COMMISSION DELEGATED REGULATION (EU) 2023/1651

of 17 May 2023

supplementing Directive (EU) 2019/2034 of the European Parliament and of the Council with regard to regulatory technical standards for the specific liquidity measurement of investment firms under Article 42(6) 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 (EU) 2019/2034 of the European Parliament and of the Council of 27 November 2019 on the prudential supervision of investment firms and amending Directives 2002/87/EC, 2009/65/EC, 2011/61/EU, 2013/36/EU, 2014/59/EU and 2014/65/EU ([1]), and in particular Article 42(6), third subparagraph, thereof,

Whereas:

(1) To measure the adequate level of liquidity that investment firms should hold, it is necessary to lay down common criteria to estimate the corresponding liquidity needs under normal and stressed circumstances, and to determine whether there are any gaps between the level of liquid assets held by investment firms and the liquidity needs identified.

(2) 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 of the European Parliament and of the Council ([2]) are deemed to have only a limited liquidity risk relative to other investment firms. That is why competent authorities, pursuant to Article 43(1), second subparagraph, of Regulation (EU) 2019/2033, may exempt such investment firms from the liquidity requirement laid down in Article 43(1), first subparagraph, of that Regulation. That exemption is, however, optional. To cater for small and non-interconnected investment firms that have not been exempted by their competent authority from that liquidity requirement, it would be disproportionate to subject those investment firms to the same liquidity requirements as bigger and interconnected investment firms. It is therefore appropriate to lay down that competent authorities, when they measure the liquidity risk and elements of liquidity risk referred to in Article 42(1), first subparagraph, point (a), of Directive (EU) 2019/2034, should only measure the liquidity risk or elements of liquidity risk that stem from those activities and from other factors, specific to small and non-interconnected investment firms, which are highly likely to lead to a liquidity risk that is material and that is not covered by the liquidity requirements laid down in Part Five of Regulation (EU) 2019/2033. Those factors include activities of providing portfolio management, operating a multilateral trading facility as defined in Article 4, point (22), of Directive 2014/65/EU of the European Parliament and of the Council ([3]) or an organised trading facility as defined in Article 4, point (23), of that Directive, granting credits and loans to investors, as well as the funding risk, and the group structure's relevance to liquidity risk.

(3) Article 7(3) of Regulation (EU) 2019/2033 requires that Union parent investment firms, Union parent investment holding companies and Union parent mixed financial holding companies comply with the liquidity requirements set out in Part Five of that Regulation at consolidated level. A Union parent investment firm, Union parent investment holding company and Union parent mixed financial holding company may be exposed, in a consolidated situation, to liquidity risk or elements of liquidity risk that are material and are not covered or not sufficiently covered by those liquidity requirements. Similarly, a Union parent investment firm, Union parent investment holding company and Union parent mixed financial holding company may not meet, in a consolidated situation, the requirements set out in Articles 24 and 26 of Directive (EU) 2019/2034, while other administrative

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

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

([3]) Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.6.2014, p. 349).

measures are unlikely to sufficiently improve the arrangements, processes, mechanisms, and strategies referred to in Article 42(1), point (b), of Directive (EU) 2019/2034 within an appropriate timeframe. Competent authorities should therefore, for such Union parent investment firms, Union parent investment holding companies and Union parent mixed financial holding companies, measure on a consolidated basis whether the exposure of those firms and companies to liquidity risk is material and not covered by the liquidity requirements laid down in Part Five of Regulation (EU) 2019/2033.

(4) Different activities of investment firms may affect their liquidity profile in different ways. Changes in the value of asset prices may generate losses and affect investment firms' balance sheets and liquidity position, despite those firms not holding clients' assets on own account. Investment firms providing portfolio management services may be sensitive to market fluctuations that can create or sharpen the cash flow mismatches between inflows from payment of fees typically received on a quarterly or semi-annual basis and outflows for the payment of liabilities as they fall due. It is therefore appropriate to specify for each investment service or activity listed in Section A of Annex I to Directive 2014/65/EU the criteria that competent authorities should consider when measuring whether the liquidity risk or elements of liquidity risk of an investment firm are sufficiently covered by the liquidity requirement set out in Part Five of Regulation (EU) 2019/2033. Competent authorities should in particular be required to consider those investment services or activities that are most sensitive to market fluctuations because such fluctuations are unpredictable in both timing and scale, and may affect the liquidity risk in different ways, including higher margin calls, lower profits and reduced fees.

(5) Investment firms that are authorised to grant credits or loans to investors as an ancillary service are exposed to specific liquidity risk. Late repayment of debts by investors may impair an investment firm's ability to meet its obligations, while the liquidation of collaterals with deteriorated liquidity profile may result in less liquid assets to deploy on ordinary operations. Competent authorities should therefore assess the increased risk for investment firms performing such services.

(6) Funding is a primary source of liquidity for investment firms, and limited or suspended access to funding may result in discontinuing investment firms' services, with a potential negative impact on markets and clients. Considering the differences between funding investment firms and funding deposit-taking credit institutions, and considering that accessing funding by such investment firms may entail risks in certain circumstances, it is necessary to specify the elements that competent authorities should take into account when setting specific liquidity requirements for such investment firms.

(7) The deterioration of macroeconomic and geopolitical situations may cause investment firms to face severe restrictions in accessing funding. Competent authorities should therefore assess the consequences that such deterioration might have on the funding sources of investment firms, including wholesale funding and credit lines. Against that background, it is necessary to specify the elements that competent authorities need to assess in relation to adverse external events, the occurrence of which may increase the liquidity risk of investment firms.

(8) To enable competent authorities to determine which operational events may have a material impact on the investment firms' liquidity, it is necessary to specify the operational events that are expected to be the most relevant for investment firms as a subset of the list of loss event types referred to in Article 324 of Regulation (EU) No 575/2013 of the European Parliament and of the Council ([4]).

(9) Increased liquidity risk may arise from reputational risk, which may in turn affect the operations of investment firms. While some effects of the reputational risk are not readily predictable, others like reduced market access or accessing liquidity from counterparties can be anticipated. Competent authorities should therefore assess the impact of such predictable effects of reputational risk on the liquidity risk of investment firms.

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

(10) Due to the potential impact of liquidity risk on an investment firm's functioning, investment firms should closely monitor such risk. In line with Article 29 of Directive (EU) 2019/2034, investment firms are to have robust strategies, policies and processes in place, including monitoring liquidity risk and confronting liquidity shortages. It is therefore necessary to specify what competent authorities should assess to evaluate the effectiveness of the liquidity risk management and control of investment firms.

(11) Whereas a group may provide additional liquidity to an investment firm, such a group may also use significant liquid resources belonging to the investment firm through agreements and other asset-transfer mechanisms between the investment firm, on one hand, and the parent undertaking or any other entities of the group, on the other hand. Therefore, competent authorities should be required to assess the overall group structure and consider the implications that such agreements and other asset-transfer mechanisms may have on the liquidity risk of investment firms that are part of such a group.

(12) This Regulation is based on the draft regulatory technical standards submitted to the Commission by the European Banking Authority.

(13) The European Banking Authority 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 under Article 37 of Regulation (EU) No 1093/2010 of the European Parliament and of the Council ([5]),

HAS ADOPTED THIS REGULATION:

Article 1

Assessment of liquidity risk and elements of liquidity risk justifying specific liquidity requirements

1. Competent authorities shall, taking into account the size, scope and complexity of the investment firm's activities, closely assess the specific liquidity requirement referred to in Article 42 of Directive (EU) 2019/2034 by determining the adequate amount of liquid assets that an investment firm is to hold to cover liquidity needs resulting from its activities. Competent authorities shall determine that amount by considering all risk factors that may influence the liquidity position of an investment firm and generate liquidity gaps, including the following factors:

(a) whether there is liquidity risk stemming from the provision of investment services, and activities and specific ancillary services referred to in Article 2 of this Regulation;

(b) whether there is liquidity risk stemming from the unavailability of funding resources as referred to in Article 3 of this Regulation;

(c) whether there are external events affecting liquidity as referred to in Article 4 of this Regulation;

(d) whether there is operational risk affecting liquidity as referred to in Article 5 of this Regulation;

(e) whether there is reputational risk affecting liquidity as referred to in Article 6 of this Regulation;

(f) whether there is an inadequate management and control of liquidity risk as referred to in Article 7 of this Regulation;

(g) where the investment firm is part of a group, the structure of the group and its impact on the liquidity of the investment firm as referred to in Article 8 of this Regulation.

([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).

2. For 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, competent authorities shall assess the factors and liquidity risk elements referred to in paragraph 1, points (a), (b) and (g). The assessment of the liquidity risk stemming from the provision of investment services, and from the activities and specific ancillary services referred to in paragraph 1, point (a), may however focus on liquidity risk stemming from loss in income from portfolio management, liquidity risk from operating a multilateral trading facility or an organised trading facility as defined in Article 4(1), points (22) and (23), of Directive 2014/65/EU, and from granting credits or loans to investors.

3. When assessing the liquidity needs in accordance with paragraph 1 and 2, competent authorities shall do all of the following:

(a) take into account all the elements that may have a material adverse effect on an investment firm's liquidity needs under normal and stressed circumstances;

(b) take into account the available historical data, for a period of time it deems as sufficient, on all of the following:

 (i) mismatches between liquid assets or other liquidity resources and liquidity needs;

 (ii) the historical trends in liquidity capacity;

 (iii) the observed material variations of liquid assets and liquidity needs;

(c) take into account the existence of contractual netting agreements subject to the conditions laid down in Article 31 of Regulation (EU) 2019/2033, or other risk mitigation mechanisms that would effectively reduce the potential net liquidity outflow that an investment firm has towards central counterparties, clearing members, credit institutions or other investment firms;

(d) determine whether the investment firm has sound processes, mechanisms and strategies to measure, monitor and manage its liquidity risk as set out in Articles 24 and 26 of Directive (EU) 2019/2034;

(e) take into account potential interconnections among the factors referred to in paragraph 1;

(f) base the assessment on reliable, accurate and up to date information.

For the purposes of point (a), stressed circumstances shall mean market stress and stress inherent to an investment firm where funding may not be accessible on a timely or cost-effective basis.

4. Where Article 7(3) of Regulation (EU) 2019/2033 applies, competent authorities shall apply Articles 2 to 7 of this Regulation in assessing the Union parent investment firm, Union parent investment holding company, or Union parent mixed financial holding company's liquidity risks and elements of liquidity risk on the basis of their consolidated situations.

Article 2

Assessment of liquidity risk stemming from the investment services and activities and ancillary services

1. For investment firms performing any of the activities referred to in Section A, points (1) or (2), of Annex I to Directive 2014/65/EU, competent authorities shall assess the level of liquidity needs to be covered by liquid assets by taking into account all of the following:

(a) the specific features of the services provided to clients, in particular the time mismatch between fees received from clients and fees paid to trading platforms for transmission or execution of orders on behalf of clients;

(b) the liquidity outflow due to increased fees charged to access the trading platforms or less favourable arrangements, including reduced days of accounts payable by the investment firm;

(c) delays in the payment of fees due from clients.

2. For investment firms performing any of the activities referred to in Section A, points (3) or (6), of Annex I, to Directive 2014/65/EU, competent authorities shall assess the level of liquidity needs to be covered by liquid assets by taking into account all of the following:

(a) the assessment of intraday liquidity risk for the investment firm's trading book positions;

(b) the liquidity risk arising from the risk of a price change of the instrument concerned due to factors related to its issuer or the issuer of the underlying instrument and from the price change of an instrument due to a change in the level of interest rates or to a broad equity market movement unrelated to any specific attributes of the individual securities;

(c) the specific features of the investment firm's trading activities, in particular the maturity profile of the transactions, the possible occurrence of long-term transactions and the currencies of the transactions;

(d) the level of asset encumbrance, the characteristics of the collateral to be provided, in particular its maturity and currency, and whether assets provided as collateral can be re-used or rehypothecated by the investment firm's counterparties;

(e) the level of intraday margin that the investment firm may be contractually required to post under normal and stressed circumstances;

(f) whether the investment firm has sufficient liquid assets or other liquidity resources to maintain trading activities in case of settlement fails or interruption of services at custodians or cash correspondents;

(g) the failure of a trade to settle on the agreed settlement date because the seller does not deliver the securities or the buyer does not deliver funds at the appropriate time.

3. For investment firms performing any of the activities referred to in Section A, points (4), (5) or (7), of Annex I, to Directive 2014/65/EU, competent authorities shall assess the level of liquidity needs to be covered by liquid assets by taking into account all of the following:

(a) the investment firm's contractual arrangements for fees received related to the performance of the clients' portfolios;

(b) the time mismatch between fees received by the investment firm from clients, and fees paid by the investment firm to providers of services specifically related to their activities, including market analysis, specialised reports, general or customised portfolio analysis, and aggregation services;

(c) where the investment firm delegates the management of assets, the time mismatch between fees received by the investment firm from clients and fees paid by the investment firm to the delegated financial entity;

(d) where another financial entity has formally delegated the management of assets to the investment firm, the time mismatch between fees received by the investment firm from the delegating entity and expenses paid by the investment firm in relation to the delegation;

(e) contractual arrangements between the investment firm and tied agents, including the timing and recurrence of the payments to the tied agents;

(f) delays in the payment of fees due from clients.

4. For investment firms performing any of the activities referred to in Section A, points (8) or (9), of Annex I to Directive 2014/65/EU, competent authorities shall assess the level of liquidity needs to be covered by liquid assets by taking into account all of the following:

(a) the time mismatch between fees received from clients and fees paid to service providers;

(b) delays in the payment of fees due from clients.

5. For investment firms performing the ancillary service referred to in Section B, point (2), of Annex I to Directive 2014/65/EU, competent authorities shall assess the level of liquidity needs to be covered by liquid assets by taking into account all of the following:

(a) the outstanding amounts of credits and loans granted to clients;

(b) the liquidity profile of the collaterals and the market and legal limits to their liquidation;

(c) the outstanding amounts of defaulted credits and loans granted to clients.

Article 3

Assessment of liquidity risk stemming from funding

When assessing the availability and quality of the funding sources of an investment firm, competent authorities shall consider all of the following:

(a) the availability of existing funding sources and the access to pre-arranged emergency funding sources;

(b) whether such funding sources are secured or unsecured;

(c) the currency of such funding sources;

(d) the amount of unencumbered assets that would be available to obtain secured funding;

(e) the different maturities of such funding sources according to their closest maturity date and the earliest date that they can contractually be called upon;

(f) the risk of disruption to the investment firm's daily cash flows caused by an interruption in the investment firm's credit facilities;

(g) other committed but undrawn funding sources provided to the investment firm.

Article 4

Assessment of external events affecting liquidity

1. Competent authorities shall assess whether an investment firm's liquidity level would enable it to continue to comply with its liquidity requirement in adverse macroeconomic, microeconomic, and geopolitical conditions, taking into account all of the following:

(a) a partial or total loss of unsecured funding capacity, including received committed or uncommitted liquidity or credit lines;

(b) a partial or total loss of secured, short-term funding;

(c) potential obligation to buy-back debt or to honour non-contractual obligations.

2. When assessing the events referred to in paragraph 1, competent authorities shall consider market-related events, specific stresses related to the situation of the issuers of the investment firm's assets or related to the funding providers of the investment firm, and a combination of those.

3. Where the investment firm is part of a group, competent authorities shall determine how the adverse conditions referred to in paragraphs 1 and 2 may affect the liquidity situation of the group as a whole and the conclusions of the assessment performed under Article 8.

Article 5

Assessment of operational risk affecting liquidity

Competent authorities shall assess the consequences of any of the following operational events on the investment firm's liquidity:

(a) the unavailability of the investment firm's systems used to access the market or funding sources;

(b) an interruption of services at custodians and cash correspondents;

(c) external or internal frauds;

(d) compensations and claims related to order execution errors.

Article 6

Assessment of reputational risk affecting liquidity

Competent authorities shall assess how any of the following events related to a loss of reputation can affect the investment firm's liquidity risk:

(a) the investment firm's market access is reduced;

(b) the investment firm's funding sources are reduced by its counterparties;

(c) market counterparties reduce their exposures to the investment firm in over-the-counter operations.

Article 7

Assessment of the sound management and controls of liquidity risk

Competent authorities shall assess whether an investment firm has robust and sound risk management and controls of its liquidity resources in place, as set out in Articles 24 and 26 of Directive (EU) 2019/2034 by considering the strategies, policies, processes and systems in place to maintain adequate levels of liquid resources, including all of the following:

(a) the systems for measuring, managing and reporting liquidity risk and the investment firm's governance framework, including the adequacy of its risk management function;

(b) any mitigating actions, including the reduction of the investment firm's activities requiring large cash outflows, the setup of its credit lines, its capital increase in cash and its use of assets as collateral in repo transactions;

(c) the robustness of the investment firm's recovery plan, where the obligation to draw up and maintain a recovery plan in accordance with Article 5(1) of Directive 2014/59/EU of the European Parliament and of the Council ([6]) applies.

Article 8

Assessment of the group structure relevant to liquidity risk

1. Where an investment firm is part of a group, competent authorities shall assess the risk posed by an excessive concentration of liquidity resources among the entities of the group.

2. Competent authorities shall assess whether there are mechanisms in place that request an investment firm to transfer part or all of its liquidity resources to any parent undertaking or to any other entities of the group.

([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).

3. Competent authorities shall assess the mechanisms used within the group to provide the investment firm with access to market or funding liquidity or to mitigate the investment firm's liquidity risk, and in particular, the effectiveness of such mechanisms, based on whether those mechanisms are formal pre-arranged agreements.

Article 9

Entry into force

This Regulation shall enter into force on the twentieth 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, 17 May 2023.

For the Commission
The President
Ursula VON DER LEYEN