Council of the
European Union

Brussels, 21 December 2017
(OR. en)

16011/17

Interinstitutional File:
2017/0358 (COD)

EF 354
ECOFIN 1149
CODEC 2143

PROPOSAL

From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
date of receipt:	21 December 2017
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
No. Cion doc.:	COM(2017) 791 final
Subject:	Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the prudential supervision of investment firms and amending Directives 2013/36/EU and 2014/65/EU

Delegations will find attached document COM(2017) 791 final.

Encl.: COM(2017) 791 final

EUROPEAN
COMMISSION

Brussels, 20.12.2017
COM(2017) 791 final

2017/0358 (COD)

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on the prudential supervision of investment firms and amending Directives 2013/36/EU and 2014/65/EU

(Text with EEA relevance)

{SWD(2017) 481 final}

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

The EU needs stronger capital markets in order to promote investment, unlock new sources of financing for companies, offer households better opportunities and strengthen the Economic and Monetary Union. The Commission is committed to putting in place all the remaining building blocks in order to complete the Capital Markets Union (CMU) by 2019[1].

Investment firms provide a range of services that give investors access to securities and derivatives markets (investment advice, portfolio management, brokerage, execution of orders etc.). Investment firms and the services they provide form a vital cog in a well-functioning CMU. They play an important role in facilitating savings and investment flows across the EU, with various services used to support effective capital allocation and risk management.

There are investment firms in all Member States. According to information compiled by the European Banking Authority (EBA), there were 6 051 investment firms in the European Economic Area (EEA)[2] at the end of 2015. These include firms providing a limited set of services to retail customers in the main through to those offering a number of services to a broad range of retail, professional and corporate clients.

Based on information from the EBA, around 85 % of EEA investment firms limit their activities to:

- offering investment advice;
- receiving and transmitting orders;
- managing portfolios; and
- executing orders.

Acting as an important hub for capital markets and investment activities, the UK has the largest number of EEA investment firms, with roughly half of them based there, followed by Germany, France, the Netherlands and Spain. Most EEA investment firms are small or medium-sized. The EBA estimates that some eight investment firms, largely concentrated in the UK, control around 80 % of the assets of all investment firms in the EEA.

As one of the new priority actions to strengthen capital markets and build a CMU, the Commission therefore announced in its Mid-Term Review of the Capital Markets Union Action Plan[3] that it would propose a more effective prudential and supervisory framework for investment firms,

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[1] See 'Communication on the Mid-Term Review of the Capital Markets Union Action Plan', COM(2017) 292 final, 8 June 2017; and, 'Communication on Reinforcing integrated supervision to strengthen Capital Markets Union and financial integration in a changing environment', COM(2017) 542 final, 20 September 2017.

[2] EBA report on investment firms, response to Commission's call for advice of December 2014 (EBA/Op/2015/20), Table 12: Population of investment firms, by category, by country, p. 96. https://www.eba.europa.eu/documents/10180/983359/EBA-Op-2015-20+Report+on+investment+firms.pdf

[3] COM(2017) 292 final.

calibrated to the size and nature of investment firms, in order to boost competition and improve investors' access to new opportunities and better ways of managing their risks. In view of the pivotal role played by UK investment firms in this area to date, the UK's decision to withdraw from the EU further underlines the need to update the regulatory architecture in the EU in order to support this development.

The proposals covering this Directive and the accompanying Regulation ('the proposals') were included in the 2017 Commission Work Programme as a REFIT exercise. They aim to ensure that investment firms are subject to capital, liquidity and other key prudential requirements and corresponding supervisory arrangements that are adapted to their business yet sufficiently robust to capture the risks of investment firms in a prudentially sound manner in order to protect the stability of the EU's financial markets. The proposals are the outcome of a review mandated by Articles 493(2), 498(2), 508(2) and 508(3) of Regulation (EU) No 575/2013 (Capital Requirements Regulation, or CRR)[4] which, together with Directive 2013/36/EU (Capital Requirements Directive IV, or CRD IV)[5], constitute the current prudential framework for investment firms. When agreeing these texts, co-legislators decided that the framework for investment firms should be reviewed given that its rules are largely geared to credit institutions.

Unlike credit institutions, investment firms do not take deposits or make loans. This means that they are a lot less exposed to credit risk and the risk of depositors withdrawing their money at short notice. Their services focus on financial instruments – unlike deposits, these are not payable at par but fluctuate according to market movements. They do however compete with credit institutions in providing investment services, which credit institutions can offer to their customers under their banking licence. Credit institutions and investment firms are therefore two qualitatively different institutions with different primary business models but with some overlap in the services they can provide.

Investment firms have been subject to EU prudential rules alongside credit institutions since 1993, the year in which the first EU framework governing the activities of investment firms entered into force. Now replaced by the Markets in Financial Instruments Directive (MiFID)[6] and, as of January 2018, by MiFID II / MiFIR[7], this framework sets out the conditions for authorisation and organisational and business conduct requirements under which investment services can be provided to investors as well as other requirements governing the orderly functioning of financial markets.

The prudential framework for investment firms in the CRR/CRD IV works in conjunction with MiFID. Typically, prudential requirements on financial institutions are designed to (i) ensure that they have sufficient resources to remain financially viable and to carry out their services through economic cycles; or (ii) enable an orderly wind-down without causing undue economic harm to their customers or to the stability of the markets they operate in. As a result, they should aim to

[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 investment firms and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p. 1).

[5] 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 (OJ L 176, 27.6.2013, p. 338).

[6] Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ L 145, 30.4.2004, p. 1).

[7] 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. 349-496) and Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 (OJ L 173, 12.6.2014, p. 84).

reflect the risks that different financial institutions face and pose, be proportionate to the likelihood of the risks occurring, and broadly strike a balance between ensuring the safety and soundness of different financial institutions and avoiding excessive costs which could hinder them from carrying out their business in a viable way.

Systemic investment firms, a number of which are identified as global, or other systemically important institutions under Article 131 of CRD IV should still be subject to the CRR/CRD IV framework, including the amendments proposed by the Commission on 23 November 2016[8], in accordance with the revised approach for identifying them in the proposals. This is because these firms typically incur and underwrite risks on a significant scale throughout the single market. Their activities expose them to credit risk, which is mainly in the form of counterparty credit risk as well as market risk for positions they take on own account, whether for their clients or themselves. They therefore constitute a greater risk to financial stability given their size and interconnectedness. In light of these risks and in order to ensure a level playing field, such systemic investment firms should be treated as credit institutions.

As announced in the Commission Communication of September 2017 on the review of the European Supervisory Authorities[9] (ESAs), this would also imply among other things that their operations in Member States participating in the Banking Union are subject to direct supervision by the ECB in the Single Supervisory Mechanism. At present, these firms are largely concentrated in the UK but are in the process of considering plans to relocate parts of their operations to the EU-27, notably to Member States participating in the Banking Union. While this covers only a small number of firms, they nevertheless represent a sizeable share of the total assets and business volume of all investment firms in the EU.

For other investment firms, the fact that the current prudential framework focuses on credit institutions and the risks they face and pose rather than investment firms is more problematic. The services provided by these firms and the risks they can create are, to a large extent, not explicitly addressed by the existing rules. Of the eight investment services that investment firms are authorised to perform under MiFID[10], only (i) dealing on own account; and (ii) underwriting or placing instruments on a firm commitment basis have clear corresponding requirements under the CRR. For the other investment services (reception and transmission of orders, execution of orders, portfolio management, investment advice, placing instruments without a firm commitment basis, operation of a multilateral trading facility), such requirements are missing and result in approximate coverage of the risks involved. While limited in some cases, the risks inherent in these activities for the firm and, as a consequence, for the firm's clients and the wider markets they operate in are therefore not captured in a targeted way.

This gives rise to three main problems, which are assessed in the staff working document accompanying the proposals.

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[8] In line with the second set of advice from EBA of October 2016 (Opinion of the European Banking Authority on the First Part of the Call for Advice on Investment Firmshttps://www.eba.europa.eu/documents/10180/1639033/Opinion+of+the+European+Banking+Authority+on+the+First+Part+of+the+Call+for+Advice+on+Investment+Firms+%28EBA-Op-2016-16%29.pdf,) the Commission proposed in November 2016 that investment firms identified as global or as other systemically important institutions (G-SIIs, O-SIIs) in accordance with Article 131 of the Capital Requirements Directive should still be subject to the revised Capital Requirements Regulation. In March 2017, there were eight investment firms in this group, all based in the UK. The Commission also proposed that other investment firms could be unaffected by these changes. See: Commission proposals to revise the Capital Requirements Regulation and Directive of 23 November 2016, https://ec.europa.eu/info/law/banking-prudential-requirements-directive-2013-36-eu/upcoming_en

[9] COM(2017) 542 final.

[10] MiFID II will add the investment service 'operation of an organised trading facility' to this list.

First, while the framework caters to some extent to the different types of business profiles of investment firms in the form of exemptions, it is a source of considerable regulatory complexity for many firms in general. Second, its detailed requirements and exemptions constitute a crude and risk-insensitive proxy for the actual risks incurred and posed by investment firms, which differ from those of banks. Third, due to its inherent complexity and lack of risk sensitivity, its implementation by Member States gives rise to fragmentation in the overall regulatory landscape for investment firms, with scope for harmful regulatory arbitrage. This could threaten the integrity and functioning of the single market.

The objectives of the proposals are to address the problems of the existing framework while facilitating the take-up and pursuit of business by investment firms where possible. Specifically, they set out a prudential framework that is better adapted to their business models. They consist of more appropriate and risk-sensitive requirements for investment firms, better targeting the risks they actually pose and incur across different types of business models. Finally, they constitute a more streamlined regulatory toolkit to enable prudential supervisors to carry out their oversight effectively.

Finally, MiFID II and MiFIR were adopted in the wake of the financial crisis to cover securities markets, investment intermediaries and trading venues. The new framework reinforces and replaces the current MiFID I framework. In the context of the revision of the prudential framework for EU investment firms, the absence of a mandatory reporting requirement for third-country firms active in Member States through branches has been identified as a weakness. National competent authorities are unable to assess on a regular basis the volume of financial services activities carried out by branches of third-country firms on their territories. This proposal would therefore give competent authorities the appropriate tools to monitor these activities.

As mandated by the Articles of the CRR, the review of the prudential framework for investment firms has been carried out in consultation with EBA, the European Securities and Markets Authority (ESMA) and the national competent authorities represented in these ESAs. Following a first call for advice by the Commission in December 2014, EBA published its first report on the current prudential framework for investment firms, calling for changes to the current approach for all but the largest and most systemic investment firms in December 2015[11]. Following a second call for advice by the Commission in June 2016, EBA published a discussion paper for consultation focusing on a potential new prudential regime for the vast majority of investment firms in November 2016[12]. Taking account of the feedback and the additional data it had gathered from investment firms together with national competent authorities, EBA published its final recommendations in September 2017[13]. The proposals build on these recommendations in all key respects except for the identification of systemic investment firms, for the reasons explained in the accompanying staff working document and summarised under the section on 'impact assessment' below.

- **Consistency with existing policy provisions in the policy area**

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[11] EBA report on investment firms, response to Commission's call for advice of December 2014 (EBA/Op/2015/20), http://www.eba.europa.eu/documents/10180/983359/EBA-Op-2015-20+Report+on+investment+firms.pdf

[12] Designing a new prudential regime for investment firms (EBA/DP/2016/02), https://www.eba.europa.eu/documents/10180/1647446/Discussion+Paper+on+a+new+prudential+regime+for+Investment+Firms+%28EBA-DP-2016-02 %29.pdf/cf75b87e-2db3-47a3-b1f3-8a30fa6962da

[13] EBA opinion on the design of a new prudential framework for investment firms (EBA/Op/2017/11), http://www.eba.europa.eu/documents/10180/1976637/EBA+Advice+on+New+Prudential+Framework+on+Investment+Firms+%28EBA-Op-2017-11 %29.pdf

This proposal complements the ongoing review of the CRR/CRD IV regime for credit institutions following the proposals adopted by the Commission on 23 November 2016, which allowed all non-systemic investment firms to opt out of its revised provisions[14]. This option was introduced in recognition of the fact that these revised provisions were not designed with most investment firms in mind and they would have created further complexity in the existing rulebook. The review of the prudential regime for most investment firms also put forward in this proposal was already well underway at the time, and subjecting them to an even more complex regime for a brief period pending the application of the new regime was considered disproportionate. This proposal therefore creates a new regime for the majority of investment firms by carving them entirely out of the CRR/CRD IV framework and leaving only systemic investment firms within the scope of the latter, including its revised provisions, in accordance with the revised approach for identifying them in this proposal.

The proposal is also consistent with MiFID and MiFID II / MiFIR. By setting prudential requirements that are tailored to the business and risks of investment firms, it clarifies when and why these requirements apply. As such, it overcomes some cases of arbitrary application of prudential requirements in the current framework, which arise because they are set first and foremost in relation to investment services listed in MiFID rather than the actual build-up of risks in the type and volumes of business conducted by investment firms.

- **Consistency with other EU policies**

Investment firms play an important role in facilitating investment flows across the EU. Accordingly, the review also forms part of the Commission initiatives to ensure a strong and fair single market with a well-functioning financial system and CMU in order to mobilise investments and boost growth and jobs[15]. A more suitable prudential and supervisory framework with lower compliance costs for investment firms should help (i) improve the overall conditions for businesses; (ii) boost market entry and competition in the process; and (iii) improve investors' access to new opportunities and better ways of managing their risks.

The revised approach for identifying systemic investment firms that should remain under the CRR/CRD IV framework is also consistent with the objective of avoiding loopholes in the functioning of the Banking Union. Recent structural market developments indicate that third-country banking groups have increasingly complex structures in the EU, operating through entities that escape supervision by the ECB under the Single Supervisory Mechanism. As outlined in the Commission Communication of October 2017 on completing the Banking Union[16], ensuring that systemic investment firms remain in the CRR/CRD IV in accordance with the approach for identifying them in this proposal also brings them under the prudential supervision by banking supervisors and, for their operations in Member States participating in the Banking Union, under the prudential oversight of the ECB.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

- **Legal basis**

The Treaty on the Functioning of the European Union confers on the European institutions the competence to lay down appropriate provisions by way of Directives to make it easier for persons to take up and pursue commercial activities across the EU (Article 53 TFEU). This extends to

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[14] Commission proposals to revise the Capital Requirements Regulation and Directive of 23 November 2016, https://ec.europa.eu/info/law/banking-prudential-requirements-directive-2013-36-eu/upcoming_en

[15] Communication on the Mid-Term Review of the Capital Markets Union Action Plan, June 2017 (COM(2017) 292), https://ec.europa.eu/info/publications/mid-term-review-capital-markets-union-action-plan_en

[16] COM(2017) 592 final.

legislation dealing with the prudential supervision of providers of financial services, in this case investment firms. The provisions of this proposed Directive replace those in CRD IV, which are also based on Article 53 TFEU, as they relate to investment firms.

- **Subsidiarity**

The proposal revises and simplifies the existing EU rules that govern the prudential treatment of investment firms in order to (i) better accommodate and address risks in their business models; (ii) improve the level playing field among firms; and (iii) enhance supervisory convergence. To achieve this, a new EU framework should replace the existing one rather than devolve these choices to regulatory frameworks in the Member States. This is because investment firms authorised under MiFID today routinely provide their services to customers across EU borders. Separate and disjointed changes to the rules by Member States could introduce competitive distortions and discriminatory treatment, which would fragment the single market. This could increase cases of harmful regulatory arbitrage, with possible knock-on effects for financial stability and investor protection in other Member States in case of problems. It could also skew the range and type of investment services that are available in a given Member State, to the possible detriment of overall market efficiency and investor choice. The revised rules should avoid undue regulatory disparities and ensure a level playing field for all authorised firms across the single market.

- **Proportionality**

As a REFIT exercise, the key objective is to render the new framework more suitable, relevant and proportionate compared to the existing framework for investment firms. Accordingly, this proposal strikes a balance between ensuring that the requirements are at once:

- comprehensive and robust enough to capture the risks of investment firms in a prudentially sound manner; and
- flexible enough to cater to the various types of business models without impeding their ability to operate in a commercially viable way.

The proposal is mindful of ensuring that the costs of the regime in terms of both capital requirements and associated compliance and administrative costs, which are generated by the need to manage the staff and systems in order to run the new requirements as well as report on compliance to supervisors, are kept to the minimum to achieve this balance.

As outlined in the accompanying staff working document, these associated costs are expected to decrease on an ongoing basis, with some new one-off costs at the outset. In terms of capital, an overarching policy choice that has underpinned work on the review and impacts the above is the objective of ensuring that, on aggregate, EU-wide capital requirements on investment firms do not increase too much. This translates into different distribution effects for some types of firms. These are alleviated by the provisions of the proposal so that the biggest impacts are phased in and capped.

- **Choice of instrument**

A Directive is chosen since its provisions replace those in CRD IV relating to investment firms. This ensures that its provisions can be transposed by Member States in accordance with relevant national administrative arrangements consistent with existing practice.

3. RESULTS OF EX-POST ASSESSMENTS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

• Ex-post assessment of existing legislation

The assessment of the existing CRR/CRD IV framework, which is based on the analysis carried out by the EBA and ESMA in their 2015 report[17] in particular and on the parallel work and analysis of the Commission services, is summarised in the accompanying staff working document.

It concludes that the existing rules, which are based on international regulatory standards for large banking groups and targeted at the risks of banks, only partially achieve their aims in terms of (i) ensuring sufficient capital for the risks of most investment firms; (ii) keeping compliance costs in check; (iii) securing a level playing field across the EU; and (iv) ensuring effective prudential oversight. Many of its provisions are considered ineffective and inefficient in this regard. The exception is large and systemic investment firms whose size, risk profile and interconnectedness with other participants in financial markets make them 'bank-like' in character.

For the rest, the status quo was assessed to create (i) excessive complexity and disproportionate compliance burdens especially for many small and medium-sized firms; (ii) poorly tailored and risk-insensitive prudential metrics and requirements for accurately capturing the risks of investment firms; and (iii) cases of diverging national implementation of the rules and a fragmented regulatory landscape across the EU.

• Stakeholder consultations

Stakeholders were consulted at several points during the review. In terms of the main milestones, following a first call for advice by the Commission in December 2014, EBA published a report on the current prudential framework for investment firms together with proposals for changes in December 2015. This constitutes a comprehensive and publicly available analysis of the status quo, with data on numbers and types of investment firms in Member States. This analysis helped extend the review to stakeholders who may not be directly impacted by the rules and encouraged them to join in the subsequent discussion.

On 4 November 2016, EBA published a discussion paper for consultation focusing on a potential new prudential regime for investment firms. The paper was open for comments for 3 months. EBA published its draft recommendations on 3 July 2017, inviting comments from stakeholders. Its work was also supported by a detailed data-gathering exercise involving investment firms. This was carried out by national competent authorities on behalf of EBA in two stages in 2016 and 2017.

Given the detailed public consultation and data collection undertaken by EBA, the Commission considered it unnecessary to run a general public consultation in parallel. The Commission services instead consulted stakeholders in a targeted fashion to gather further views on the main elements of the review. This included:

- a roundtable with industry stakeholders (investment firms, investors, law firms, consultants) on 27 January 2017 on EBA draft proposals for a future regime;
- a workshop on the costs of the current regime on 30 May 2017; and

[17] EBA report on investment firms, response to Commission's call for advice of December 2014 (EBA/Op/2015/20), https://www.eba.europa.eu/documents/10180/983359/EBA-Op-2015-20+Report+on+investment+firms.pdf

- a workshop on EBA's draft final recommendations on 17 July 2017.

The review was discussed with Member States in the Financial Services Committee in March and October 2017 and in the Experts Group on Banking, Payments and Insurance in June and September 2017. Stakeholder input received on the Commission's inception impact assessment published in March 2017 was also taken into account[18]. Finally, the Commission also considered input received previously in the wide-ranging call for evidence on the efficiency, consistency and coherence of the overall EU regulatory framework for financial services, in which several respondents pointed to various issues relevant for the review[19].

Investment firms represent various business models, and their views tend to focus on aspects of the proposals specific to them. This complicates cross-cutting comparisons of the relative weight of stakeholder positions. However, in general the large majority of stakeholders welcome a tailored prudential framework more suited to their business models. They stress that their systemic relevance is limited and that capital requirements should focus on ensuring they can be wound down in an orderly way. In terms of specific requirements that apply to their particular business model, investment firms that conduct agency-only services and do not enter into transactions in financial instruments using their own balance sheet generally criticise proposals for linking capital requirements to the size of the client portfolios they manage in a linear way. While many firms that trade on own account agree that the existing framework for capturing market risk has some merit in light of the risks they incur and pose, other trading firms note that it exaggerates risks in the methods and products they trade in. These views have been taken into account in the calibration of the proposed new risk metrics (K-factors — see below) and the possibility to phase in and cap higher requirements.

- **Collection and use of expertise**

The review was carried out based on comprehensive advice provided by EBA in consultation with ESMA, as required by the relevant Articles in CRR, which constitute the legal basis for the review (notably Article 508(2) and (3)). The main public outputs of the EBA were as follows:

- the December 2015 report setting out a comprehensive assessment of the status quo and initial recommendations for changes;
- the November 2016 discussion paper published for consultation on the contours of a possible new regime; and
- the September 2017 final report with detailed recommendations.

The precise calibration of the recommendations for new capital requirements was supported by a detailed data-gathering exercise involving investment firms. This was carried out by national competent authorities on behalf of EBA in two stages in 2016 and 2017. The Commission was involved throughout and was able to benefit from the discussions assessing the advantages and disadvantages of the detailed policy recommendations as they unfolded.

- **Impact assessment**

According to the Better Regulation Toolbox (tool #9), no Commission impact assessment is necessary whenever an EU agency has been mandated to carry out policy design work and related

[18] https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-1546878_en

[19] See e.g. various replies submitted in the Commission's Call for Evidence of 2015 http://ec.europa.eu/finance/consultations/2015/financial-regulatory-framework-review/index_en.htm

analysis, to the extent that the Commission proposal does not deviate much from the agency's recommendations and the Commission services consider its assessment to be of sufficient quality.

While the Regulatory Scrutiny Board examined a draft impact assessment for this initiative, a staff working document was deemed more appropriate given that the specific mandate of the review is based on the advice of the ESAs and their stakeholder consultation and technical work. The objective of the staff working document accompanying the proposals is therefore to explain the advice given by the ESAs, including the results of their analysis and consultation, while providing the Commission services' views on its conclusions, with a view to guiding the Commission's decision-making.

On capital requirements, EBA assesses that its advice would increase these on aggregate for all non-systemic EU investment firms by 10 % compared to Pillar 1 requirements today, and decrease them by 16 % compared to total requirements applied as a result of Pillar 2 add-ons. The way in which these impacts would be distributed among investment firms depends on their size, which investment services they provide and how the new capital requirements will apply to them. As detailed in the Staff Working Document accompanying the proposals, including its Annex II, the 10% aggregate increase in Pillar 1 requirements is the sum of considerably lower requirements for some and increases in excess of 10% for others. On available own funds, EBA finds that only a few firms would fail to have sufficient capital to comfortably meet the new requirements – this involves just a small number of investment advisors, trading firms and multiservice firms. However, for firms in this group whose increases would be over twice their current requirements, a cap could be granted for a number of years.

The accompanying staff working document concludes that, overall, EBA's recommendations are considered to be an appropriate and proportionate means of achieving the review's objectives in an effective and efficient manner compared to the status quo. More generally, EBA's advice is a clear positive step towards a prudential framework for investment firms that can both ensure that they operate on a sound financial basis while not hindering their commercial prospects. As such, it should support the review's aims in a balanced fashion. On the one hand, it should help ensure that the risks of investment firms for customers and markets are addressed in a more targeted way both in their ongoing operations and in case they need to be wound down. On the other, it should help ensure that they can fully perform their role in facilitating investment flows across the EU, which is consistent with the aims of the CMU to mobilise savings and investments in order to boost growth and jobs.

It only diverges with EBA's recommendations on the identification of systemic investment firms. Rather than postpone this so it is clarified via criteria to be developed in technical rules implementing the proposals as EBA recommends, it is considered more appropriate to set this out in the proposals themselves in order to ensure a regulatory level playing field between credit institutions and systemic investment firms. On this point, the proposals go beyond EBA's advice in its opinion on the review of investment firms. However, the proposals thereby deliver on EBA's opinion on issues related to the UK's decision to leave the EU[20].

- **Regulatory fitness and simplification**

As outlined in the accompanying staff working document, simplification of the prudential rules for the vast majority of investment firms is expected to considerably reduce their administrative and

[20] Opinion of the European Banking Authority on issues related to the departure of the United Kingdom from the European Union (EBA/Op/2017/12) of 12 October 2017, http://www.eba.europa.eu/documents/10180/1756362/EBA+Opinion+on+Brexit+Issues+%28EBA-Op-2017-12 %29.pdf

compliance burdens. Various redundant regulatory and reporting requirements could be removed, allowing capital dedicated to regulatory purposes to switch to more productive uses. The proposals, by setting capital and other prudential requirements, including remuneration and governance, that are proportionate to investment firms alleviate for the first time the significant costs that firms incur as a result of the bank-centric requirements of the current regime. This would put an end to the complicated task of matching and reconciling business data to an ill-fitted regulatory framework and reporting regime.

Investment firms that are SMEs[21] are expected to be among the main beneficiaries. A more proportionate and appropriate prudential framework for them should help improve the conditions for conducting business, and barriers to entry should decrease. For example, streamlining the onerous reporting framework should reduce administrative burdens and compliance costs for SMEs, including innovative firms seeking to grow through digital means. Similarly, by exempting small and non-interconnected investment firms from the current governance and remuneration rules as laid down under the current CRD IV/CRR, the proposals would reduce administrative and compliance costs for these enterprises. Some one-off costs of transitioning to the new regime are to be expected as firms need to overhaul risk management systems, update compliance departments and revise contracts with law firms and other service providers that are currently used to facilitate compliance. However, the compliance cost savings should support the CMU's aims in general by helping investment firms play their role in mobilising savings from investors towards productive uses.

In terms of compliance costs, firms are set to save tens of thousands to hundreds of thousands of euros depending on the type and size of firm. How these reductions in compliance costs relate and compare to changes in capital requirements for different types of firms is not known at this stage, but should feature in the future monitoring and evaluation of the framework.

- **Fundamental rights**

This proposal strengthens the exercise of the right of various investment firms to conduct their business unencumbered by rules designed primarily for other types of participants in financial markets. The legislative measures in the proposals setting out rules for remuneration in investment firms observe the principles recognised by the Charter of Fundamental Rights of the European Union, notably the freedom to conduct a business and the right of collective bargaining and action.

4. BUDGETARY IMPLICATIONS

The proposal will not have implications for the EU budget.

5. OTHER ELEMENTS

- **Implementation plans and monitoring, evaluation and reporting arrangements**

The envisaged changes by the proposals should be evaluated in order to determine the degree to which the following objectives have been met:

- a simpler categorisation of investment firms in a manner that captures their different risk profiles;

[21] As defined in the Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p. 36-41), i.e. enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million.

- a set of prudential rules, notably on capital, liquidity, remuneration and governance requirements, that are appropriate, proportionate and sensitive to the specific risks that investment firms are exposed to and that ensure that capital is assigned to where it is needed;

- a framework that corresponds to the risks inherent in the nature and range of activities undertaken by investment firms in a direct and discernible way and thereby supports taking up the business; and

- a streamlined supervisory toolkit to enable the full and accurate oversight of business practices and the associated risks.

To this end, some of the following information could be gathered as part of a future review in order to serve as indicators in evaluating the impact of the proposed changes: (i) compliance costs in terms of staff, legal advice and regulatory reporting; (ii) levels of capital requirements; (iii) other new costs e.g. from liquidity rules; (iv) evolution in the numbers of firms between the different categories; (v) changes in recourse to Pillar 2 add-ons by competent authorities; (vi) cases and impact of failure of investment firms under the new regime; and (vii) evolution of the size of investment firms in terms of assets and client order volumes.

- **Detailed explanation of the specific provisions of the proposal**

Subject matter and scope

The proposal sets out requirements for the appointment of prudential supervisory authorities, the initial capital of investment firms, the supervisory powers and tools for the prudential supervision of investment firms by the competent authorities, and the publication requirements for competent authorities in the field of prudential regulation and supervision. The Directive applies to all investment firms covered by MIFID II, which is set to apply as of January 2018.

Appointment and powers of supervisory authorities

The proposal requires Member States to appoint an authority to exercise the powers for prudential supervision under this Directive, transferring the applicable provisions from CRD IV to this Directive. Member States can either bestow these onto an existing authority in the shape of the function and powers granted under CRD IV or vest them in a new authority.

Initial capital

Levels of initial capital, based on the services and activities that investment firms are authorised to provide in accordance with MIFID, are revised and harmonised across the EU from the levels stipulated in CRD IV to take into account inflation since these levels were set. Transitional arrangements are provided to allow smaller firms in particular to attain the new amounts of initial capital where necessary.

Home/host powers

Competences in accordance with CRD IV are conferred upon home and host authorities for the prudential supervision of investment firms. Relevant cooperation arrangements between authorities should be established.

Exchange of information and professional secrecy

Provisions for the exchange of information between competent authorities on prudential supervision and professional secrecy are introduced based on CRD IV and complementing MiFID II.

Penalties

In line with CRD IV, Member States are required to establish administrative penalties and other administrative measures which are effective, proportionate and dissuasive in order to sanction violations under the provisions of this Directive and [Regulation (EU) No ----/--].

Internal capital adequacy and supervisory review and evaluation

Simplified requirements based on those in CRD IV are introduced for investment firms and competent authorities to assess the adequacy of arrangements and procedures in order to ensure that firms comply with the provisions of this Directive and [Regulation (EU) No ----/--].

Competent authorities should have powers to review and evaluate the prudential situation of investment firms and, where necessary, to exercise powers to require changes in areas such as internal governance and controls, risk management processes and procedures and, where necessary, set additional requirements, including in particular capital and liquidity requirements.

Governance and remuneration

In line with the assessment by the EBA in its Advice[22] and the evaluation of this EBA assessment carried out by the Commission services in the accompanying staff working document, the rules on corporate governance and remuneration are revised in order to ensure the orderly functioning of investment firms and to prevent excessive risk-taking by their staff.

At the same time, these rules aim to reflect the differences in risks posed by credit institutions and investment firms. It is not considered proportionate to apply the requirements of this Directive to governance arrangements, remuneration policies and practices of small and non-interconnected investment firms. The proposal aims to ensure the consistency of remuneration and governance rules across the different pieces of legislation, including CRD IV, Directive 2009/65/EC (UCITS) and 2011/61/EU (AIFMD).

While the proposal does not set a specific limit on the ratio between variable and fixed components of variable remuneration, it requires that investment firms set appropriate ratios themselves. This takes into account the potential impact that setting a single ratio could have on the cost flexibility and profitability of some investment firms.

The findings of Commission Report COM(2016) 510 revealed that the deferral and pay-out in instruments requirements are generally not efficient in the case of small and non-complex investment firms and for staff with low levels of variable remuneration. The Commission therefore proposes to set a threshold at firm and staff levels below which investment firms and/or staff members will benefit from the derogations from the application of the rules on the deferral and pay-out in instruments.

Third countries

Agreements with third countries may be concluded by the Union regarding the means of

[22] http://www.eba.europa.eu/documents/10180/1976637/EBA+Advice+on+New+Prudential+Framework+on+Investment+Firms+%28EBA-Op-2017-11 %29.pdf

supervising compliance with the group capital test. Administrative cooperation arrangements with third countries supervisory authorities may be concluded by the Member States and EBA to facilitate the exchange of information.

Systemic investment firms

The proposal for a Regulation accompanying this proposal for a Directive contains a provision that would change the definition of credit institutions to include undertakings whose business includes dealing on own account or underwriting or placing financial instruments on a firm commitment basis, where the total value of the assets of the undertaking is EUR 30 billion or more. This proposal for a directive contains complementary provisions on the process for seeking authorisation as a credit institution.

2017/0358 (COD)

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on the prudential supervision of investment firms and amending Directives 2013/36/EU and 2014/65/EU

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 53(1) thereof,

Having regard to the proposal from the European Commission,

Having regard to the opinion of the European Central Bank,[23]

Having regard to the opinion of the European Economic and Social Committee,[24]

After transmission of the draft legislative act to the national parliaments,

Acting in accordance with the ordinary legislative procedure,

Whereas:

(1) Robust prudential supervision is an integral part of the regulatory conditions in which financial institutions may provide services within the Union. Investment firms are, together with credit institutions, subject to Directive 2013/36/EU of the European Parliament and of the Council[25] and to Regulation (EU) No 575/2013 of the European Parliament and of the Council[26] as regards their prudential treatment and supervision, while their authorisation and other organisational and conduct requirements are set out in Directive 2004/39/EC of the European Parliament and of the Council[27].

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[23] OJ C […], […], p. […].

[24] OJ C […], […], p. […].

[25] 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 (OJ L 176, 27.6.2013, p. 338).

[26] 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).

[27] Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ L 145, 30.4.2004, p. 1).

(2) The existing prudential regimes under Regulation (EU) No 575/2013 and Directive 2013/36/EU are largely based on successive iterations of the international regulatory standards set for large banking groups by the Basel Committee on Banking Supervision and only partially address the specific risks inherent to the diverse activities of investment firms. The specific vulnerabilities and risks inherent to investment firms should therefore be further addressed by means of appropriate and proportionate prudential arrangements at Union level.

(3) Sound prudential supervision should ensure that investment firms are managed in an orderly way and in the best interests of their clients. They should take into account the potential for investment firms and their clients to engage in excessive risk-taking and the different degrees of risk assumed and posed by investment firms. Equally, such prudential supervision should aim to avoid undue administrative burden on investment firms.

(4) Many of the requirements that stem from Regulation (EU) No 575/2013 and Directive 2013/36/EU framework are designed to address common risks faced by credit institutions. Accordingly, the existing requirements are largely calibrated to preserve the lending capacity of credit institutions through economic cycles and to protect depositors and taxpayers from possible failure, and are not designed to address the different risk-profiles of investment firms. Investment firms do not have large portfolios of retail and corporate loans and do not take deposits. The likelihood that their failure can have detrimental impacts for overall financial stability is lower than in the case of credit institutions. The risks faced and posed by investment firms are thus substantially different to the risks faced and posed by credit institutions and such difference should be clearly reflected in the prudential framework of the Union.

(5) Differences in the application of the existing framework in different Member States threaten the level playing-field for investment firms within the Union. Those differences stem from the overall complexity of the application of the framework to different investment firms based on the services they provide, where some national authorities adjust or streamline such application in national law or practice. Given that the existing prudential framework does not address all the risks faced and posed by some types of investment firms, large capital add-ons have been applied to certain investment firms in some Member States. Uniform provisions addressing those risks should be established in order to ensure harmonised prudential supervision of investment firms across the Union.

(6) A specific prudential regime is therefore required for investment firms which are not systemic by virtue of their size and interconnectedness with other financial and economic actors. Systemic investment firms should, however, remain subject to the existing prudential framework under Directive 2013/36/EU and Regulation (EU) No 575/2013. Those investment firms are a subset of investment firms to which the framework laid down in Directive 2013/36/EU and Regulation (EU) No 575/2013 currently applies and which do not benefit from dedicated exemptions from any of its principle requirements. The largest and most interconnected firms have business model and risk profiles that are similar to those of significant credit institutions. They provide "bank-like" services and underwrite risks at significant scale. Furthermore, systemic investment firms are large enough to, and have business models and risk-profiles which represent a threat for the stable and orderly functioning of financial markets on par with large credit institutions. Therefore it is appropriate that those investment firms remain subject to the provisions set out in the Directive 2013/36/EU and Regulation (EU) No 575/2013.

(7) There may be Member States in which the authorities competent for the prudential supervision of investment firms are different from the authorities that are competent for the supervision of market conduct. It is therefore necessary to create a mechanism of cooperation and exchange of information between those authorities.

(8) To foster the harmonisation of supervisory standards and practices within the Union, the European Banking Authority (EBA) should, in close cooperation with the European Securities and Markets Authority (ESMA), retain primary competence for the coordination and convergence of supervisory practices in the area of prudential supervision over investment firms within the European System for Financial Supervision (ESFS).

(9) The required level of initial capital of an investment firm should be based on the services and activities which that investment firm is authorised to provide, and respectively perform, according to Directive 2004/39/EC. The possibility for Member States to lower the required level of initial capital in specific situations, as provided for in Directive 2013/36/EU, on the one hand, and the situation of uneven implementation of that Directive, on the other hand, have led to a situation where the required level of initial capital diverges across the Union. To end that fragmentation, the required level of initial capital should be harmonised.

(10) While investment firms are removed from the scope of Directive 2013/36/EU and Regulation (EU) No 575/2013, certain concepts used in the context of Directive 2013/36/EU and respectively, Regulation (EU) No 575/2013, shall maintain their well-established meaning. To enable and ease a consistent reading of such concepts when used, in acts of Union law, in relation to investment firms, references in such Union acts to the initial capital of investment firms, to the supervisory powers of competent authorities for investment firms, to the internal capital adequacy assessment process of the investment firms, to the supervisory review and evaluation process of competent authorities for investment firms, to governance and remuneration provisions applicable to investment firms shall be construed as referring to the corresponding provisions in this Directive.

As far as references to the amount of initial capital are concerned, the following correlation shall apply. Levels of initial capital set by Article 8 of this Directive should, as of the date of application of this Directive, be construed to replace references to levels of initial capital set by Directive 2013/36/EU as follows: the initial capital of investment firms referred to in Article 28 of Directive 2013/36/EU should be construed to refer to Article 8(1); the initial capital of investment firms referred to in Articles 29 or 31 of Directive 2013/36/EU should be construed to refer to Article 8(2) or (3), depending on the type of investment services and activities of an investment firm; the initial capital referred to in Article 30 of Directive 2013/36/EU should be construed to refer to Article 8(1).

(11) The proper functioning of the internal market requires that the responsibility for supervising the financial soundness of an investment firm, and in particular its solvency, lies with the competent authority of its home Member State. To achieve an effective supervision of investment firms also in other Member States where they provide services or have a branch, close cooperation with the competent authorities of these Member States should be ensured.

(12) For informational and supervisory purposes, and in particular to ensure the stability of the financial system, competent authorities of host Member States should be able to carry out, on a case-by-case basis, on-the-spot checks, inspect the activities of branches of investment

firms on their territory and require information about the activities of those branches. Supervisory measures for those branches should however remain the responsibility of the home Member State.

(13) To protect commercially sensitive information, competent authorities should be bound by rules of professional secrecy when conducting their supervisory tasks and when exchanging confidential information.

(14) To strengthen the prudential supervision of investment firms and the protection of clients of investment firms, auditors should report promptly to the competent authorities those facts which can have a serious effect on the financial situation of an investment firm or its administrative and accounting organisation.

(15) The processing of personal data for the purposes of this Directive should be carried out in accordance with Regulation (EU) No 2016/679 of the European Parliament and of the Council[28], and with Regulation (EU) No 45/2001 of the European Parliament and of the Council[29]. In particular, where this Directive allows for exchanges of personal data with third countries, the relevant provisions of Chapter V of Regulation (EU) No 2016/679 and Article 9 of Regulation (EU) No 45/2001 should apply.

(16) To safeguard compliance with the obligations laid down in this Directive and [Regulation (EU) ---/----[IFR], Member States should provide for administrative penalties and other administrative measures which are effective, proportionate and dissuasive. In order to ensure that administrative penalties have a dissuasive effect they should be published except in certain well-defined circumstances. To enable clients and investors to make an informed decision about their investment options, those clients and investors should have access to information on administrative penalties and measures imposed on investment firms.

(17) To detect breaches of national provisions transposing this Directive and breaches of [Regulation (EU)---/----[IFR], Member States should have the necessary investigatory powers and should establish effective mechanisms to report potential or actual breaches.

(18) Investment firms should have internal capital which is adequate in quantity, quality and distribution to cover the specific risks to which they are or may be exposed. Competent authorities should ensure that investment firms have the adequate strategies and processes in place to asses and maintain the adequacy of their internal capital.

(19) Supervisory review and evaluation powers should continue to remain an important regulatory tool allowing competent authorities to assess qualitative elements, including internal governance and controls, risk management processes and procedures and, where needed, to set additional requirements, including in particular in relation to capital and liquidity requirements.

(20) To align remuneration with the risk profile of investment firms and to guarantee a level-playing field, investment firms should be subject to clear principles on corporate

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28 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (OJ L 119, 4.5.2016, p. 1).

29 Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8, 12.1.2001, p. 1).

governance arrangements and rules on remuneration that take into account the differences between credit institutions and investment firms. Small and non-interconnected investment firms should however be exempted from those rules because the provisions on remuneration and corporate governance under Directive 2014/65/EU are sufficiently comprehensive for those types of firms.

(21) Similarly, Commission report COM(2016) 510[30] demonstrated that the requirements on deferral and pay-out in instruments laid down in Directive 2013/36/EU are not appropriate for small and non-complex investment firms or for staff with low levels of variable remuneration. Clear, consistent and harmonised criteria for identifying investment firms and individuals exempted from those requirements are necessary to ensure supervisory convergence, and to guarantee a level-playing field. At the same time, it is however appropriate to offer some flexibility to competent authorities to adopt a stricter approach where they consider that necessary.

(22) It is also appropriate to offer some flexibility to investment firms in the way they use non-cash instruments when paying variable remuneration, as long as such instruments are effective in achieving the objective of aligning the interest of staff with the interest of various stakeholders, such as shareholders and creditors, and contribute to the alignment of variable remuneration with the risk profile of the investment firm.

(23) The revenues of investment firms in the form of fees, commissions and other revenues in relation to the provision of different investment services are highly volatile. Limiting the variable component of remuneration to a portion of the fixed component of remuneration would affect the firm's ability to reduce remuneration at times of reduced revenues and could lead to an increase of the firm's fixed cost base, leading in turn to risks for the firm's ability to withstand times of economic downturn or reduced revenues. To avoid those risks, a single maximum ratio between the variable and the fixed elements of remuneration should not be imposed on non-systemic investment firms. Instead, those investment firms should set appropriate ratios themselves.

(24) In response to the growing public demand for tax transparency and to promote investment firms' corporate responsibility, it is appropriate to require that investment firms disclose certain information, including information on profits made, taxes paid and any public subsidies received.

(25) To address risks at investment firm only group level, the prudential consolidation method required by the Regulation (EU) No 575/2013 should in the case of investment firm only groups be replaced by a group capital test. The determination of the group supervisor, however, should be based on the same principles that apply in the case of supervision on a consolidated basis. To ensure proper cooperation, core elements of coordination measures, and in particular information requirements in emergency situations or cooperation and coordination arrangements should be similar to the core elements of coordination applicable in the context of the single rulebook for credit institutions.

(26) On the one hand, the Commission should be able to submit recommendations to the Council for the negotiation of agreements between the Union and third countries for the practical exercise of supervision of compliance with the group capital test for investment firms, the parent undertakings of which are established in third countries, and for

[30] Report from the Commission to the European Parliament and the Council, Assessment of the remuneration rules under Directive 2013/36/EU and Regulation (EU) No 575/2013 (COM(2016) 510 final).

investment firms operating in third countries the parent undertakings of which are established in the Union. On the other hand, Member States and EBA should also be able to set-up administrative arrangements with third countries to perform their supervisory tasks.

(27) To ensure legal certainty and avoid overlaps between the current prudential framework applicable to both credit institutions and investment firms and this Directive, Regulation (EU) No 575/2013 and Directive 2013/36/EU are amended in order to remove investment firms from their scope. However, investment firms which are part of a banking group should remain subject to those provisions in Regulation (EU) No 575/2013 and Directive 2013/36/EU which are relevant for the banking group, such as the provisions on the intermediate EU parent undertaking referred to in [Article 21b] of Directive 2013/36/EU and to the rules on prudential consolidation set out in Chapter 2 of Title 2 of Part One of Regulation (EU) No 575/2013.

(28) It is necessary to specify the steps that undertakings need to take to verify whether they fall under the definition of a credit institution as set out in Article 4(1)(1)(b) of Regulation (EU) No 575/2013 and therefore need to obtain authorisation as a credit institution. Because certain investment firms already carry out the activities referred to in points (3) and (6) of Section A of Annex I to Directive 2014/65/EU, it is also necessary to ensure clarity about the continuity of any authorisation granted for those activities.

(29) To ensure effective supervision, it is important that undertakings meeting the conditions set out in Article 4(1)(1)(b) of Regulation (EU) No 575/2013 apply for an authorisation as a credit institution. Competent authorities should therefore have the possibility to apply sanctions to undertakings that do not apply for that authorisation.

(30) The amendment to the definition of 'credit institution' in Regulation (EU) No 575/2013 by Regulation [Regulation (EU)---/----[IFR]] may as of its entry into force capture investment firms that are already operating on the basis of an authorisation issued in accordance with Directive 2014/65/EU. Those undertakings should be allowed to continue operating under their authorisation as investment firms until the authorisation of a credit institution is granted. Those investment firms should submit an application for authorisation as a credit institution at the latest when the average of their monthly total assets exceed any of the thresholds set out in Article 4(1)(1)(b) of Regulation (EU) No 575/2013 over a period of twelve consecutive months. Where an investment firm exceeds any of the thresholds set out in Article 4(1)(1)(b) of Regulation (EU) No 575/2013 as of the date of entry into force of this Directive, the average of their monthly total assets should be calculated taking into account the twelve consecutive months preceding that date. Those investment firms should apply for authorisation as a credit institution within one year and one day after the entry into force of this Directive.

(31) The amendment to the definition of 'credit institution' in Regulation (EU) No 575/2013 Regulation [Regulation (EU)---/----[IFR]] may also affect undertakings which have already applied for authorisation as investment firms under Directive 2014/65/EU and for which the application is still pending. Such applications should be transferred to the competent authorities under Directive 2013/36/EU and be treated in accordance with the authorisation provisions set out in that Directive if the envisaged total assets of the undertaking meet any of the thresholds set out in Article 4(1)(1)(b) of Regulation (EU) No 575/2013.

(32) Undertakings referred to in Article 4(1)(1)(b) of Regulation (EU) No 575/2013 should also be subject to all the requirements for access to the activity of credit institutions laid down in Title III of Directive 2013/36/EU, including the provisions on the withdrawal of authorisation in accordance with Article 18 of that Directive. Article 18 of that Directive should however be amended to ensure that competent authorities may also withdraw the authorisation granted to a credit institution where that credit institution uses its authorisation exclusively to engage in the activities referred to in Article 4(1)(1)(b) of Regulation (EU) No 575/2013 and has for a period of 5 consecutive years average total assets below the thresholds set out in that Article 4(1)(1)(b).

(33) Pursuant to Article 39 of Directive 2014/65/EU, third-country firms providing financial services in the EU are subject to national regimes which may require the establishment of a branch in a Member State. To facilitate the regular monitoring and assessment of activities carried out by third-country firms through branches in the Union, competent authorities should be informed about the scale and scope of the services and activities carried out through branches on their territory.

(34) EBA, in cooperation with ESMA, has issued a report based on thorough background analysis, data collection and consultation for a bespoke prudential regime for all non-systemic investment firms which serves as the basis for the revised prudential framework for investment firms.

(35) To ensure the harmonised application of this Directive, EBA should be charged with drafting technical standards to specify the information which home and host authorities should exchange in the context of supervision, to set out how investment firms should assess the size of their activities for the purposes of internal governance requirements and notably to assess whether they constitute a small and non-interconnected firm. Technical standards should also specify which staff members have a material impact for the risk-profile of firms for the purposes of remuneration provisions, and specify the additional Tier 1 and Tier 2 instruments which qualify as variable remuneration. Finally, technical standards should specify the elements for the assessment of the scope of application of requirements on internal governance, transparency, treatment of risks and remuneration, the application of additional capital requirements by competent authorities, and the functioning of supervisory colleges.

(36) To ensure the uniform application of this Directive and to take account of developments in financial markets, the power to adopt acts in accordance with Article 290 of the Treaty on the Functioning of the European Union should be delegated to the Commission in respect of the further specification of the definitions in this Directive, of the internal capital and risk assessments of investment firms, and of the supervisory review and evaluation powers of competent authorities. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level, and that those consultations be conducted in accordance with the principles laid down in the Interinstitutional Agreement on Better Law-Making of 13 April 2016. In particular, to ensure equal participation in the preparation of delegated acts, the European Parliament and the Council receive all documents at the same time as Member States' experts, and their experts systematically have access to meetings of Commission expert groups dealing with the preparation of delegated acts.

(37) To ensure uniform conditions for the implementation of this Directive, and in particular with regard to the adoption of the draft implementing technical standards drafted by EBA

regarding information exchange requirements between competent authorities, and in order to take account of developments in the economic and monetary field with regard to levels of initial capital requirements for investment firms, implementing powers should be conferred on the Commission. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council[31].

(38) Since the objectives of this Directive, namely to set up an effective and proportionate prudential framework to ensure that investment firms authorised to operate within the Union operate on a sound financial basis and are managed in an orderly way including in the best interests of their clients, cannot be sufficiently achieved by the Member States, but, by reason of their scale and effects, would be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

(39) In accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents[32], Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified.

HAVE ADOPTED THIS DIRECTIVE:

TITLE I

SUBJECT MATTER, SCOPE AND DEFINITIONS

Article 1

Subject matter

This Directive lays down rules concerning:

(a) the initial capital of investment firms;

(b) supervisory powers and tools for the prudential supervision of investment firms by competent authorities;

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31 Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ L 55, 28.2.2011, p. 13).

32 OJ C 369, 17.12.2011, p. 14.

(c) the prudential supervision of investment firms by competent authorities in a manner that is consistent with the rules set out in [Regulation (EU) ---/----[IFR];

(d) publication requirements for competent authorities in the field of prudential supervision of investment firms.

Article 2

Scope

1. This Directive shall apply to investment firms authorised and supervised under Directive 2014/65/EU of the European Parliament and of the Council[33].

Article 3

Definitions

1. For the purposes of this Directive, the following definitions shall apply:

(1) 'ancillary services undertaking' means ancillary services undertaking as defined in Article 4(1)(18) of Regulation (EU) No 575/2013;

(2) 'authorisation' means authorisation of an investment firm in accordance with Title II of Directive 2014/65/EU;

(3) 'branch' means branch as defined in Article 4(1)(30) of Directive 2014/65/EU;

(4) 'close links' means close links as defined in Article 4(1)(35) of Directive 2014/65/EU;

(5) 'competent authority' means a public authority or body of a Member State that is officially recognised and empowered by national law to supervise investment firms in accordance with this Directive, as part of the supervisory system in operation in that Member State;

(6) 'commodity dealers' means commodity dealers as defined in Article 4(1)(145) of Regulation (EU) No 575/2013;

(7) 'control' means the relationship between a parent undertaking and a subsidiary, as described in Article 22 of Directive 2013/34/EU of the European Parliament and of the Council[34], or in the accounting standards to which an investment firm is subject under

[33] 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).

[34] Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (OJ L 182, 29.6.2013, p. 19).

Regulation (EC) No 1606/2002[35], or a similar relationship between any natural or legal person and an undertaking;

(8) 'compliance with the group capital test' means compliance with the requirements of Article 7 of [Regulation (EU) No ---/----[IFR] by the parent undertaking in an investment firm group;

(9) 'credit institution' means credit institution as defined in Article 4(1)(1) of Regulation (EU) No 575/2013;

(10) 'derivatives' means derivatives as defined in Article 2(1)(29) of Regulation (EU) No 600/2014[36];

(11) 'financial institution' means a financial institution as defined in Article 4(1)(13) of [Regulation (EU) No ---/----[IFR];

(12) 'group' means group as defined in Article 2(11) of Directive 2013/34/EU;

(13) 'group supervisor' means a competent authority responsible for the supervision of compliance with the group capital test of Union parent investment firms and investment firms controlled by Union parent investment holding companies or Union parent mixed financial holding companies;

(14) 'home Member State' means home Member State as defined in Article 4(1)(55)(a) of Directive 2014/65/EU;

(15) 'host Member State' means host Member State as defined in Article 4(1)(56) of Directive 2014/65/EU;

(16) 'initial capital' means the capital which is required for the purposes of authorisation as an investment firm;

(17) 'investment firm' means investment firm as defined in Article 4(1)(1) of Directive 2014/65/EU;

(18) 'investment firm group' means investment firm group as defined in Article 4(1)(23) of [Regulation (EU) ---/----[IFR];

(19) 'investment holding company' means investment holding company as defined in Article 4(1)(21) of [Regulation (EU) ---/----[IFR];

(20) 'investment services and activities' means investment services and activities as defined in Article 4(1)(2) of Directive 2014/65/EU;

(21) 'management body' means a management body as defined in Article 4(1)(36) of Directive 2014/65/EU;

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[35] Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards (OJ L 243, 11.9.2002, p. 1).

[36] Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 (OJ L 173, 12.6.2014, p. 84).

(22) ‘management body in its supervisory function’ means the management body acting in its role of overseeing and monitoring management decision-making;

(23) ‘mixed financial holding company’ means mixed financial holding company as defined in Article 2(15) of Directive 2002/87/EC of the European Parliament and of the Council[37];

(24) ‘senior management’ means senior management as defined in Article 4(1)(37) Directive 2014/65/EU;

(25) ‘parent undertaking’ means a parent undertaking as defined in Article 4(1)(32) of Directive 2014/65/EU;

(26) ‘subsidiary’ means subsidiary as defined in Article 4(1)(33) of Directive 2014/65/EU;

(27) ‘systemic risk’ means systemic risk as defined in Article 3(1)(10) of Directive 2013/36/EU;

(28) ‘Union parent investment firm’ means a Union parent investment firm as defined in Article 4(1)(49) of [Regulation (EU) No ---/----[IFR];

(29) ‘Union parent investment holding company’ means a Union parent investment holding company as defined in Article 4(1)(50) of [Regulation (EU) No ---/----[IFR];

(30) ‘Union parent mixed financial holding company’ means a Union parent mixed financial holding company as defined in Article 4(1)(51) of [Regulation (EU) No ---/----[IFR];

2. The Commission shall be empowered to adopt delegated acts in accordance with Article 54 in order to clarify:

   (a) the definitions set out in paragraph 1 to ensure uniform application of this Directive;

   (b) the definitions set out in paragraph 1 to take account, in the application of this Directive, of developments on financial markets.

TITLE II

COMPETENT AUTHORITIES

Article 4

Designation and powers of the competent authorities

1. Member States shall designate one or more competent authorities that carry out the functions and duties provided for in this Directive. The Member States shall inform the

[37] Directive 2002/87/EC of the European Parliament and of the Council of 16 December 2002 on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate and amending Council Directives 73/239/EEC, 79/267/EEC, 92/49/EEC, 92/96/EEC, 93/6/EEC and 93/22/EEC, and Directives 98/78/EC and 2000/12/EC of the European Parliament and of the Council (OJ L 035, 11.2.2003, p. 1).

Commission and EBA of that designation, and where there is more than one competent authority, of the functions and duties of each competent authority.

2. Member States shall ensure that the competent authorities supervise the activities of investment firms, and, where applicable, of investment holding companies and mixed financial holding companies, to assess compliance with the requirements of this Directive and of [Regulation (EU) ---/----[IFR].

3. Member States shall ensure that the competent authorities have the necessary powers, including the power to conduct on-the-spot checks in accordance with Article 12, to obtain the information needed to assess the compliance of investment firms and, where applicable, of investment holding companies and mixed financial holding companies, with the requirements of this Directive and of [Regulation (EU) ---/----[IFR], and to investigate possible breaches of those requirements.

4. Member States shall ensure that the competent authorities have the expertise, resources, operational capacity, powers and independence necessary to carry out the functions relating to the prudential supervision, investigations and penalties set out in this Directive.

5. Member States shall require investment firms to provide their competent authorities with all the information necessary for the assessment of the compliance of investment firms with the national rules transposing this Directive and compliance with [Regulation (EU) ---/----[IFR]. Internal control mechanisms and administrative and accounting procedures of the investment firms shall enable the competent authorities to check their compliance with those rules at all times.

6. Member States shall ensure that investment firms register all their transactions and document systems and processes which are subject to this Directive and [Regulation (EU) ---/----[IFR] in such a manner that the competent authorities are able to assess compliance with the national rules transposing this Directive and compliance with [Regulation (EU) ---/----[IFR] at all times.

Article 5

Cooperation within a Member State

1. Competent authorities shall cooperate closely with the public authorities or bodies responsible in their Member State for the supervision of credit institutions and financial institutions. Member States shall require that those competent authorities and those public authorities or bodies exchange any information which is essential or relevant to the exercise of their functions and duties.

2. Competent authorities that are different from those designated in accordance with Article 67 of Directive 2014/65/EU shall establish a mechanism for cooperation with those authorities and for the exchange of all information that is relevant for the exercise of their respective functions and duties.

Article 6

Cooperation within the European System of Financial Supervision

In the exercise of their duties, competent authorities shall take into account the convergence of supervisory tools and supervisory practices in the application of the legal provisions adopted pursuant to this Directive and to [Regulation (EU) ---/----[IFR].

Member States shall ensure that:

(a) competent authorities, as parties to the ESFS, cooperate with trust and full mutual respect, in particular when ensuring the flow of appropriate and reliable information between them and other parties to the ESFS;

(b) competent authorities participate in the activities of EBA, and, where appropriate, in the colleges of supervisors referred to in Article 44 and in Article 116 of Directive 2013/36/EU;

(c) competent authorities make every effort to comply with the guidelines and recommendations issued by EBA pursuant to Article 16 of Regulation (EU) No 1093/2010 of the European Parliament and of the Council[38] and to respond to the warnings and recommendations issued by the European Systemic Risk Board (ESRB) pursuant to Article 16 of Regulation (EU) No 1092/2010 of the European Parliament and of the Council[39];

(d) competent authorities cooperate closely with the ESRB;

(e) tasks and powers conferred on the competent authorities do not inhibit the performance of the duties of those competent authorities as members of EBA or of the ESRB, or under this Directive and under [Regulation (EU) ---/----[IFR].

Article 7
Union dimension of supervision

Competent authorities in each Member State shall, in the exercise of their general duties, duly consider the potential impact of their decisions on the stability of the financial system in the other Member States concerned and, in particular, in emergency situations, based on the information available at the relevant time.

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[38] 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).

[39] Regulation (EU) No 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board (OJ L 331, 15.12.2010, p. 1).

TITLE III
INITIAL CAPITAL

Article 8
Initial capital

1. The initial capital of an investment firm required pursuant to Article 15 of Directive 2014/65/EU for the authorisation to provide the investment services or perform the investment activities listed in points (3), (6), (8) or (9) of Section A of Annex I to Directive 2014/65/EU shall be EUR 750 000.

2. The initial capital of an investment firm required pursuant to Article 15 of Directive 2014/65/EU for the authorisation to provide the investment services or perform the investment activities listed in points (1), (2), (4), (5) or (7) of Section A of Annex I to Directive 2014/65/EU and which is not permitted to hold client money or securities belonging to its clients shall be EUR 75 000.

3. The initial capital of an investment firm required pursuant to Article 15 of Directive 2014/65/EU for investment firms other than those referred to in paragraphs 1 and 2 shall be EUR 150 000.

4. The Commission shall update, by means of implementing acts, the amount of initial capital referred to in paragraphs 1 to 3 of this Article to take account of developments in the economic and monetary field. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 56(2).

Article 9
Composition of initial capital

The initial capital of an investment firm shall consist of one or more of the items referred to in Article 9 of [Regulation (EU) ---/----[IFR].

TITLE IV
PRUDENTIAL SUPERVISION

CHAPTER 1
Principles of prudential supervision

SECTION 1
COMPETENCES AND DUTIES OF HOME AND HOST MEMBER STATES

Article 10
Competences of the competent authorities of the home Member State

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

Article 11
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 [Regulation (EU) ---/----[IFR], in particular by exchanging information about investment firms without delay, including on the following:

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

   (b) information about compliance with capital requirements by the investment firm;

   (c) information about concentration risk and liquidity 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 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 and EBA, take appropriate measures to protect clients to whom services are provided and to protect the stability of the financial system.

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. 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 adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010.

7. EBA, in consultation with ESMA, shall develop draft implementing technical standards to establish standard forms, templates and procedures for the information sharing requirements which are likely to facilitate 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.

8. EBA shall submit the draft technical standards referred to in paragraphs 6 and 7 to the Commission by [*nine months from the date of entry into force of this Directive*].

Article 12

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 on-the-spot checks of the information referred to in Article 11(1) and inspect that branch.

2. The competent authorities of the host Member State shall, for supervisory purposes and where they consider it 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 those checks and inspections, the competent authorities of the host Member State shall consult the competent authorities of the home Member State.

After 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 that is relevant for the risk assessment of the investment firm concerned.

SECTION 2

PROFESSIONAL SECRECY AND DUTY TO REPORT

Article 13
Professional secrecy and exchange of confidential information

1. Member States shall ensure that competent authorities and all persons associated with those 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 [Regulation (EU) ---/----[IFR].

   Confidential information which such 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 if necessary for carrying out those proceedings.

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

   (a) the monitoring of the prudential rules set out in this Directive and in [Regulation (EU) ---/----[IFR];

   (b) to impose sanctions;

   (c) in administrative appeals against decisions of the competent authorities;

   (d) in court proceedings initiated under Article 21.

3. Natural and legal persons or bodies, other than competent authorities, receiving confidential information pursuant to this Directive and [Regulation (EU) ---/----[IFR] shall only use that information 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 European 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 ESCB and the ECB in their capacity as monetary authorities, and, where appropriate, public authorities responsible for overseeing payment and settlement systems, confidential information where that information is necessary for the performance of their tasks.

Article 14
Administrative arrangements with third countries for the exchange of information

Member States, and EBA in accordance with Article 33 of Regulation (EU) No 1093/2010, may, for the purposes of performing their supervisory tasks pursuant to this Directive or [Regulation (EU) ---/----[IFR], conclude administrative arrangements with the supervisory authorities of third countries to exchange information, including in relation to the following:

(a) the supervision of financial institutions and financial markets;

(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.

Those arrangements shall contain professional secrecy provisions that are equivalent to those laid down in Article 13 of this Directive.

Article 15
Duties of persons responsible for the control of annual and consolidated accounts

Member States shall provide that any person authorised in accordance with Directive 2006/43/EC[40] and performing in an investment firm the tasks described in Article 73 of Directive 2009/65/EC[41] or 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
PENALTIES, INVESTIGATORY POWERS AND RIGHT OF APPEAL

Article 16
Administrative penalties and other administrative measures

1. Member States shall lay down rules on administrative penalties and other administrative measures in respect of breaches of national provisions transposing this Directive and of [Regulation (EU)---/----[IFR], including where the following occurs:

   (a) an investment firm fails to have in place internal governance arrangements as set out in Article 24;

   (b) an investment firm fails to report to the competent authorities, in breach of Article 52(1)(b) of [Regulation (EU) ---/----IFR], information on compliance with the obligation to meet capital requirements as set out in Article 11 of that Regulation, or provides incomplete or inaccurate information;

   (c) an investment firm fails to report to the competent authorities, in breach of Article 34 of [Regulation (EU) ---/----], information about concentration risk or provides incomplete or inaccurate information;

   (d) an investment firm incurs a concentration risk in excess of the limits set out in Article 36 of [Regulation (EU) ---/----[IFR], without prejudice to Articles 37 and 38 of that Regulation;

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[40] 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).

[41] Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ L 302 17.11.2009, p. 32).

(e) an investment firm repeatedly or persistently fails to hold liquid assets in breach of Article 42 of [Regulation (EU) ---/----[IFR], without prejudice to Article 43 of that Regulation;

(f) an investment firm fails to disclose information, or provides incomplete or inaccurate information, in breach of the provisions set out in Part Six of [Regulation (EU) ---/----[IFR];

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

(h) an investment firm is found liable for a serious breach of national provisions adopted pursuant to Directive (EU) 2015/849[42];

(i) an investment firm allows one or more persons not complying 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 penalties for breaches which are subject to national criminal law shall communicate to the Commission the relevant criminal law provisions.

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

2. The administrative penalties 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 for any other natural persons to exercise functions in investment firms;

(d) in case of a legal person, administrative pecuniary penalties 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 penalties 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 case of a natural person, administrative pecuniary penalties of up to EUR 5 000 000, or in the Member States whose currency is not the euro, the

[42] 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).

corresponding value in the national currency on [*date of entry into force of this Directive*].

Where an undertaking referred to in point (d) 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 [Regulation (EU) ---/----[IFR], penalties may be applied 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 penalties or administrative measures referred to in paragraph 1 and the level of administrative pecuniary penalties, 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 17
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 on 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 person who consents to be interviewed for the purposes 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 18
Publication of administrative penalties and measures

1. Member States shall ensure that competent authorities publish on their official website any administrative penalties and measures imposed in accordance with Article 16 and which has not been appealed or can no longer be appealed, without undue delay. 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 penalty is imposed or against whom the measure is taken. The information shall only be published after that person has been informed of those penalties or measures and to the extent the publication is necessary and proportionate.

2. Where Member States permit the publication of administrative penalties or measures imposed in accordance with Article 16 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 penalties or measures imposed in accordance with Article 16 on an anonymous basis in any of the following cases:

(a) the penalty 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 19
Reporting penalties to EBA

Competent authorities shall inform EBA of administrative penalties and measures imposed pursuant to Article 16, of any appeal against those penalties and measures and of the outcome thereof. EBA shall maintain a central database of administrative penalties and measures communicated to it solely for the purpose of exchanging information between competent authorities. That database shall be accessible to competent authorities only and it shall be updated regularly.

EBA shall maintain a website with links to each competent authority's publication of administrative penalties and measures in accordance with Article 16 and shall state the period for which each Member State publishes administrative penalties and measures.

Article 20
Reporting of breaches

1. Member States shall ensure that competent authorities establish effective and reliable mechanisms to report potential or actual breaches of national provisions transposing this Directive and of [Regulation (EU) ---/----[IFR], including the following:

(a) specific procedures for the treatment of reports on breaches;

(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) No 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 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 and independent channel. Those procedures may be provided for by 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 21
Right of appeal

Member States shall ensure that decisions and measures taken pursuant to [Regulation (EU) ---/---- [IFR] 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

Article 22
Internal Capital

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

2. The strategies and processes referred to in paragraph 1 shall be subject to regular internal review to ensure that they remain comprehensive and proportionate to the nature, scale and complexity of the activities of the investment firm concerned.

SECTION 2

INTERNAL GOVERNANCE, TRANSPARENCY, TREATMENT OF RISKS AND REMUNERATION

Article 23
Assessment for the purposes of the application of this Section

1. For the purposes of this Section, Member States shall ensure that investment firms assess, on an annual basis, and in accordance with points (a) and (b), whether they meet the conditions set out in Article 12(1) of [Regulation (EU) ---/----[IFR]:

   (a) an investment firm shall determine whether, based on the figures from the two-year period immediately preceding a given financial year, it satisfies the conditions set out in points (c) to (g) of Article 12(1) of [Regulation (EU) ---/----[IFR];

   (b) an investment firm shall determine whether, based on the figures from that same period, it exceeds on average the limits laid down in points (a), (b), (h) and (i) of Article 12 (1) of [Regulation (EU) ---/----[IFR].

2. This Section shall not apply where, on the basis of the assessment referred to in paragraph 1, an investment firm determines that it meets all of the conditions set out in Article 12(1) of [Regulation (EU) ---/----[IFR].

3. An investment firm that, on the basis of the assessment referred to in paragraph 1, determines that it does not meet all of the conditions set out in that Article 12(1) of [Regulation (EU) ---/----[IFR], it shall comply with this Section as of the financial year following the financial year in which that assessment took place.

4. Member States shall ensure that this Section is applied to investment firms on an individual basis and at group level.

   Member States shall ensure that investment firms subject to this Section implement the requirements of this Section in their subsidiaries that are financial institutions as defined in Article 4(13) of [Regulation (EU) ---/----[IFR], including those established in third countries, unless 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 subsidiaries are established.

5. Competent authorities may set a shorter period than the two years referred in paragraph 1 of this Article where both of the following conditions are met:

   (a) the business of the investment firm has been subject to a material change; and

(b) as a result of point (a), the investment firm meets the conditions set out in Article 12(1) of [Regulation (EU) ---/----[IFR].

6. EBA, in consultation with ESMA, shall develop draft regulatory technical standards to specify the method for calculating the average referred to in paragraph 1(b) of this Article. EBA shall submit those draft regulatory technical standards to the Commission by [*date of entry into force of this Directive*].

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

Article 24
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 investment firms are or might be exposed to;

(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.

2. When establishing the arrangements referred to in paragraph 1, the criteria set out in Articles 26 to 31 of this Directive, as well as in Article 9 of Directive 2014/65/EU, shall be taken into account.

3. The arrangements referred to in paragraph 1 shall be comprehensive 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.

Article 25
Country-by-country reporting

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

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

(b) the turnover;

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

(d) the profit or loss before tax;

(e) the tax on profit or loss;

(f) the public subsidies received.

2. The information referred to in paragraph 1 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 26
Treatment of risks

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 risks 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 determine which investment firms are considered significant in terms of their size, internal organisation and the nature, scope and complexity of their activities. Member States shall require those firms 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 firm´s risk strategies and policies.

Competent authorities may allow an investment firm which is not considered to be significant as referred to in the first subparagraph to allow the audit committee as referred to in Article 39 of Directive 2006/43/EC, where one has been established, to perform the function of the risk committee referred to in the first subparagraph. Members of that committee shall have the knowledge, skills and expertise referred to in the second subparagraph.

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

Article 27
Risk-to-customers, risk-to-market, risk-to-firm

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 customers;

(b) material sources and effects of risk to market;

(c) risks to the investment firm, in particular arising from its trading activities when it deals on its own account and in relation to concentration risk arising from exposures to individual clients and groups of connected clients;

(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 liquidity.

The strategies, policies, processes and systems shall be proportionate to the complexity, risk profile, 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.

2. By way of derogation from Article 23, points (a), (c) in relation to concentration risk and (d) of paragraph 1 shall apply to investment firms that meet the conditions set out in Article 12(1) of [Regulation (EU) ---/----[IFR].

3. The Commission shall be empowered to adopt delegated acts in accordance with Article 54 to further specify details 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 28
Remuneration policies

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

   (a) the remuneration policy is clear and documented;

   (b) the remuneration policy is consistent with and promotes sound and effective risk management;

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

   (d) the management body in its supervisory function adopts and periodically reviews the remuneration policy and has the overall responsibility for its implementation;

   (e) the implementation of the remuneration policy is subject to a central and independent internal review by control functions;

   (f) 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;

   (g) the remuneration of senior officers in the risk management and compliance functions is directly overseen by the remuneration committee referred to in Article 31 or, where such a committee has not been established, by the management body in its supervisory function;

   (h) 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.

   (i) the fixed component shall represent 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 to pay no variable remuneration component.

2. For the purposes of point (i) 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 individuals referred to in paragraph 1 have on the risk profile of the investment firm.

3. Member States shall ensure that investment firms apply the principles referred to in paragraph 1 in a manner that is appropriate to their size and internal organisation and to the nature, the 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 individuals whose professional activities have a material impact on the investment firm's risk profile as referred to in paragraph 1.

   EBA shall submit those draft regulatory technical standards to the Commission by [*nine months from the date of entry into force of this Directive*].

   Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Article 10 to 14 of Regulation (EU) No 1093/2010.

Article 29

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 to in Article 2(1)(28) of Directive 2014/59/EU, the following requirements apply:

(a) where variable remuneration 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 of all staff shall be limited to a portion of net revenue;

(b) investment firms shall establish limits to the remuneration of the members of the management body of the investment firm;

(c) the investment firm shall only pay variable remuneration to members of the management body of the investment firm where such remuneration has been approved by the competent authority.

For the purposes of point (c), competent authorities shall only approve payment of variable remuneration to members of the management body of the investment firm in exceptional circumstances.

Article 30
Variable remuneration

1. Member States shall ensure that any variable remuneration awarded and paid by an investment firm complies with all of the following requirements:

   (a) where variable remuneration is performance related, the total amount of variable remuneration shall be 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 shall be taken into account;

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

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

   (e) there shall be no guaranteed variable remuneration other than for new staff and only for the first year of employment of new staff;

   (f) payments relating to the early termination of an employment contract shall 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 shall be 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 shall take into account all types of current and future risks and the cost of the capital and liquidity required in accordance with Regulation (EU) ---/---- [IFR];

   (i) the allocation of the variable remuneration components within the investment firm shall take into account all types of current and future risks;

   (j) at least 50% of the variable remuneration shall consist of any of the following instruments:

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

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

      (3) 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;

(k) at least 40% of the variable remuneration shall be 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 a variable remuneration of a particularly high amount where the proportion of the variable remuneration deferred is at least 60%;

(l) up to 100% of the variable remuneration shall be 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;

(m) discretionary pension benefits shall be in line with the business strategy, objectives, values and long-term interests of the investment firm.

2. For the purposes of paragraph 1, competent authorities shall ensure the following:

(a) individuals referred to in Article 28(1) shall not use personal hedging strategies or remuneration and liability-related insurances to undermine the principles referred to in paragraph 1;

(b) variable remuneration shall not be paid through financial vehicles or methods that facilitate the non-compliance with this Directive or Regulation (EU) ---/----[IFR].

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 (k) of paragraph 1, the deferral of the variable remuneration shall vest no faster than on a pro-rata basis.

For the purposes of point (m) 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, 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 by that employee.

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

(a) an investment firm, the asset value of which 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 this individual's total annual remuneration.

By way of derogation from point (a), competent authorities may decide that investment firms with asset values below the threshold referred to in point (a) are not subject to the derogation because of the nature and scope of their activities, their internal organisation, or, where applicable, the characteristics of the group to which they belong.

By way of derogation from point (b), competent authorities may decide that individuals whose annual variable remuneration is below the thresholds referred to in point (b) are not subject to the derogation because of national market specificities in terms of remuneration practices or because of the nature of the responsibilities and job profile of those individuals.

5. Member States shall require investment firms to apply the provisions laid down in this Article to remuneration awarded for services provided or performance following the financial year of the assessment referred to in Article 23(1).

6. EBA, in consultation with ESMA, shall develop draft regulatory technical standards to specify the classes of instruments that satisfy the conditions set out in paragraph 1(j)(3).

EBA shall submit those draft regulatory technical standards to the Commission by [*nine months from the date of entry into force of this Directive*].

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Article 10 to 14 of Regulation (EU) No 1093/2010.

7. EBA, in consultation with ESMA, shall adopt guidelines facilitating the implementation of paragraph 4 and ensuring its consistent application.

Article 31
Remuneration committee

1. Member States shall ensure that competent authorities have the necessary powers to guarantee that investment firms which are determined as significant in accordance with Article 26(4) establish a remuneration committee. That remuneration committee shall exercise competent and independent judgment on remuneration policies and practices and the incentives created for managing risk, capital and liquidity.

2. Member States shall ensure that competent authorities have the necessary powers to guarantee 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 32
Oversight of remuneration policies

1. Member States shall ensure that competent authorities collect the information disclosed in accordance with points (c), (d) and (f) of Article 51 of [Regulation (EU) ---/----[IFR] and use that information to benchmark remuneration trends and practices. Competent authorities shall provide that information to EBA.

2. EBA shall use the information received from the competent authorities in accordance with paragraph 1 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 28 to 31 and principles on sound remuneration policies set out in Commission Recommendation 2009/384/EC[43].

4. Member States shall ensure that investment firms provide competent authorities, where requested, 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. Competent authorities shall forward that information to EBA, which shall publish it on an aggregate home Member State basis in a common reporting format. EBA, in consultation with ESMA, may elaborate guidelines to facilitate the implementation of this paragraph and to ensure the consistency of the information collected.

SECTION 3

SUPERVISORY REVIEW AND EVALUATION PROCESS

Article 33
Supervisory review and evaluation

1. Competent authorities shall review the arrangements, strategies, processes and mechanisms implemented by investment firms to comply with this Directive and [Regulation (EU) ---/----[IFR] and evaluate all of the following to ensure a sound management and coverage of their risks:

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43 Commission Recommendation 2009/384/EC of 30 April 2009 on remuneration policies in the financial services sector (OJ L 120, 15.5.2009, p. 22).

(a) the risks referred to in Article 27;

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

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

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, systemic importance, nature, scale and complexity of the activities of the investment firms concerned and taking into account the principle of proportionality.

3. Member States shall ensure that, where a review shows that an investment firm may pose systemic risk as referred to in Article 23 of Regulation (EU) No 1093/2010, competent authorities inform EBA without delay about the results of that review.

4. Competent authorities shall take appropriate action where the review and evaluation referred to in point (e) of paragraph 1 has shown that the economic value of equity of an investment firm has declined by more than 15 % of its Tier 1 capital as a result of a sudden and unexpected change in interest rates as set out in any of the six supervisory shock scenarios applied to interest rates, as specified in the [Commission Delegated Regulation adopted pursuant to Article 98 (5) of Directive 2013/36/EU].

5. When conducting the review and evaluation referred to in point (f) 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 performance of the management body.

6. The Commission shall be empowered to adopt delegated acts in accordance with Article 54 to further specify details 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 34
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 3 years, investment firms' compliance with the requirements for the permission

to use internal models as referred to in Article 22 of [Regulation (EU) ---/----]. Competent authorities shall in particular have regard to changes in an investment firm's business and to the implementation of those models to new products, and review and assess whether the investment firm uses well developed and up-to-date techniques and practices for those 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 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 models are improved promptly.

3. Where an investment firm that has been granted permission to use internal models no longer meets the requirements for applying those models, competent authorities shall require either demonstration that the effect of non-compliance is immaterial or presentation of 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 shall 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.

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 should use internal models and how those internal models should treat 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 35
Supervisory measures

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

(a) the investment firm does not meet the requirements of this Directive or of [Regulation (EU) ---/----[IFR];

(b) competent authorities have evidence that the investment firm is likely to breach [Regulation (EU) ---/----[IFR] or the provisions transposing this Directive within the next 12 months.

Article 36
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.

2. For the purposes of Article 33, Article 34(3) and Article 35 and of the application of [Regulation (EU)---/----[IFR], competent authorities shall have the following powers:

(a) to require investment firms to have additional capital in excess of the requirements set out in Article 11 of [Regulation (EU) ---/----[IFR], under the conditions laid down in Article 37 of this Directive, or to adjust the capital 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 22 and 24;

(c) to require investment firms to present a plan to comply with supervisory requirements pursuant to this Directive and to [Regulation (EU) ---/----[IFR], 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 capital 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 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) ---/----[IFR], including reporting on capital and liquidity positions;

(k) to impose specific liquidity requirements;

(l) to require additional disclosures on an ad hoc basis.

For the purposes of point (j), 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) either of the conditions referred to in points (a) or (b) of Article 35 has been met;

(b) the competent authority considers it necessary to gather the evidence referred to in Article 35(b).

Information shall be deemed as duplicative where the competent authority already has the same or substantially the same information, where that information may be produced by the competent authority or may be 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 37
Additional capital requirement

1. Competent authorities shall impose the additional capital requirement referred to in Article 36(2)(a) only where, on the basis of the reviews carried out in accordance with Articles 35 and 36, they conclude that an investment firm is in one of the following situations:

   (a) the investment firm is exposed to risks or elements of risks that are not covered or not sufficiently covered by the capital requirement set out in Part Three of [Regulation (EU) ---/----[IFR];

   (b) the investment firm does not meet the requirements set out in Articles 22 and 24 and other administrative measures are unlikely to sufficiently improve the arrangements, processes, mechanisms and strategies within an appropriate timeframe;

   (c) the prudential valuation of the trading book is 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 evaluation carried out in accordance with Article 34 shows that noncompliance 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 capital as set out in Article 38(1).

2. For the purpose of paragraph 1(a), risks or elements of risk shall only be considered as not covered or not sufficiently covered by the capital requirement set out in Part Three of [Regulation (EU) ---/----[IFR] 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 22(1) are higher than the investment firm's capital requirement set out in Part Three of [Regulation (EU) ---/---[IFR].

For the purpose of the first subparagraph, the capital considered adequate covers all material risks or elements of such risks that are not subject to a specific capital requirement. This may include risks or elements of risks that are explicitly excluded from the capital requirement set out in Part Three of [Regulation (EU) ---/----[IFR].

3. Competent authorities shall determine the level of the additional capital required pursuant to Article 36(2)(a) as the difference between the capital considered adequate pursuant to paragraph 2 of this Article and the capital requirement set out in Part Three of [Regulation (EU) ---/----[IFR].

4. Competent authorities shall require investment firms to meet the additional capital requirement referred to in Article 36(2)(a) with own funds subject to the following conditions:

(a) at least three quarters of the additional capital requirement shall be met with Tier 1 capital;

(b) at least three quarters of the Tier 1 capital shall be composed of CET 1 capital;

(c) those own funds shall not be used to meet any of the capital requirements set out in points (a), (b) and (c) of Article 11 of [Regulation (EU) ---/----[IFR].

5. Competent authorities shall substantiate in writing their decision to impose an additional capital requirement as referred to in Article 36(2)(a) 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 paragraph 1(d) of this Article, a specific statement of why the level of capital established in accordance with Article 38(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 shall be measured. EBA shall ensure that the draft regulatory technical standards are proportionate in light of:

(a) the implementation burden on investment firms and competent authorities;

(b) the possibility that the higher level of capital requirements that apply where investment firms do not use internal models may justify the imposition of

lower capital 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 [*nine months from the date of entry into force of this Directive*].

Power is conferred on the Commission to adopt the regulatory technical standards in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010.

Article 38
Guidance on capital adequacy

1. Competent authorities shall ensure that investment firms have a level of capital that, based on Article 22, is sufficiently above the requirements set out in Part Three of [Regulation (EU) --/----[IFR] and in this Directive, including the additional capital requirements referred to in Article 36(2)(a), to ensure that:

   (a) cyclical economic fluctuations do not lead to a breach of those requirements;

   (b) the investment firm's capital can absorb the potential losses and risks identified pursuant to supervisory review processes.

2. Competent authorities shall regularly review the level of capital that has been set by each investment firm in accordance with paragraph 1 and, where relevant, communicate the conclusions of that review to the investment firm concerned, including any expectation for adjustments to the level of capital established in accordance with paragraph 1.

Article 39
Cooperation with resolution authorities

1. Competent authorities shall consult resolution authorities prior to determining any additional capital required pursuant to Article 36(2)(a) and prior to communicating to investment firms any expectation for adjustments to the level of capital as referred to in Article 38(2). For that purpose, competent authorities shall provide resolution authorities with all available information.

2. Competent authorities shall inform the relevant resolution authorities about the additional capital required pursuant to Article 36(2)(a) and about any expectation for adjustments as referred to in Article 38(2).

Article 40
Publication requirements

Member States shall empower the competent authorities to:

(a) require investment firms to publish the information referred to in Article 45 of [Regulation (EU) ---/----[IFR] more than once per year and to set deadlines for that publication;

(b) require investment firms to use specific media and locations 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 group of investment firms in accordance with Article 24(1) of this Directive and Article 10 of Directive 2014/65/EU.

Article 41
Obligation to inform EBA

1. Competent authorities shall inform EBA of:

(a) their review and evaluation process referred to in Article 33;

(b) the methodology used for decisions referred to in Articles 36 to 38.

2. EBA shall assess the information provided by competent authorities to develop consistency in the supervisory review and evaluation process. It may request additional information from competent authorities to complete its assessment, on a proportional basis and in accordance with Article 37 of Regulation (EU) No 1093/2010.

EBA shall report to the European Parliament and 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.

EBA shall issue guidelines for the competent authorities in accordance with Article 16 of Regulation (EU) No 1093/2010 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 27.

CHAPTER 3

Supervision of compliance with the group capital test

SECTION 1
SUPERVISION OF COMPLIANCE WITH THE GROUP CAPITAL TEST

Article 42
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 of compliance with the group capital test is exercised by the competent authority that authorised 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 of compliance with the group capital test is exercised by the competent authority that authorised that investment firm.

3. Member States shall ensure that, where two or more investment firms authorised in two or more Member States have as their parent the same Union parent investment holding company or the same Union parent mixed financial holding company, 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 was set up.

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 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 of compliance with the group capital test is exercised by the competent authority that authorised the investment firm with the largest balance sheet total.

6. Competent authorities may, by common agreement, waive the criteria referred to in paragraphs 3 to 5 where their application would not be appropriate for the effective 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 supervise compliance with the group capital test. Competent authorities shall in those cases, 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 decision thereof.

Article 43
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 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 42 shall, subject to Section 2, 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 pursuance of their tasks.

Article 44
Colleges of supervisors

1. Member States shall ensure that the group supervisor determined pursuant to Article 42 shall 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.

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

   (a) the tasks referred to in Article 43;

   (b) 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;

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

   (d) increasing the efficiency of supervision by seeking to avoid the unnecessary duplication of supervisory requirements.

3. Colleges of supervisors shall also be established where all 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 countries' supervisory authorities, subject to confidentiality requirements that are equivalent in the opinion of all competent authorities to the requirements laid down in Section 2, Chapter I of this Title.

6. The group supervisor determined pursuant to Article 42 shall chair the meetings of the college and adopt decisions. That group supervisor shall keep all members of the college 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 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 shall be formalised by written arrangements.

7. In the event of disagreement with a decision adopted by the group supervisor on the functioning of supervisory colleges, 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 supervisory colleges under this Article on its own initiative in accordance with the second subparagraph of Article 19(1) of that Regulation.

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 [*nine months from the date of entry into force of this Directive*].

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

Article 45
Cooperation requirements

1. Member States shall ensure that the group supervisor and the competent authorities referred to in Article 44(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 penalties and exceptional measures taken by competent authorities in accordance with national provisions transposing this Directive;

   (e) the imposition of a specific capital requirement under Article 36 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 penalties imposed on investment firms by competent authorities or any other exceptional measures taken by those authorities;

   (c) specific capital requirements imposed in accordance with Article 36.

4. The group supervisor shall be consulted where significant penalties 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 46
Verification of information concerning entities located in other Member States

1. Member States shall ensure that where competent authorities in one Member State need 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, the 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.

   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 47
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 48
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.

Article 49
Mixed activity holding companies

1. Member States shall provide that, where an investment firm group is headed by 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 its subsidiaries, 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 50
Penalties

In accordance with Section 3, Chapter 2 of this Title, Member States shall ensure that administrative penalties or other administrative measures aimed at ending or mitigating breaches 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, that breach laws, regulations or administrative provisions transposing this Chapter.

Article 51
Assessment of third countries' supervision and other supervisory techniques

1. Member States shall ensure that where an investment firm, the parent undertaking of which has its head office in a third country, is not subject to effective supervision at group level, the competent authorities assesses whether the investment firm is 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) ---/----[IFR].

2. Where the assessment referred to in paragraph 1 concludes that no such equivalent supervision applies, Member States shall apply the provisions set out in this Directive and [Regulation (EU) ---/----[IFR] to the investment firm or shall allow for appropriate supervisory techniques which achieve the objectives of supervision regarding compliance with the group capital test set out in [Regulation (EU) ---/----[IFR]. 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 consultation with 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 of [Regulation (EU) ---/----[IFR] to that investment holding company or that mixed financial holding company.

Article 52
Cooperation with supervisory authorities of third countries

The Commission may submit recommendations to the Council 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.

TITLE V
PUBLICATION BY COMPETENT AUTHORITIES

Article 53
Publication requirements

1. Competent authorities shall make public all of the following information:

   (a) the texts of laws, regulations, administrative rules and general guidance adopted in their Member State pursuant to this Directive;

   (b) the manner of exercise of the options and discretions available pursuant to this Directive and [Regulation (EU) ---/----[IFR];

   (c) the general criteria and methodologies they use in the supervisory review and evaluation referred to in Article 33;

   (d) aggregate statistical data on key aspects of the implementation of this Directive and [Regulation (EU) ---/----[IFR] in their Member State, including the number and nature of supervisory measures taken in accordance with Article 36(2)(a) and of administrative penalties imposed in accordance with Article 16.

2. The information published in accordance with paragraph 1 shall be sufficiently comprehensive and accurate to enable a meaningful comparison of the application of points (b), (c) and (d) of paragraph 1 by the competent authorities of the different Member States.

3. The publications shall follow a common format and be updated regularly. They shall be accessible at a single electronic location.

TITLE VI
DELEGATED AND IMPLEMENTING ACTS

Article 54
Exercise of the delegation

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.

2. The power to adopt delegated acts referred to in Articles 3(2), 27(3) and 33(6) shall be conferred on the Commission for an indeterminate period of time from [*date of entry into force of this Directive*].

3. The delegation of power referred to in Articles 3(2), 27(3) and 33(6) may be revoked at any time by the European Parliament or by the Council. A decision to revoke shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the Official Journal of the European Union or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.

4. Before adopting a delegated act, the Commission shall consult experts designated by each Member State in accordance with the principles laid down in the Interinstitutional Agreement of 13 April 2016 on Better Law-Making.

5. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.

6. A delegated act adopted pursuant to Articles 3(2), 27(3) and 33(6) shall enter into force only if no objection has been expressed either by the European Parliament or the Council within a period of [two months] of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by [two months] at the initiative of the European Parliament or of the Council.

Article 55
Implementing Acts

The alteration of the amount of initial capital prescribed in Articles 8 and 11(7) to take account of developments in the economic and monetary field shall be adopted as implementing acts in accordance with the examination procedure referred to in Article 56(2).

Article 56
Committee procedure

1. The Commission shall be assisted by the European Banking Committee established by Commission Decision 2004/10/EC[44]. That Committee shall be a committee within the meaning of Regulation (EU) No 182/2011.

2. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply.

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44 Commission Decision 2004/10/EC of 5 November 2003 establishing the European Banking Committee (OJ L 3, 7.1.2004, p. 36).

TITLE VII
AMENDMENTS TO OTHER DIRECTIVES

Article 57
Amendments to Directive 2013/36/EU

Directive 2013/36/EU is amended as follows:

(1) in the title, the words ‘and investment firms’ are deleted;

(2) Article 1 is replaced by the following:

‘‘*Article 1*
Subject matter

This Directive lays down rules concerning:

(a) access to the activity of credit institutions;

(b) supervisory powers and tools for the prudential supervision of credit institutions by competent authorities;

(c) the prudential supervision of credit institutions by competent authorities in a manner that is consistent with the rules set out in Regulation (EU) No 575/2013;

(d) publication requirements for competent authorities in the field of prudential regulation and supervision of credit institutions.’’;

(3) Article 2 is amended as follows:

(a) paragraph 1 is replaced by the following:

“1. This Directive shall apply to credit institutions.”;

(b) paragraphs 2 and 3 are deleted;

(c) in paragraph 5, point (1) is deleted;

(d) paragraph 6 is replaced by the following:

‘‘6. The entities referred to in points (3) to (24) of paragraph 5 and in the delegated acts adopted in accordance with paragraphs 5a and 5b of this Article shall be treated as financial institutions for the purposes of Article 34 and Title VII, Chapter 3.’’;

(4) Article 3(1) is amended as follows:

(a) point (3) is replaced by the following:

"(3) 'institution' means institution as referred to in Article 4(1)(3) of Regulation (EU) ---/----*[IFR].'';

(b) point (4) is deleted;

(5) Article 5 is replaced by the following:

"Article 5
Coordination within Member States

Member States that have more than one competent authority for the prudential supervision of credit institutions and financial institutions shall take the requisite measures to organise coordination between those authorities.'';

(6) the following Article 8a is inserted:

''Article 8a

Specific requirements for authorisation of credit institutions referred to in Article 4(1)(1)(b) of Regulation (EU) No 575/2013

1. Member States shall require the undertakings referred to in Article 4(1)(1)(b) of Regulation (EU) No 575/2013 which have already obtained an authorisation pursuant to Title II of Directive 2014/65/EU to submit an application for authorisation in accordance with Article 8, at the latest on the following dates:

(a) when the average of monthly total assets, calculated over a period of twelve consecutive months, exceeds EUR 30 billion; or

(b) when the average of monthly total assets calculated over a period of twelve consecutive months is below EUR 30 billion, and the undertaking is part of a group in which the combined value of the total assets of all undertakings in the group that carry out any of the activities referred to in points (3) and (6) of Section A of Annex I of Directive 2014/65/EU and have total assets below EUR 30 billion, calculated as an average over a period of twelve consecutive months, exceeds EUR 30 billion.

2. The undertakings referred to in paragraph 1 may continue carrying out the activities referred to in Article 4(1)(1)(b) of Regulation (EU) No 575/2013 until they obtain the authorisation referred to in that paragraph.

3. By way of derogation from paragraph 1, undertakings referred to in Article 4(1)(1)(b) of Regulation (EU) No 575/2013 that on [*date of entry into force of Directive (EU) ---/----[IFD] - 1 day*] are carrying out activities as investment firms authorised under Directive 2014/65/EU, shall apply for authorisation in accordance with Article 8 within [*1 year + 1 day after entry into force of Directive (EU) ---/----[IFD*].

4. Where the competent authority, after receiving the information in accordance with Article [95a] of Directive 2014/65/EU, determines that an undertaking is to be authorised as a credit institution in accordance with Article 8 of this Directive, it shall notify the undertaking and the competent authority as defined in Article 4(1)(26) of

Directive 2014/65/EU and shall take over the authorisation procedure from the date of that notification.

5. EBA shall develop draft regulatory technical standards to specify:

(a) the information to be provided by the undertaking to the competent authorities in the application for the authorisation, including the programme of operations provided for in Article 10;

(b) the methodology for calculating the thresholds referred to in paragraph 1.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in points (a) and (b) in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010.

EBA shall submit those draft technical standards to the Commission by [*1st January 2019*].

(7) in Article 18 the following point (aa) is inserted:

"(aa) uses its authorisation exclusively to engage in the activities referred to in Article 4(1)(1)(b) of Regulation (EU) No 575/2013 and has for a period of 5 consecutive years average total assets below the thresholds set out in that Article;";

(8) Title IV is deleted;

(9) in Article 51(1), the first subparagraph is replaced by the following:

"The competent authorities of a host Member State may request the consolidating supervisor, where Article 112(1) applies, or the competent authorities of the home Member State, that a branch of a credit institution shall be considered as significant.'';

(10) in Article 53, paragraph 2 is replaced by the following:

"2. Paragraph 1 shall not prevent the competent authorities from exchanging information with each other or transmitting information to the ESRB, EBA, or the European Supervisory Authority (European Securities and Markets Authority) ("ESMA") established by Regulation (EU) No 1095/2010 of the European Parliament and of the Council* in accordance with this Directive, with Regulation (EU) No 575/2013, with [*Directive (EU) ---/----[IFD] on the prudential supervision of investment firms*], with other Directives applicable to credit institutions, with Article 15 of Regulation (EU) No 1092/2010, with Articles 31, 35 and 36 of Regulation (EU) No 1093/2010 and with Articles 31 and 36 of Regulation (EU) No 1095/2010. That information shall be subject to paragraph 1.";

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* Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

(11) in Article 66(1), the following point (aa) is inserted:

"(aa) carrying out at least one of the activities referred to in Article 4(1)(1)(b) of Regulation (EU) No 575/2013 and exceeding the threshold indicated in that Article without being authorised as a credit institution.";

(12) in Article 76(5), the last sentence is deleted.

(13) in Article 86, paragraph 11 is replaced by the following:

"11. Competent authorities shall ensure that institutions have in place liquidity recovery plans setting out adequate strategies and proper implementation measures to address possible liquidity shortfalls, including in relation to branches established in another Member State. Competent authorities shall ensure that those plans are tested by the institutions at least annually, updated on the basis of the outcome of the alternative scenarios set out in paragraph 8, reported to and approved by senior management, so that internal policies and processes can be adjusted accordingly. Institutions shall take the necessary operational steps in advance to ensure that liquidity recovery plans can be implemented immediately. Those operational steps shall include holding collateral immediately available for central bank funding. This includes holding collateral in the currency of another Member State where necessary, or the currency of a third country to which the credit institution has exposures, and where operationally necessary within the territory of a host Member State or of a third country to whose currency it is exposed.'';

(14) in Article 110, paragraph 2 is deleted;

(15) in Article 114, paragraph 1 is replaced by the following:

"1. 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 a group have been authorised or where significant branches as referred to in Article 51 are established, the consolidating supervisor shall, subject to Chapter 1, Section 2, and where applicable Section 2 of Chapter I of Title IV of [*Directive (EU) ---/----[IFD]* of the European Parliament and of the Council]*, alert as soon as is practicable, EBA and the authorities referred to in Article 58(4) and Article 59 and shall communicate all information essential for the pursuance of their tasks. Those obligations shall apply to all competent authorities.

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* [*Directive (EU) ---/----* of the European Parliament and of the Council of …… on ……..];"

(16) Article 116 is amended as follows:

(a) paragraph 2 is replaced by the following:

2. The competent authorities participating in the colleges of supervisors and EBA shall cooperate closely. The confidentiality requirements under Title VII, Chapter 1, Section II of this Directive, and, where applicable, Section 2 of Chapter I of Title IV of [*Directive (EU) ---/----[IFD]* shall not prevent the competent authorities from exchanging confidential information within colleges

of supervisors. The establishment and functioning of colleges of supervisors shall not affect the rights and responsibilities of the competent authorities under this Directive and under Regulation (EU) No 575/2013.";

(b) paragraph 6 is replaced by the following:

"6. The competent authorities responsible for the supervision of subsidiaries of an EU parent institution or an EU parent financial holding company or EU parent mixed financial holding company and the competent authorities of a host Member State where significant branches as referred to in Article 51 are established, ESCB central banks as appropriate, and third countries' supervisory authorities where appropriate and subject to confidentiality requirements that are equivalent, in the opinion of all competent authorities, to the requirements under Title VII, Chapter 1, Section II of this Directive and, where applicable, under Section 2 of Chapter I of Title IV of [*Directive (EU) ---/---[IFD]* Directive 20xx/xx/EU may participate in colleges of supervisors.";

(c) paragraph 9 is replaced by the following:

"9. The consolidating supervisor, subject to the confidentiality requirements under Title VII, Chapter 1, Section II, of this Directive, and where applicable, under Section 2 of Chapter I of Title IV of [*Directive (EU) ---/---[IFD]*, shall inform EBA of the activities of the college of supervisors, including in emergency situations, and communicate to EBA all information that is of particular relevance for the purposes of supervisory convergence.";

(17) in Article 125, paragraph 2 is replaced by the following:

"2. Information received, within the framework of supervision on a consolidated basis, and in particular any exchange of information between competent authorities which is provided for in this Directive, shall be subject to professional secrecy requirements at least equivalent to those referred to in Article 53(1) of this Directive for credit institutions or under Article 13 of [*Directive (EU) ---/----[IFD]*.";

(18) in Article 128, the second subparagraph is deleted;

(19) in Article 129, paragraphs 2, 3 and 4 are deleted;

(20) in Article 130, paragraphs 2, 3 and 4 are deleted;

(21) in Article 143(1), point (d) is replaced by the following:

"(d) without prejudice to the provisions set out in Title VII, Chapter 1, Section II of this Directive and where applicable, the provisions set out in Title IV, Chapter 1, Section 2 of [*Directive (EU) ---/----[IFD]*, aggregate statistical data on key aspects of the implementation of the prudential framework in each Member State, including the number and nature of supervisory measures taken in accordance with Article 102(1)(a) and of administrative penalties imposed in accordance with Article 65.";

Article 58
Amendments to Directive 2014/65/EU

Directive 2014/65/EU is amended as follows:

(1) in Article 8, point (a) is replaced by the following:

> "(a) no longer meets the conditions under which authorisation was granted, such as compliance with the conditions set out in [Regulation (EU) ---/----[IFR];";

(2) Article 15 is replaced by the following:

> *"Article 15*
> Initial capital endowment
>
> "Member States shall ensure that the competent authorities do not grant authorisation unless the investment firm has sufficient initial capital in accordance with the requirements of Article 8 of [*Directive (EU) ---/----[IFD]*, having regard to the nature of the investment service or activity in question.";

(3) Article 41 is replaced by the following:

Article 41

Granting of the authorisation

"1. The competent authority of the Member State where the third-country firm has established or intends to establish its branch shall only grant authorisation where the competent authority is satisfied that:

(a) the conditions under Article 39 are fulfilled; and

(b) the branch of the third-country firm will be able to comply with the provisions referred to in paragraphs 2 and 3.

The competent authority shall inform the third-country firm, within six months of submission of a complete application, whether or not the authorisation has been granted.

2. The branch of the third-country firm authorised in accordance with paragraph 1, shall comply with the obligations laid down in Articles 16 to 20, 23, 24, 25 and 27, Article 28(1), and Articles 30, 31 and 32 of this Directive and in Articles 3 to 26 of Regulation (EU) No 600/2014 and the measures adopted pursuant thereto and shall be subject to the supervision of the competent authority in the Member State where the authorisation was granted.

Member States shall not impose any additional requirements on the organisation and operation of the branch in respect of the matters covered by this Directive and shall not treat any branch of third-country firms more favourably than Union firms.

Member States shall ensure that competent authorities notify ESMA on an annual basis of the number of branches of third-country firms active on their territory.

3. The branch of the third-country firm that is authorised in accordance with paragraph 1 shall report to the competent authority referred to in paragraph 2 the following information on an annual basis:

(a) the scale and scope of the services and activities of carried out by the branch in that Member State;

(b) the turnover and the aggregated value of the assets corresponding to the services and activities referred to in point (a);

(c) a detailed description of the investor protection arrangements available to the clients of the branch, including the rights of those clients resulting from the investor-compensation scheme referred to in Article 39(2)(f);

(d) their risk management policy and arrangements applied by the branch for the services and activities referred to in point (a).

4. The competent authorities referred to in paragraph 2, the competent authorities of entities that are part of the same group to which branches of third-country firms authorised in accordance with paragraph 1 belong, and ESMA and EBA shall cooperate closely to ensure that all activities of that group in the Union are subject to comprehensive, consistent and effective supervision in accordance with this Directive, Regulation 600/2014, Directive 2013/36/EU, Regulation (EU) No 575/2013, Directive [*Directive (EU) ---/----* [IFD]*, and Regulation [Regulation (EU) ---/----* [IFR].

5. ESMA shall develop draft regulatory technical standards to further specify the information referred to in paragraph 3.

ESMA shall submit those draft regulatory technical standards to the Commission by [date to be inserted].

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010'.

6. ESMA shall develop draft implementing technical standards to specify the format in which the information referred to in paragraph 3 is to be reported to the national competent authorities.

ESMA shall submit those draft implementing technical standards to the Commission by [date to be inserted].

Power is delegated to the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.".

(4) in Article 81(3), point (a) is replaced by the following:

"(a) to check that the conditions governing the taking-up of the business of investment firms are met and to facilitate the monitoring of the conduct of that business, administrative and accounting procedures and internal-control mechanisms;";

(5) the following Article 95a is inserted:

''*Article 95a*

Transitional provision on the authorisation of credit institution referred to in Article 4(1)(1)(b) of Regulation (EU) No 575/2013

Competent authorities shall inform the competent authority referred to in Article 8 of Directive 2013/36/EU where the envisaged total assets of an undertaking which has applied for authorisation pursuant to Title II of this Directive before [*date of entry into force of Directive (EU) ---/--- [IFD*] in order to carry out the activities referred to in points (3) and (6) of Section A of Annex I exceeds EUR 30 billion, and notify the applicant thereof.".

TITLE VIII
TRANSITIONAL AND FINAL PROVISIONS

Article 59
Transitional provisions

1. Members States shall ensure that investment firms, other than the ones referred to in paragraph 2, which were in existence on or before 1 January 20xx [*date of entry into force of this Directive*] and the initial capital of which does not attain the levels referred to in Article 8, shall comply with that Article at the latest by [*five years from the date of entry into force of this Directive*] by an annual increase of EUR 5 000.

   Where the annual increase specified in the first subparagraph is not sufficient for an investment firm to reach the required level of initial capital at the end of the five-year period, Member States shall allow for an additional transitional period of maximum five years. The competent authorities shall set the annual amounts applicable during that additional transitional period.

2. Members States shall ensure that commodity dealers comply with the provisions of Article 8 at the latest by [*five years after the date of entry into force of this Directive].*

Article 60
Review

By [*three years after the date of application of this Directive and Regulation (EU) ---/---- [IFR]*] the Commission, in close cooperation with EBA and ESMA, shall submit a report, together with a legislative proposal if appropriate, to the European Parliament and to the Council, on the following:

(a) the provisions on remuneration in this Directive and in Regulation (EU) ---/---- [IFR];

(b) the effectiveness of information-sharing arrangements under this Directive;

(c) the cooperation of the Union and Member States with third countries in the application of this Directive and of Regulation (EU) ---/---- [IFR];

(d) the implementation of this Directive and Regulation (EU) ---/----[IFR] to investment firms on the basis of their legal structure or ownership model.

Article 61
Transposition

1. By [*18 months after the date of entry into force of this Directive*], Member States shall adopt and publish the laws, regulations and administrative provisions necessary to comply with this Directive.

2. Member States shall apply those provisions from [*date of application of Regulation (EU) No ---/----[IFR*].

3. Member States shall communicate to the Commission and to EBA the text of the provisions of national law which they adopt in the field covered by this Directive.

   Where the documents accompanying notification of transposition measures provided by Member States are not sufficient to fully assess the compliance of the transposing provisions with certain provisions of this Directive, the Commission may, upon EBA's request, with a view to carrying out its tasks under Regulation (EU) No 1093/2010, or on its own initiative, require Member States to provide more detailed information regarding the transposition and implementation of those provisions and this Directive.

4. Provisions referred to in paragraph 1 shall refer to this Directive or be accompanied by such a reference on the occasion of their official publication.

Article 62
Entry into force

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

For the purposes of supervision and resolution of investment firms, references to Directive 2013/36/EU in other Union acts shall be construed as references to this Directive.

Article 63
Addressees

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament	*For the Council*
The President	*The President*