies, and makes a request to that effect, the relevant competent authorities of that other Member State carry out that verification in accordance with paragraph 2.

2 Competent authorities that have received a request pursuant to paragraph 1 shall do any of the following:

a carry out the verification themselves within the framework of their competence;

b allow the competent authorities who made that request to carry out the verification;

c request an auditor or expert to carry out the verification impartially and to report the results promptly.

For the purposes of points (a) and (c), the competent authorities that made the request shall be allowed to participate in the verification.

Section 2

Investment holding companies, mixed financial holding companies and mixed#activity holding companies

Article 51

Inclusion of holding companies in supervision of compliance with the group capital test

Member States shall ensure that investment holding companies and mixed financial holding companies are included in the supervision of compliance with the group capital test.

Article 52

Qualifications of directors

Member States shall require that the members of the management body of an investment holding company or mixed financial holding company are of sufficiently good repute and possess sufficient knowledge, skills and experience to effectively perform their duties, taking into account the specific role of an investment holding company or mixed financial holding company.

Article 53

Mixed#activity holding companies

1 Member States shall provide that, where the parent undertaking of an investment firm is a mixed#activity holding company, the competent authorities responsible for the supervision of the investment firm may:

a require that the mixed#activity holding company supply them with any information that may be relevant for the supervision of that investment firm;

b supervise transactions between the investment firm and the mixed#activity holding company and the subsidiaries of the latter, and require the investment firm to have in place adequate risk management processes and internal control mechanisms, including sound reporting and accounting procedures to identify, measure, monitor and control those transactions.

2 Member States shall provide that their competent authorities may carry out, or have carried out by external inspectors, on#the#spot inspections to verify the information received from mixed#activity holding companies and their subsidiaries.

Article 54

Sanctions

[[X1]In accordance with Section 3 of Chapter 1 of this Title,**]** Member States shall ensure that administrative sanctions or other administrative measures aiming to end or mitigate breaches of the laws, regulations or administrative provisions transposing this Chapter or to address the causes of such breaches may be imposed on investment holding companies, mixed financial holding companies and mixed#activity holding companies, or their effective managers.

Editorial Information

X1 Substituted by Corrigendum 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 (Official Journal of the European Union L 314 of 5 December 2019).

Article 55

Assessment of third#country supervision and other supervisory techniques

1 Member States shall ensure that, where two or more investment firms that are subsidiaries of the same parent undertaking, the head office of which is in a third country, are not subject to effective supervision at group level, the competent authority assesses whether the investment firms are subject to supervision by the third#country supervisory authority which is equivalent to the supervision set out in this Directive and in Part One of Regulation (EU) 2019/2033.

2 Where the assessment referred to in paragraph 1 of this Article concludes that no such equivalent supervision applies, Member States shall allow for appropriate supervisory techniques which achieve the objectives of supervision in accordance with Article 7 or 8 of Regulation (EU) 2019/2033. Those supervisory techniques shall be decided by the competent authority which would be the group supervisor had the parent undertaking been established in the Union, after consulting the other competent authorities involved. Any measures taken pursuant to this paragraph shall be notified to the other competent authorities involved, to EBA and to the Commission.

3 The competent authority which would be the group supervisor had the parent undertaking been established in the Union may, in particular, require the establishment of an investment holding company or mixed financial holding company in the Union and apply Article 7 or 8 of Regulation (EU) 2019/2033 to that investment holding company or mixed financial holding company.

Article 56

Cooperation with third#country supervisory authorities

The Commission may submit recommendations to the Council, either at the request of a Member State or on its own initiative, for the negotiation of agreements with one

or more third countries regarding the means of supervising compliance with the group capital test by the following investment firms:

(a) investment firms the parent undertaking of which has its head office in a third country;

(b) investment firms located in third countries, the parent undertaking of which has its head office in the Union.

(**1**) Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (OJ L 201, 27.7.2012, p. 1).

(**2**) Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts, amending Council Directives 78/660/EEC and 83/349/EEC and repealing Council Directive 84/253/EEC (OJ L 157, 9.6.2006, p. 87).

(**3**) Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (OJ L 141, 5.6.2015, p. 73).

(**4**) Commission Recommendation of 30 April 2009 on remuneration policies in the financial services sector (OJ L 120, 15.5.2009, p. 22).