

II

(Non-legislative acts)

REGULATIONS

COMMISSION DELEGATED REGULATION (EU) 2021/923

of 25 March 2021

supplementing Directive 2013/36/EU of the European Parliament and of the Council with regard to regulatory technical standards setting out the criteria to define managerial responsibility, control functions, material business units and a significant impact on a material business unit's risk profile, and setting out criteria for identifying staff members or categories of staff whose professional activities have an impact on the institution's risk profile that is comparably as material as that of staff members or categories of staff referred to in Article 92(3) of that Directive

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

Having regard to Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC ⁽¹⁾, and in particular Article 94(2) thereof,

Whereas:

- (1) Not only the professional activities of the staff members referred to in Article 92(3), points (a), (b) and (c), of Directive 2013/36/EU can have a material impact on an institution's risk profile, but also the professional activities of other staff members. That will in particular be the case where such staff members have managerial responsibilities for material business units or for control functions because they can make strategic or other fundamental decisions that have an impact on the business activities or on the control framework applied. Such control functions include, typically, risk management, compliance and internal audit. The risks taken by material business units and the way those units are managed are the most important factors for an institution's risk profile.
- (2) It is therefore necessary to lay down criteria to identify staff members, other than the staff members referred to in Article 92(3), points (a), (b) and (c), of Directive 2013/36/EU, the professional activities of which have a material impact on the institution's risk profile. Those criteria should take into account the authority and responsibilities of such staff members, the institution's risk profile and performance indicators, the institution's internal organisation, and the nature, scope and complexity of the institution concerned. Those criteria should also enable institutions to set proper incentives in their remuneration policies to ensure that the staff members concerned act prudently when performing their tasks. Lastly, those criteria should reflect the level of risk of different activities within the institution.
- (3) Some staff members are responsible for providing internal support that is crucial to the operation of an institution's business activities. Their activities and decisions can also have a material impact on an institution's risk profile, because their activities and decisions may expose the institution to material operational and other risks.
- (4) Credit risk and market risk are typically entered into in order to generate business. Depending on the amounts and risk involved, such business activities can have a material impact on an institution's risk profile. It is therefore appropriate to use criteria based on limits of authority to identify staff members the activities of which can have a

⁽¹⁾ OJ L 176, 27.6.2013, p. 338.

material impact on an institution's risk profile. Those criteria should be calculated at least annually on the basis of capital figures and approaches used for regulatory purposes. To ensure the proportionate application of the criteria within small institutions, however, a *de minimis* threshold for credit risk should be applied.

- (5) The criteria to identify staff members the professional activities of which have a material impact on an institution's risk profile should also take into account that for some institutions, the requirements relating to the trading book can be waived under Regulation (EU) No 575/2013 of the European Parliament and of the Council ⁽²⁾ and that in that Regulation limits are set in different ways for institutions using different approaches to calculate capital requirements.
- (6) Appropriate qualitative criteria should ensure that staff members are identified as having a material impact on an institution's risk profile where they are responsible for groups of staff whose activities could have a material impact on the institution's risk profile. This includes situations where the activities of individual staff members under their management do not individually have a material impact on the institution's risk profile but the overall scale of their activities could have such an impact.
- (7) The total remuneration of staff members typically depends on the contribution that staff make to the successful achievement of the institution's business objectives. That remuneration thus depends on the responsibilities, duties, abilities and skills of staff members, and on the performance of staff members and the institution. Where a member of staff is awarded a total remuneration that exceeds a certain threshold, it is reasonable to presume that such remuneration is linked to the staff member's contribution to the institution's business objectives and, therefore, to the impact of the staff member's professional activities on the risk profile of the institution. It is therefore appropriate to use quantitative criteria related to the total remuneration of a staff member, both in absolute terms and relative to other members of staff within the same institution, to determine whether the professional activities of such staff member could have a material impact on the institution's risk profile.
- (8) Clear and appropriate thresholds should be established to identify staff whose professional activities have a material impact on an institution's risk profile. Institutions should be expected to apply the quantitative criteria in a timely manner. Quantitative criteria should follow developments in remuneration to be realistic. A first method to follow such developments is to base those criteria on the total remuneration awarded in the preceding performance year, which includes the fixed remuneration paid for that performance year, and the variable remuneration awarded in that performance year. A second method to follow such developments is to base those criteria on the total remuneration awarded for the preceding performance year, which includes the fixed remuneration paid for that performance year and the variable remuneration awarded in the current performance year for the preceding financial year. The second method provides for a better alignment of the identification process with the actual remuneration awarded for a performance period, but can only be applied where a timely calculation for the application of the quantitative criteria is still possible. Where such calculation is no longer possible, the first method should be used. Under either method, the variable remuneration can include amounts that are awarded based on performance periods that are longer than one year, depending on the performance criteria used by the institution.
- (9) Article 92(3) of Directive 2013/36/EU sets a quantitative threshold of EUR 500 000 combined with the average of the remuneration of members of the management body and senior management for the identification of staff the activities of which have a material impact on the risk profile of a material business unit. Remuneration above that quantitative threshold or amounting to one of the highest remunerations within the institution thus establishes a strong presumption that the activities of staff receiving such remuneration have a material impact on the institution's risk profile, in which case more supervisory scrutiny should be applied to establish whether the professional activities of such staff members have a material impact on the institution's risk profile.

⁽²⁾ Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p. 1).

- (10) Staff members should not be subject to Article 94 of Directive 2013/36/EU where institutions establish on the basis of additional objective criteria that the activities of such staff members does in fact not have a material impact on the institution's risk profile, taking into account all risks to which the institution is or may be exposed. To ensure effective and consistent application of those objective criteria, competent authorities should approve the exclusion of the highest earning staff members identified under the quantitative criteria. For staff members that are awarded more than EUR 1 000 000 (high earners), competent authorities should inform the European Banking Authority ('EBA') before approving exclusions, so that the EBA can assess the consistent application of those criteria.
- (11) In order for competent authorities and auditors to be able to review the assessments carried out by institutions to identify their staff whose professional activities have a material impact on their risk profiles, it is critical that institutions keep record of the assessments made and their results, including of staff who have been identified under criteria based on their total remuneration but whose professional activities are assessed as not to have a material impact on the institution's risk profile.
- (12) Commission Delegated Regulation (EU) No 604/2014 ⁽³⁾ should be repealed. Investment firms as defined in Article 4(1), point (2), of Regulation (EU) No 575/2013 should, however, not bear unjustified costs when complying with this Regulation. Delegated Regulation (EU) No 604/2014 should therefore continue to apply to such firms until 26 June 2021, date by which Member States must adopt and publish the measures to comply with Directive (EU) 2019/2034 of the European Parliament and of the Council ⁽⁴⁾.
- (13) This Regulation is based on the draft regulatory technical standards submitted to the Commission by EBA.
- (14) EBA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the advice of the Banking Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1093/2010 of the European Parliament and of the Council ⁽⁵⁾,

HAS ADOPTED THIS REGULATION:

Article 1

Definitions

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

- (1) 'managerial responsibility' means a situation, in which a staff member:
- (a) heads a business unit or a control function and is directly accountable to the management body as a whole or to a member of the management body or to the senior management;
 - (b) heads one of the functions laid down in Article 5(a);
 - (c) heads a subordinated business unit, or a subordinated control function in a large institution as defined in Article 4(1), point (146), of Regulation (EU) No 575/2013 and reports to a staff member that has the responsibilities as referred to in point (a);
- (2) 'control function' means a function that is independent from the business units it controls and that is responsible to provide an objective assessment of institution's risks, review or report on those, including, but not limited to, the risk management function, the compliance function and the internal audit function;

⁽³⁾ Commission Delegated Regulation (EU) No 604/2014 of 4 March 2014 supplementing Directive 2013/36/EU of the European Parliament and of the Council with regard to regulatory technical standards with respect to qualitative and appropriate quantitative criteria to identify categories of staff whose professional activities have a material impact on an institution's risk profile (OJ L 167, 6.6.2014, p. 30).

⁽⁴⁾ 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 (OJ L 314, 5.12.2019, p. 64).

⁽⁵⁾ Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ L 331, 15.12.2010, p. 12).

- (3) 'material business unit' means a business unit as defined in Article 142(1), point (3), of Regulation (EU) No 575/2013 that meets any of the following criteria:
- (a) it has allocated internal capital of at least 2 % of the internal capital of the institution as referred to in Article 73 of Directive 2013/36/EU, or is otherwise assessed by the institution as having a material impact on the institution's internal capital;
 - (b) it is a core business line as defined in Article 2(1), point (36), of Directive 2014/59/EU of the European Parliament and of the Council ⁽⁶⁾.

Article 2

Application of criteria

1. Where this Regulation is applied on an individual basis in accordance with Article 109(1) of Directive 2013/36/EU, compliance with the criteria set out in Articles 3 to 6 of this Regulation shall be assessed against the institution's individual risk profile.
2. Where this Regulation is applied on a consolidated or sub-consolidated basis in accordance with Article 109, paragraphs 2 to 6 of Directive 2013/36/EU, compliance with the criteria set out in Articles 3 to 6 of this Regulation shall be assessed against the risk profile of the relevant parent institution, financial holding company or mixed financial holding company on a consolidated or sub-consolidated basis.
3. Where Article 6(1), point (a), is applied on an individual basis, the remuneration awarded by the institution shall be considered. Where Article 6(1), point (a), is applied on a consolidated or sub-consolidated basis, the consolidating institution shall consider the remuneration awarded by any entity that falls within the scope of consolidation.
4. Article 6(1), point (b), shall only apply on an individual basis.

Article 3

Criteria for determining whether the professional activities of staff members have a significant impact on the relevant material business unit's risk profile as referred to in Article 94(2), point (b), of Directive 2013/36/EU

Institutions shall apply within their remuneration policies all of the following criteria to determine whether the professional activities of staff members have a significant impact on the risk profile of a material business unit:

- (a) the risk profile of the material business unit;
- (b) the distribution of internal capital to cover the nature and level of the risks, as referred to in Article 73 of Directive 2013/36/EU;
- (c) the risk limits of the material business unit;
- (d) the risk and performance indicators used by the institution to identify, manage and monitor risks of the material business unit in accordance with Article 74 of Directive 2013/36/EU;
- (e) the relevant performance criteria set by the institution in accordance with Article 94(1), points (a) and (b), of Directive 2013/36/EU;
- (f) the duties and authorities of staff members or categories of staff in the material business unit concerned.

⁽⁶⁾ Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a Framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014, p. 190).

*Article 4***Staff members or categories of staff the professional activities of which have an impact on the institution's risk profile that is comparably as material as that of staff referred to in Article 92(3) of Directive 2013/36/EU**

Institutions shall identify staff members or categories of staff as having an impact on an institution's risk profile that is comparably as material as that of the staff members referred to in Article 92(3) of Directive 2013/36/EU where those staff members or categories of staff meet any of the criteria laid down in Articles 5 or 6 of this Regulation.

*Article 5***Qualitative criteria**

In addition to staff members identified under the criteria set out in Article 92(3), points (a), (b) and (c) of Directive 2013/36/EU, staff members shall be deemed to have a material impact on an institution's risk profile where one or more of the following qualitative criteria are met:

- (a) the staff member has managerial responsibility for:
 - (i) legal affairs;
 - (ii) the soundness of accounting policies and procedures;
 - (iii) finance, including taxation and budgeting;
 - (iv) performing economic analysis;
 - (v) the prevention of money laundering and terrorist financing;
 - (vi) human resources;
 - (vii) the development or implementation of the remuneration policy;
 - (viii) information technology;
 - (ix) information security;
 - (x) managing outsourcing arrangements of critical or important functions as referred to in Article 30(1) of Commission Delegated Regulation (EU) 2017/565 ⁽⁷⁾;
- (b) the staff member has managerial responsibilities for any of the risk categories set out in Articles 79 to 87 of Directive 2013/36/EU, or is a voting member of a committee responsible for the management of any of the risk categories set out in those Articles;
- (c) with regard to credit risk exposures of a nominal amount per transaction, representing 0,5 % of the institution's Common Equity Tier 1 capital and which is at least EUR 5 million, the staff member meets one of the following criteria:
 - (i) the staff member has the authority to take, approve or veto decisions on such credit risk exposures;
 - (ii) the staff member is a voting member of a committee which has the authority to take the decisions as referred to in point (i) of this point (c);
- (d) in relation to an institution for which the derogation for small trading book businesses set out in Article 94 of Regulation (EU) No 575/2013 does not apply, the staff member meets one of the following criteria:
 - (i) the staff member has the authority to take, approve or veto decisions on transactions on the trading book that in aggregate represent one of the following thresholds:
 - where the standardised approach is used, an own funds requirement for market risks that represents 0,5 % or more of the institution's Common Equity Tier 1 capital;
 - where an internal model-based approach is approved for regulatory purposes, 5 % or more of the institution's internal value-at-risk limit for trading book exposures at a 99th percentile (one-tailed confidence interval level);

⁽⁷⁾ Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive (OJ L 87, 31.3.2017, p. 1).

- (ii) the staff member is a voting member of a committee that has the authority to take the decisions mentioned in point (i) of this point;
- (e) the staff member heads a group of staff members who have individual authorities to commit the institution to transactions and either of the following conditions is met:
 - (i) the sum of those authorities equals or exceeds the threshold referred to in point (c)(i) or in point (d)(i), the first indent;
 - (ii) where an internal model-based approach is approved for regulatory purposes, those authorities amount to 5 % or more of the institution's internal value-at-risk limit for trading book exposures at a 99th percentile (one-tailed confidence interval level); where the institution does not calculate a value-at-risk at the level of that staff member, the value-at-risk limits of staff under the management of this staff member shall be added up;
- (f) the staff member meets either of the following criteria with regard to decision on approving or vetoing the introduction of new products:
 - (i) the staff member has authority to take such decisions;
 - (ii) the staff member is a voting member of a committee that has authority to take such decisions.

Article 6

Quantitative criteria

1. In addition to staff members identified under the criteria set out in Article 92(3), points (a) and (b), of Directive 2013/36/EU, staff members shall be deemed to have a material impact on an institution's risk profile where any of the following quantitative criteria are met:
 - (a) the staff members, including staff members as referred to in Article 92(3), point (c), of Directive 2013/36/EU, have been awarded in or for the preceding financial year a total remuneration that is equal to or greater than EUR 750 000;
 - (b) where the institution has over 1 000 members of staff, the staff members are within the 0,3 % of staff, rounded to the next higher integral figure, which has, within the institution, been awarded the highest total remuneration in or for the preceding financial year on an individual basis.
2. The criteria laid down in paragraph 1 shall not apply where the institution determines that the professional activities of the staff member do not have a material impact on the institution's risk profile, because the staff member, or the category of staff to which the staff member belongs, meet any of the following conditions:
 - (a) the staff member or categories of staff only carry out professional activities and has authorities in a business unit that is not a material business unit;
 - (b) the professional activities of the staff member or category of staff have no significant impact on the risk profile of a material business unit having regard to the criteria set out in Article 3.
3. The application of paragraph 2 by an institution shall be subject to the prior approval of the competent authority responsible for prudential supervision of that institution. The competent authority shall only give its prior approval where the institution can demonstrate that one of the conditions set out in paragraph 2 are satisfied.
4. Where the staff member was awarded a total remuneration of EUR 1 000 000 or more in or for the preceding financial year, the competent authority shall only give its prior approval under paragraph 3 in exceptional circumstances. In order to ensure the consistent application of this paragraph, the competent authority shall inform the EBA before giving its approval in respect of such a staff member.

The existence of exceptional circumstances shall be demonstrated by the institution and assessed by the competent authority. Exceptional circumstances shall be situations that are unusual and very infrequent or far beyond what is usual. The exceptional circumstances shall be related to the staff member.

*Article 7***Calculation of the average total remuneration for members of the management body and senior management and of variable remuneration awarded**

1. The average total remuneration of all members of the management body and senior management shall be calculated by taking into account the total of the fixed and variable remuneration of all members of the management body in its management function and supervisory function as well as of all staff that belongs to the senior management as defined in Article 3(1), point (9), of Directive 2013/36/EU.
2. For the purposes of this Regulation, variable remuneration that has been awarded but has not yet been paid shall be valued as at the date of the award without taking into account the application of the discount rate referred to in Article 94(1), point (g)(iii), of Directive 2013/36/EU or reductions in pay-outs, through clawback, malus or otherwise.
3. All amounts of the variable and fixed remuneration shall be calculated gross and on a full-time equivalent basis.
4. Institution's remuneration policies shall set out the reference year for the variable remuneration that they take into account when calculating the total remuneration. That reference year shall be either the year preceding the financial year in which the variable remuneration is awarded or the year preceding the financial year for which the variable remuneration is awarded.

*Article 8***Repeal of Delegated Regulation (EU) No 604/2014**

Delegated Regulation (EU) No 604/2014 is repealed. That Delegated Regulation, however, shall continue to apply to investment firms as defined in Article 4(1), point (2), of Regulation (EU) No 575/2013 until 26 June 2021.

*Article 9***Entry into force**

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

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

Done at Brussels, 25 March 2021.

For the Commission
The President
Ursula VON DER LEYEN
