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COMMISSION DELEGATED REGULATION (EU) .../...

of 22.9.2021

supplementing Regulation (EU) 2019/2033 of the European Parliament and of the Council with regard to regulatory technical standards specifying the methods for measuring the K-factors referred to in Article 15 of that Regulation

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

Point (a) Article 15(5) of Regulation (EU) 2019/2033 ('the Regulation') empowers the Commission to adopt, following submission of draft standards by the European Banking Authority (EBA), and in accordance with Articles 10 to 14 of Regulation No (EU) 1093/2010, delegated acts to specify the methods for measuring the K-factors.

In accordance with Article 10(1) of Regulation No (EU) 1093/2010 establishing the EBA, the Commission shall decide within three months of receipt of the draft standards whether to endorse the drafts submitted. The Commission may also endorse the draft standards in part only, or with amendments, where the Union's interests so require, having regard to the specific procedure laid down in those Articles.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

In accordance with the third subparagraph of Article 10(1) of Regulation No (EU) 1093/2010, the EBA has carried out a public consultation on the draft technical standards submitted to the Commission in accordance with point (a) Article 15(5) of the Regulation. A consultation paper was published on the EBA internet site on 4 June 2020, and the consultation closed on 4 September 2020. Moreover, the EBA worked in consultation with European Securities and Markets Authority (ESMA), invited the EBA's Banking Stakeholder Group set up in accordance with Article 37 of Regulation No (EU) 1093/2010 to provide advice on them. Together with the draft technical standards, the EBA has submitted an explanation on how the outcome of these consultations has been taken into account in the development of the final draft technical standards submitted to the Commission.

Together with the draft technical standards, and in accordance with the third subparagraph of Article 10(1) of Regulation No (EU) 1093/2010, the EBA has submitted its Impact Assessment, including its analysis of the costs and benefits, related to the draft technical standards submitted to the Commission. This analysis is available at <https://eba.europa.eu/regulation-and-policy/investment-firms/regulatory-technical-standards-prudential-requirements-investment-firms>, pages 60-85 of the Final Draft Regulatory Technical Standards package.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

The draft RTS specify the methods for measuring the K-factors to the extent that these are not fully detailed in the Regulation. In particular, they specify the methods for measuring Risk-to-Client and Risk-to-Firm K-factors, whereas Risk-to-Market K-factors are already detailed enough in the IFR and requires no further specification.

For the purpose of calculation of Risk-to-Client K-factors the following elements have been further specified in the draft RTS.

When investment firms use tied agents, any investment services, activities or ancillary services carried out by tied agents which act on investment firm's behalf shall be included in the relevant K-factors.

When measuring K-AUM in case of non-discretionary advisory arrangements of an on-going nature, the amounts related to ancillary advisory services shall not be included in the AUM, while amounts of assets that relate to non-discretionary advisory arrangements of an on-going

nature to another financial sector entity that undertakes discretionary portfolio management shall be included.

The draft RTS provide further specifications for measuring K-AUM, K-CMH, K-ASA and K-COH including requirements to avoid double counting, specifications for the calculation of orders' reception, transmission, and execution, distinguishing the cases for cash trades and derivatives.

For the purpose of calculation of Risk-to-Firm K-factors, the draft RTS further specify the methods for measuring DFT K-factors for cash trades and derivatives.

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(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

Having regard to 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 806/2014¹, and in particular Article 15(5), third subparagraph, thereof,

Whereas:

- (1) Some of the K-factors within the meaning of Article 4(1), point (26), of Regulation (EU) 2019/2033 do not require further specifications as that Regulation elaborates in detail the methods for measuring them. This is the case with the ‘net position risk’ K-factor (K-NPR), which is derived from Regulation (EU) No 575/2013 of the European Parliament and of the Council², as well as with the ‘concentration risk’ K-factor (K-CON) and ‘trading counterparty default’ K-factor (K-TCD), which use a simplified application of the corresponding requirements under that Regulation. However, in other cases such as ‘assets under management’ (AUM), ‘client money held’ (CMH), ‘client orders handled’ (COH), ‘assets safeguarded and administered’ (ASA) and ‘daily trading flow’ (DTF), the methods for measuring those factors would benefit from further clarifications.
- (2) All activity carried out by an investment firm should be captured by K-factors in order to adequately reflect the risks. Taking into account that a tied agent is a natural or legal person who acts only on behalf of a certain investment firm and under the full and unconditional responsibility of that investment firm, there is a need to ensure that any activity of a tied agent is included in AUM, ASA, CMH and COH K-factors of an investment firm.
- (3) The investment service of the ‘investment advice’ referred to in Annex I, Section A, point 5, to Directive 2014/65/EU of the European Parliament and of the Council³ is distinct from the ancillary service of the ‘advice to undertakings on capital structure, industrial strategy and related matters and advice and services relating to mergers and

¹ OJ L 314, 5.12.2019, p. 1.

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

³ Directive 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).

the purchase of undertakings’ referred to Annex I, Section B, point 3, to that Directive. Against this background and also on the basis of the definition of the ‘investment advice of an ongoing nature’ in of Article 4(1), point 21, of Regulation (EU) 2019/2033, where the aforementioned ancillary service is not included, it is necessary to specify that any assets under management relating to that ancillary service should be excluded for the purposes of the calculation of the K-AUM.

- (4) In order to ensure a consistent measurement of AUM and ASA when calculating K-AUM and K-ASA, financial instruments should be valued at their fair value in accordance with applicable accounting standards, so as to allow the reflection of the market value of the financial instruments, where available.
- (5) Since the calibration of the CMH coefficient in Table 1 of Article 15 of Regulation (EU) 2019/2033 already takes into account the risk to clients associated with the management of the cash, the amounts included in the measuring of the CMH should not be included in the measuring of the AUM. Further, in order to avoid any double counting in the calculation of the capital requirements, the amounts already considered for the measuring of the CMH should not be included in the measuring of the ASA.
- (6) The definition of CMH in Article 4(1), point 28, of Regulation (EU) 2019/2033 together with recital (24) of that Regulation clarify the amounts to be considered for the measuring of CMH. Therefore, it is sufficient to further specify the remaining operational aspects of the method for measuring the CMH with a view to ensuring the robustness of the CMH figures, in particular by avoiding overreliance on external reporting and focusing on the investment firm’s internal accounting records and figures used for [the] internal reconciliation.
- (7) The methods for measuring the amounts to be included as reception and transmission of orders and execution of orders in COH should include specific rules for the case where market prices are not readily available because they are not contained in the orders. It is necessary to reflect the differences between the case of execution of orders and the case of reception and transmission, as prices and timing at which the orders should be recorded for the measuring of COH may differ in each case. Further, in the case of reception and transmission of orders, in particular, the transmitted orders are a better reference for this purpose than the received orders, as the latter may fail to be transmitted.
- (8) As the investment service of ‘reception and transmission of orders in relation to one or more financial instruments’ referred to in Annex I, Section A, point 1, to Directive 2014/65/EU is distinct from the investment activities of ‘Operation of Multilateral or Organised Trading Facilities –MTFs, OTFs’ referred to in points 8 and 9 thereof, it is necessary to clarify that buying and selling interests brought together in MTFs and OTFs operated by the investment firm are not to be included for the calculation of the K-COH cash trades or the K-COH derivatives.
- (9) Since the capital requirements for investment firms under Regulation (EU) 2019/2033 are based on the K-factors which cover all the services and activities included in Annex I to Directive 2014/65/EU, it is necessary to lay down rules for the adaptation of those methods in those cases where otherwise there could occur double counting. This is the case, in particular, of certain ancillary services which can be performed only in conjunction with services and activities listed in Annex I, Section A, to that Directive. Therefore, orders related to the ancillary service referred to in Annex I, Section B, point 3, to Directive 2014/65/EU (advice to undertakings on capital structure, industrial strategy and related matters and advice and services relating to

mergers and the purchase of undertakings), which relate to advice on transactions between investors, in case of corporate finance or private equity transactions, should not be included in the measuring of the AUM, nor in that of the COH, as those K-factors already account for them.

- (10) Regulation (EU) 2019/2033 provides for two different coefficients for the measuring of COH in Table 1 of its Article 15, one for cash trades and a separate one for derivatives. Further clarifications should be provided on how to allocate trades between the two classes of instruments and on the valuation method to be used in each case. In particular, derivatives should be included in the measuring of K-factors based on the notional value and the cash trades at market value because the coefficients of the K-factors are calibrated on that basis.
- (11) It is necessary to specify the calculation of the notional amount of a derivative because Regulation (EU) 2019/2033 does not contain rules on how to calculate it. Given that Article 29(3) of Regulation (EU) 2019/2033 lays down rules on how to calculate the notional amount of derivatives for the purposes of the calculation of the TCD, and in order to ensure consistency in the measuring of the TCD and the DTF, those rules for measuring the notional amount of a derivative should apply also for the measuring of the DTF.
- (12) This Regulation is based on the draft regulatory technical standards submitted to the Commission by the European Banking Authority (EBA).
- (13) The 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 Council⁴. The EBA has also consulted the European Securities and Markets Authority before submitting the draft technical standards on which this Regulation is based,

HAS ADOPTED THIS REGULATION:

SECTION 1

METHODS FOR MEASURING THE RISK-TO-CLIENT K-FACTORS

Article 1

Methods for measuring the Risk-to-Client K-factors in the case of investment services and activities conducted using tied agents

For the purposes of measuring its Risk-to-Clients (RtC) K-factors in accordance with Article 16 of Regulation (EU) 2019/2033, an investment firm shall include within each of AUM, CMH, ASA and COH referred to in Articles 17, 18, 19 and 20 of that Regulation, respectively, any amounts that relate to the investment services and activities of the investment firm, carried out by any tied agents registered to act on its behalf.

⁴ Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ L 331, 15.12.2010, p. 12).

Article 2

Methods for measuring the AUM in case of non-discretionary advisory arrangements of an on-going nature

1. For the purpose of measuring its RtC K-factors in accordance with Article 16 of Regulation (EU) 2019/2033, an investment firm shall not include within its AUM, referred to in Article 17 of that Regulation, any amounts of assets that relate to ancillary services referred to in Annex I, Section B, point 3, to Directive 2014/65/EU.
2. Where an investment firm provides non-discretionary advisory arrangements of an on-going nature to another financial sector entity that undertakes discretionary portfolio management, it shall include within its AUM referred to in Article 17 of Regulation (EU) 2019/2033 any amounts of assets that relate to those non-discretionary advisory arrangements.

Article 3

Methods for measuring the AUM in case of discretionary portfolio management

For the purposes of Article 17 of Regulation (EU) 2019/2033, the measurement of total monthly AUM shall be made in accordance with all of the following:

- (a) the calculation shall include the value of financial instruments calculated at fair value in accordance with the applicable accounting standards;
- (b) financial instruments with a negative fair value shall be included in absolute value;
- (c) the calculation shall include cash except any amounts covered under CMH in accordance with Article 4 of this Regulation.

Article 4

Methods for measuring CMH

For the purposes of Article 18 of Regulation (EU) 2019/2033, the measurement of CMH shall be based on the following:

- (a) balances that the investment firm uses for its internal reconciliations;
- (b) the values contained in the investment firm's accounting records.

Article 5

Methods for measuring ASA

For the purposes of Article 19 of Regulation (EU) 2019/2033, the measurement of total daily ASA shall include the value of all client financial instruments safeguarded and administered, calculated at fair value in accordance with the applicable accounting standards. It shall exclude CMH referred to in Article 4 of this Regulation.

Article 6

Methods for measuring the execution of orders in COH

1. For the purposes of calculating K-COH in accordance with Article 20 of Regulation (EU) 2019/2033, an investment firm shall include in the calculation of COH such client's order at the point in time at which it has confirmation that the execution has taken place and the price is known.

2. Where an investment firm executes on behalf of a client an order that is received from another investment firm, the calculation of COH by the executing investment firm shall include that order within its total of orders measured for the purposes of execution of client orders and shall exclude it from its total of orders measured for the purposes of reception and transmission of orders.

Article 7

Methods for measuring the reception and transmission of orders in COH

1. For the purposes of calculating K-COH in accordance with Article 20 of Regulation (EU) 2019/2033, where an investment firm receives and transmits a client order, that order shall be included at the point in time at which the investment firm transmits the order to another investment firm or executing broker.
2. An investment firm shall not include orders received and transmitted in the measurement of COH where it brings together two or more investors to bring about a transaction between those investors, such as in the case of corporate finance or private equity transactions.
3. Where an investment firm includes in the measurement of COH orders received and transmitted, it shall use the price contained in the orders. Where no price is contained in the orders, including where these are limit orders, the investment firm shall use the market price of the financial instrument at the day of transmission.
4. Buying and selling interests brought together by an investment firm for the purposes of operating a Multilateral or an Organised Trading Facility as set out in Article 4 (1), points 22 and 23, of Directive 2014/65/EU shall not be included in the measurement of COH.

Article 8

Methods for measuring cash trades for the purposes of COH

1. For the purposes of measuring COH in accordance with Article 20 of Regulation (EU) 2019/2033, an investment firm shall include as cash trades any transactions where a counterparty undertakes to trade any of the following:
 - (a) transferable securities;
 - (b) money-market instruments;
 - (c) units in collective investment undertakings;
 - (d) exchange traded options.
2. For the purposes of measuring COH of an exchange traded option, the investment firm shall use the options premium used for the execution of that option.

Article 9

Methods for measuring derivatives for the purpose of COH

For the purposes of measuring COH in accordance with Article 20 of Regulation (EU) 2019/2033 regarding derivatives, the notional amount of a derivative contract shall be determined pursuant to Article 29(3) of that Regulation.

SECTION 2
METHODS FOR MEASURING THE RISK-TO-FIRM K-FACTORS

Article 10

Methods for measuring cash trades for the purposes of DTF

1. For the purposes of measuring DTF in accordance with Article 33 of Regulation (EU) 2019/2033 regarding cash trades, an investment firm shall include as cash trade any transaction where a counterparty undertakes to trade any of the following:
 - (a) transferable securities;
 - (b) money-market instruments;
 - (c) units in collective investment undertakings;
 - (d) exchange traded options.
2. For the purposes of measuring DTF of an exchange traded option, the investment firm shall use the options premium used for the execution of that option.

Article 11

Methods for measuring derivatives for the purposes of DTF

For the purposes of measuring DTF in accordance with Article 33 of Regulation (EU) 2019/2033 regarding derivatives, the notional amount of a derivative contract shall be determined pursuant to Article 29(3) of that Regulation.

Article 12

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, 22.9.2021

For the Commission
The President
Ursula VON DER LEYEN