EBA/RTS/2020/11

16 December 2020

Final report

Draft regulatory technical standards related to the implementation of a new prudential regime for investment firms on:

- the information for the authorisation of credit institutions under point(a) of Article 8a(6) of Directive 2013/36/EU
- the prudential requirements for investment firms under Articles 7(5), 9(4) and 13(4), point (a) to (c) of Article 15(5), and Article 23(3) of Regulation (EU) 2019/2033
- the prudential requirements for investment firms under Article 5(6) of Directive (EU) 2019/2034

Contents

1. Executive summary

The Investment Firms Directive (IFD) (Directive (EU) 2019/2034)[1] and Investment Firms Regulation (IFR) (Regulation (EU) 2019/2033)[2] give a significant number of mandates to the EBA covering a broad range of areas related to the prudential treatment of investment firms.

The implementation of the mandates is divided into four phases, according to the legal deadline set out in the IFD/IFR for the draft regulatory technical standards (RTS). A comprehensive work plan for delivering all mandates is established in the Roadmap on Investment Firms Prudential Package, which was published by the EBA on 2 May 2020[3].

These draft RTS have been developed in accordance with the principles laid down in the investment firms roadmap:

- **Proportionality**. Ensure proportionality with regard to the regulatory requirements aimed at investment firms of different sizes and complexities.
- **Non-disruptive transition**. Investment firms performing certain activities will be subject to the banking framework as of the IFR implementation date, whereas others may transition to the banking framework over time; therefore, the technical standards should allow these transitions to occur without significant disruptions.
- **A level playing field**. Considerations should be given to the level playing field between investment firms and credit institutions, in particular regarding the net position risk, the trading counterparty default and the concentration of trading book positions, while recognising the specific risk structure and risk drivers of investment firms and investment firm groups.
- **Harmonisation**. Further strengthen a harmonised regulatory environment, to foster a European level playing field across different types and categories of investment firms.

The first draft RTS included in this final report have been developed for the mandates related to the authorisation of certain credit institutions:

- Article 8a(6)(a) of the CRD (Directive 2013/36/EU) asks the EBA to draft RTS specifying the information to be provided to competent authorities for the authorisation of a credit institution in accordance with the new definition introduced in point (b) of Article 4.1.(a).1 of the CRR (Regulation (EU) No 575/2013). Mindful of a smooth transition between the CRD/CRR and the framework introduced along with the application of the IFR and IFD, the proposed draft RTS consist of a subset of the information needed for the authorisation of a credit institution, a set of requirements that is proposed in the EBA RTS/2017/08.[4]

A second group of mandates relate to capital requirements for investment firms at solo level. The mandates are implemented by developing the following draft RTS:

- Article 13(4) of the IFR asks the EBA to draft RTS specifying the deductions to be applied for the calculation of the fixed costs, which are the basis for the calculation of the fixed overheads

[1] Directive (EU) 2019/2034 of 27 November 2019 on the prudential supervision of investment firms and amending Directives 2002/87/EC, 2009/65/EC, 2011/61/EU, 2013/36/EU, 2014/59/EU and 2014/65/EU (Text with EEA relevance)

[2] Regulation (EU) 2019/2033 of 27 November 2019 on the prudential requirements of investment firms and amending Regulations (EU) No 1093/2010, (EU) No 575/2013, (EU) No 600/2014 and (EU) No 806/2014 (Text with EEA relevance)

[3] EBA Roadmap on investment firms.

[4] Draft RTS and ITS on Authorisation of Credit Institutions (EBA-RTS-2017-08 EBA-ITS-2017-05)

requirements. The notion of 'material change' is also specified, in accordance with which the competent authority may allow the fixed overheads requirement to be adjusted.

- Point (a) of Article 15(5) of the IFR asks the EBA to draft RTS specifying the methods for measuring the K-factors, when they are not already fully detailed in the IFR. The draft RTS provide clarification on the measurement of most of the Risk-to-Client (RtC) K-factors and some of Risk-to-Firm (RtF) K-factors, whereas the Risk-to-Market (RtM) K-factors are either defined as references to the CRR or detailed in the IFR and therefore require no further specification.
- Point (b) of Article 15(5) of the IFR asks the EBA to draft RTS providing clarification on the notion of segregated accounts by setting the conditions for their identification for the purpose of calculating the capital requirement related to the K-factor 'client money held' (K-CMH).
- Point (c) of Article 15(5) of the IFR asks the EBA to draft RTS specifying the adjustments to the K-factor 'daily trading flow' (K-DTF) coefficients in the event that, in stressed market conditions, K-DTF requirements seem overly restrictive and detrimental to financial stability. The draft RTS also specify that stressed market conditions shall cover only those stressed market conditions which are referred in point (a) of Article 3 of the Regulation (EU) 2017/578 when they lead to increased trading volumes.
- Article 23(3) of the IFR asks the EBA to draft RTS specifying the calculation of the amount of the total margin required for the calculation of the K-factor 'clearing margin given' (K-CMG) and the criteria for avoiding regulatory arbitrage in the event that K-CMG approach is used.
- Article 5(6) of the IFD asks the EBA to further specify the criteria set out in points (a) and (b) of paragraph 1 of Article 5 of the IFD and ensure the consistent application thereof. Therefore the draft RTS set the quantitative thresholds above which, an investment firm's activities should be considered to be of a significant scale which could lead to a systemic risk.

This final report explains the policy choices of regulatory requirements for draft RTS and outlines their legislative basis. The EBA is of the view that regulatory requirements ensure a proportionate and technically consistent prudential framework for investment firms.

The last section of this final report presents a cost-benefit analysis and an impact assessment concerning these draft RTS that assess the possible costs and benefits of the considered options and the relative scale of these costs and benefits for different stakeholders.

2. Background and rationale

2.1 Background

1. Investment firms authorised under Markets in Financial Instruments (MiFID) (Directive 2014/65/EU)[5] vary greatly in terms of size, business model, risk profile, complexity and interconnectedness, ranging from one-person companies to large internationally active groups. Currently, the prudential treatment of investment firms is set out in the CRD and the CRR. However, some investment firms are exempt from full CRD/CRR requirements depending on which services they provide and their combination or size.

2. The IFD and the IFR, which were published in the Official Journal of the European Union on 5 December 2019 and entered into force on 26 December 2019, will replace the existing prudential framework for investment firms.

3. A significant number of mandates have been given to the EBA under the IFD and the IFR. The mandates cover a broad range of areas related to the prudential treatment of investment firms. These include 18 RTS, 3 implementing technical standards (ITS), 6 sets of guidelines, 2 reports, and the requirement that the EBA must meet of maintaining a list of capital instruments, a database of administrative sanctions and a number of notifications in various areas.

4. The EBA has published the Roadmap on Investment Firms Prudential Package, which details the EBA's strategy for delivering on the mandates as well as the main principles it considered while delivering those mandates. More precisely:

   (a) The EBA is committed to ensuring proportionality with regard to the regulatory requirements aimed at investment firms of different sizes and complexities, regarding it as a key aspect of the new regime.
   (b) Given the interlinkages between the CRR/CRD on the one hand and the IFR/IFD package on the other hand, the EBA technical standards should allow for transitions between the two frameworks without significant disruptions.
   (c) Nonetheless, the EBA recognises the specific risk structure and drivers of IFs and will therefore be particularly mindful of ensuring that the main risks to clients, the market and investment firms are well covered.

5. Overall, the mandates are divided into four phases, mostly in accordance with the legal deadlines. This document covers mandates developed under the first phase. These include nine draft RTS, which focus on the following areas: reclassification of investment firms to credit

[5] EBA/Op/2015/20 Report on investment firms.

institutions, capital requirements for investment firms at solo level and requirements on a consolidated basis. Other mandates that are part of the first phase but are not included in this report are those concerning variable remuneration [6] and those related to reporting requirements [7], disclosure requirements and monitoring of the threshold referred to in Article 8a(6) of the CRD[8].

6. The next sub-sections provide a detailed explanation of the background and rationale for each of the draft RTS.

2.2 Draft RTS (under Article 8a(6), point (a) of the CRD) on the information to be provided for the authorisation of credit institutions as defined in point (1)(b) of Article 4(1) of the CRR

7. The IFD and the IFR amend the definition of a credit institution by extending it to encompass undertakings that perform activities of dealing on own account and underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis and that are subject to certain quantitative thresholds.

8. Article 62 of the IFD introduces Article 8a of the CRD on the specific requirements for the authorisation of the new credit institutions. The EBA is mandated by point (a) of Article 8a(6) of the CRD to develop the draft RTS to specify the information to be provided by the investment firms to the competent authorities in the application for authorisation.

9. Under Article 8(2) of the CRD, the EBA has received a mandate to develop a regulatory text on the issues related to the authorisation of credit institutions. To deliver this mandate, the draft RTS were developed, addressing the information to be provided for the authorisation of credit institutions and the requirements applicable to shareholders and members with qualifying holdings and obstacles, which may prevent the effective exercise of supervisory powers (EBA/RTS/2017/08[9]). These draft RTS provide a number of information requirements on credit institutions: identification details and historical information of the applicant credit institution, including its existing licensing, activities proposed, current financial situation, programme of operations and initial capital.

10. The IFR amends Article 4(1) of the CRR by identifying credit institutions based on certain criteria: one criterion as per point (1)(a) – credit institutions that take deposits or other repayable funds from the public and grant credits for their own account; and other criterion as per point (1)(b) –

[6] Article 30(1) and Article 32 (8) of Directive 2019/2034 (IFD).

[7] Article 54 of Regulation 2019/2033 (IFR).

[8] Article 55(5) of Regulation 2019/2033 (IFR).

[9] https://eba.europa.eu/eba-publishes-final-standards-specifying-information-requirements-for-the-authorisation-of-credit-institutions.

institutions carrying out certain activities[10] and fulfilling certain conditions with regard to the value of their consolidated assets[11]. The present RTS only target the latter. The EBA (draft) RTS 2017/08 are used as a starting point when delivering on the mandate under point (a) of Article 8a(6) of the CRD, as amended by the IFD, with a view to avoiding the duplication of efforts and potential sources of inconsistencies.

11. Therefore, the proposed draft RTS are based on the information requirements specified in EBA RTS 2017/08. The regulation aims to reflect the business model (for instance the lack of deposit taking) of the credit institutions that provide certain investment services and activities (dealing on own account and underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis subject to certain quantitative thresholds), as defined in point (1)(b) of Article 4(1) of the CRR.

12. Furthermore, these draft RTS aim to provide the necessary flexibility to the competent authorities in requiring information, in addition to the requirements set out in EBA RTS/2017/08. In duly justified cases, dependent on the national specificities of the investment firms licensing, the competent authorities might request additional information when, for instance, further assessing investment activities.

13. Finally, in well-defined cases, this regulation allows competent authorities to waive some information requirements taking into consideration the business model, the activities of the applicant credit institution concerned and any prior licences the applicant credit institution might possess. This accounts for the spirit of Article 8a(5) of the CRD, as amended by the IFD, according to which, in the event of re-authorisation, the competent authority needs to ensure that the existing authorisations are taken into account.

2.3 Draft RTS to specify the calculation of the fixed overheads requirement and define the notion of a material change (Article 13(4) of the IFR)

14. The EBA is mandated under Article 13(4) of the IFR to develop, in consultation with ESMA, draft RTS to supplement the calculation of the fixed overheads requirement presented in paragraph 1 of the same article. Specifically, investment firms are required to hold eligible capital of at least

[10] Activities in points (3) and (6) of Section A of Annex I to Directive 2014/65/EU of the European Parliament and of the Council.

[11] Either one of the following applies:

(a) the total value of the consolidated assets of the undertaking is equal to or exceeds EUR 30 billion;

(b) the total value of the assets of the undertaking is less than EUR 30 billion, and the undertaking is part of a group in which the total value of the consolidated assets of all undertakings in that group that individually have total assets of less than EUR 30 billion and that carry out any of the activities referred to in points (3) and (6) of Section A of Annex I to Directive 2014/65/EU is equal to or exceeds EUR 30 billion; or

(c) the total value of the assets of the undertaking is less than EUR 30 billion, and the undertaking is part of a group in which the total value of the consolidated 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 to Directive 2014/65/EU is equal to or exceeds EUR 30 billion, where the consolidating supervisor, in consultation with the supervisory college, so decides in order to address potential risks of circumvention and potential risks for the financial stability of the Union;

one quarter of the fixed overheads of the previous year or projected fixed overheads in the event of an investment firm not having completed business for 1 year. The draft RTS outline the calculation of fixed overheads requirement (FOR) and other aspects relevant for this purpose.

15. The EBA has already developed, under Article 97 (4) of the CRR, the RTS for investment firms with limited authorisation. However, the IFD and the IFR take investment firms out of the scope of application of the CRR and provide a tailored prudential regime for investment firms. Moreover, the fixed overheads requirement is a major component of the own funds requirements calculation under the IFR and the IFD.

16. The IFR introduces a new system for investment firms to calculate own funds requirements. Investment firms will always have to comply with the higher of the FOR, the permanent minimum capital requirement (PMCR) or the K-factor methodology of the IFR, which was specially designed for larger investment firms to calculate own fund requirements. Although the FOR under the CRR was developed for investment firms with limited authorisation, the FOR in the IFR acts as a minimum requirement of the own funds requirements for all investment firms. This means that every investment firm has to calculate the FOR to find out whether it is relevant for determining own funds requirements or not. This explains why the FOR is important for investment firms.

17. These draft RTS specify the calculation of capital requirements and provide a clear definition of fixed overheads. In particular, the approach for calculating the fixed overheads requirement proposed in the present RTS is a so-called subtractive approach, whereby variable cost items should be deducted from the total expenses, as calculated according to the applicable accounting framework. The proposed methodology can also be used in cases in which a firm does not use International Financial Reporting Standards (IFRS) and is, therefore, appropriate for smaller or limited-authorisation investment firms.

18. The subtractive approach results from Article 13(4) of the IFR that specifies some items that, at a minimum, have to be deducted from the amount required to determine the fixed overheads requirement. On the one hand, the elements for deduction listed in Article 13(4) of the IFR are a non-exhaustive enumeration. On the other hand, they illustrate the characteristics that the deductions should have and are in accordance with the purpose of the IFR. For instance, the legal text discusses fixed expenses by third parties, which may be illustrating cases in which, for example, tied agents or an outsourced IT provider for the firm are incurring expenses connected to carrying out business on behalf of the IF, but these expenses are not reimbursed by the investment firm.

19. In line with Article 13(2) of the IFR, competent authorities can make adjustments in own funds requirements if there has been a material change in the business activities of the firm. However, in the IFR there is no clear definition of what a material change is. To ensure that competent authorities apply the same conditions across the EU, it is necessary to establish criteria on what constitutes a material change. Minimum thresholds should be established so that those firms are exempted from the adjustments in own funds requirements if their own funds requirements fall below the threshold.

20. As required in Article 13(4) of the IFR, the EBA has consulted ESMA on the draft RTS to ensure that a consistent framework for investment firms is implemented.

2.4 Draft RTS to specify the methods for measuring the K-factors (Article 15(5)(a) of the IFR)

21. As set out in point (a) of Article 15(5) of the IFR, the EBA has been mandated to develop the draft RTS to specify the 'methods for measuring the K-factors'. Other mandates in Article 15(5) of the IFR consist of the mandate on the notion of segregated accounts, as referred in point (b), and the mandate on the adjustments for the K-factor 'daily trading flow' (K-DTF) coefficients, as referred in point (c) of the same paragraph. A separate but related mandate is given in Article 23(3) as regards the calculation of the amount of the total margin required for K-factor 'clearing margin given' (K-CMG) and conditions for prevention of regulatory arbitrage.

22. For some of the K-factors, the requirements in the IFR are, in general, clear and often do not require further specifications. This is the case for the K-factor 'net position risk' (K-NPR), which is introduced by references to the market risk requirements set out in the CRR. The draft RTS also do not include further clarification on the K-factor 'concentration risk' (K-CON), as this is located in Part Four of the IFR. Part Four already contains detailed requirements on how to measure and calculate the K-CON, which in any event uses other K-factors that are covered under Part Three as inputs, i.e. K-NPR and the K-factor 'trading counterparty default' (K-TCD).

23. For each of the K-factors, the following sub-sections summarise the rationale for the inclusion of further specifications in the draft RTS concerning the K-factors' calculation methods.

2.4.1 Tied agents

24. According to point (29) of Article 4(1) of the MiFID, the investment firm on whose behalf the tied agent is acting must take full and unconditional responsibility for the investment business undertaken via that tied agent. Therefore, the draft RTS should make clear that, for each K-factor that is relevant to the investment business conducted by a tied agent (e.g. the K-factor 'assets under management' – K-AUM), the relevant amount of metric (e.g. AUM) should be included in the total amount of metric (e.g. AUM) of the IF, for the purposes of the calculation of the relevant K-factor (e.g. K-AUM) by that IF. This approach seeks to capture all the K-factors that could be relevant to the investment business that tied agents allowed to be carried out under the MiFID.

2.4.2 K-AUM

25. The term 'assets under management' is defined in point (27) of Article 4(1) of the IFR. However, it is helpful to provide, in the draft RTS, a brief clarification on how to measure the value of assets for the purposes of Article 17 of the IFR. For example, point (c) of Article 60(2) of the MiFID Delegated Regulation (EU) 2017/565[12], which deals with reporting obligations to clients

[12] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32017R0565.

in respect of portfolio management, states that details of each financial instrument held, should be provided, including its market value or its fair value if the market value is unavailable.

26. The draft RTS refer, therefore, to fair value accounting for all positions (including derivatives and cash), encompassing the market value or estimated values in accordance with the hierarchy of IFRS 13 or other applicable accounting standards.

27. Nonetheless, to capture properly the value of the AUM, no offset should be taken into consideration, including for the instruments that might have negative value. Therefore, the draft RTS require that all positions be calculated at fair value and that the absolute value be taken if the fair value is negative.

28. The draft RTS also consider the articulation between various K-factors, including between K-AUM and K-CMH and the K-factor 'assets safeguarded and administered' (K-ASA). The draft RTS include the possibility of excluding client money held from the calculation of K-AUM and K-ASA, since client money held is already included in the calculation of K-CMH, and its inclusion in K-AUM or K-ASA factors may lead to double counting and increased capital requirements for the same risks.

2.4.3 Non-discretionary advisory arrangements of an ongoing nature

29. Point (21) of Article 4(1) of the IFR defines investment advice of an ongoing nature as 'recurring provision of investment advice as well as continuous or periodic assessment and monitoring or review of a client portfolio of financial instruments including of the investments undertaken by a client on the basis of a contractual arrangement'. The definition of AUM includes assets managed under certain non-discretionary arrangements.

30. Since, for example, it is likely that there will be different forms of remuneration in different jurisdictions, then any reference to whether ongoing advice should be considered when it involves fees might not be helpful or provide any harmonisation.

31. It might be more helpful to clarify in the draft RTS what 'shall not' be included in respect of assets under ongoing advice. For example, this is the case when an investment firm performs the ancillary service referred in point (3) of Section B of Annex I to the MiFID, as any related advisory activities provided for entrepreneurial purposes and in connection with an industrial strategy, rather than a pure financial return, would be corporate finance advice rather than investment advice as set out in point (5) of Section A of Annex I to the MiFID[13].

2.4.4 Delegation of management of assets to another financial sector entity

32. Paragraph 2 of Article 17 of the IFR specifies what to do regarding AUM if:

(a) the investment firm has formally delegated the management of assets to another financial sector entity;

[13] This reflects the question and answer issued by the Committee of European Securities Regulators (CESR) in 2010 ('CESR/10-293', dated 19 April 2010).

(b) another financial sector entity has formally delegated the management of assets to the investment firm.

33. Furthermore, the intention behind delegation provisions was to avoid 'double counting' or 'double prudential requirements' (but not to promote 'avoidance') when two authorised firms (investment firms and financial sector entity) are involved and both would otherwise be subject to certain prudential requirements. The obligation to include those AUM will lie with the entity that has the direct relationship with the client receiving the portfolio management service. However, the text in Article 17(2) of the IFR does not actually state explicitly information about one of the entities having included the relevant amount of AUM within an AUM-based capital requirement.

34. Furthermore, although the Level 1 text covers discretionary portfolio management, it does not seem to cover cases in which an investment firm when providing portfolio management service uses another investment firm (or Alternative Investment Fund Managers or management company of undertakings for the collective investment in transferable securities) in respect of providing it with investment advice for carrying out that portfolio management. AUM also include certain non-discretionary advisory arrangements. In such a situation, two different services are being provided (advice and discretionary management); it is not simply a delegation of (part of) the one service. Therefore, an investment firm that is providing such advisory arrangements (to another investment firm undertaking portfolio management) on an ongoing basis should include the relevant amount of AUM within its own calculation, even if it does not have a direct relationship with the client for whom the portfolio management is being provided.

2.4.5 K-CMH

35. The draft RTS only consider the specific mandate under point (a) of Article 15(5) of the IFR, which is the measurement of K-CMH. The specific mandate under point (b) of the same article regarding the segregated accounts is discussed separately.

36. The definition of 'client money held' is provided in point (28) Article 4(1) of the IFR. Recital (24) of the IFR clarifies that K-CMH excludes client money that is deposited in a (custodian) bank account in the name of the client itself, whereby the investment firm has access to the client money via a third party mandate. There is no further or alternative definition of 'client money' or 'client funds', neither in the MiFID nor in MiFID Delegated Directive (EU) 2017/593[14]. Therefore, in terms of the basis of measurement, it is suggested that the investment firm measures CMH based on balances that it would use for its internal reconciliations. This means using the values contained in the investment firm's internal records, for example its own books, rather than values contained in the statements received from its banks and other third parties.

2.4.6 K-ASA

37. As with the above-mentioned definition of CMH, the definition or scope of the K-ASA in point (29) of Article 4(1) of the IFR could benefit from additional clarity for the purposes of its

[14] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32017L0593.

measurement. The recommendation is therefore to follow an approach for the valuation of assets safeguarded and administered (ASA) that is similar to the one for the measurement of AUM. Referring to the fair value of the instruments implicitly addresses the various cases in which market valuation of instruments is available, because they are traded in active markets, as well as the alternative valuation methods in accordance with the IFRS 13, or applicable accounting standards, in case the market value is not immediately available in the market. In the latter situation, the hierarchy for the fair valuation should be used, depending on the market information available.

2.4.7 K-COH – K-factor 'client orders handled'

38. According to Article 20(2) of the IFR, K-COH 'shall exclude transactions executed by the investment firm in its own name either for itself or on behalf of a client'. If the investment firm is executing (or dealing) in its own name, then the K-DTF will apply. As a result, certain features needed for the measurement of COH will also need to rely on the same features that are used by the DTF, to both provide clarity and help avoid arbitrage between the two.

39. Point (d) of Article 16 of the IFR states that 'K-COH is equal to COH measured in accordance with Article 20, multiplied by the corresponding coefficient in Article 15(2)'. Although, in general, the IFR only tends to refer to 'K-COH' as if it is a single K-factor, it is implicit from point (d) of Article 16 of the IFR that, in practice, it is the sum of two separate components – (i) the value of cash trades multiplied by the coefficient for cash trades, and (ii) the value of derivatives trades multiplied by the coefficient for derivatives trades. A similar point also applies to K-DTF under Article 24 of the IFR.

40. When it comes to K-COH, there will actually be four separate components in practice – one for execution in the name of the client and one for reception and transmission of orders, both of which may have cash trades and derivatives trades of orders. The rest of this section, therefore, looks at where clarification may be added to COH, which will include investment firms that are not trading on own account.

2.4.8 Execution of client orders

41. Given that there may be practical differences in the national approaches to understanding and implementing 'execution of client orders' under the MiFID, it is helpful to provide clarity as regards the point at which a client order should be included in COH for measurement purposes. For the execution of client orders (in the name of the client) at least, Article 20(2) of the IFR establishes a method for measuring COH that requires, for cash trades at least, calculation by reference to the value paid or received on each trade. It is therefore suggested that the IFR envisages a reference to the price of executed orders, with an ordinary reading of the terms 'paid' or 'received' supporting the view that a trade must actually have taken place. Providing such clarity helps to remove any uncertainty in situations in which there may not be a definite observed price until after the fact, for example in a limit order or for an OTC derivative contract.

42. It is therefore proposed that the draft RTS clarify that, for the purpose of calculating K-COH when an investment firm is executing a client order (in the name of the client), such an order must be

included at the point at which the investment firm has confirmation that the execution has taken place and the price is known.

43. There may be practical circumstances in which an investment firm assumes some best execution responsibility for a client's order but, to achieve this, determines that another broker must be used. This could lead to a timing difference; this could also be the situation depending on the size of the order and market liquidity. In such cases, the previously suggested clarification should ensure that the order is included in the calculation at the time it is executed in the market (rather than when it is placed with the relevant broker). The definition in point (31) of Article 4(1)of the IFR – 'through the execution of orders' – does seem to imply the actual execution phase, but this may be interpreted as executed by the investment firm with the broker (as opposed to actually executed in the market); consequently, with the proposed draft RTS potential confusion is avoided.

2.4.9 Reception and transmission of client orders

44. According to the definition in point (30) of Article 4(1) of the IFR, COH covers not only the 'execution of orders on behalf of clients' but also the 'reception and transmission of client orders'. Some clarity might therefore be useful in respect of measuring reception and transmission for the purposes of COH.

45. This situation is different from executing a client order (in the client's name) in the sense that a different investment service is being provided, and it should not need to be linked to when the execution takes place. For example, the fact that an investment firm makes a mistake when processing the order could lead to the order not being executed. It is therefore proposed that the draft RTS clarify that, for the purposes of calculating K-COH when an investment firm is receiving and transmitting a client order, such an order must be included at the point at which the investment firm transmits the order (to another investment firm or executing broker).

46. Given that the MiFID service is 'reception and transmission', it makes more sense to measure the order 'at the point of transmission' and not the alternative of 'at the point of reception' by the investment firm, i.e. before it transmits it for subsequent execution. This ensures consistency and thus helps avoid confusion or even possible double counting. Consequently, it should be noted that the last sub-paragraph of Article 20(2) of the IFR provides that 'investment firms may exclude from the calculation of COH any orders which have not been executed, where such non-execution is due to timely cancellation of the order by the client'. The investment firm receiving and transmitting the client order presumably has direct contact with the client and should therefore know when the client has cancelled the order, thus allowing a proportionate application of such exclusion to occur.

47. As a result, provisions need to be provided in respect of any circumstances in which the price may not be known at the time of transmission of the order, for example for limit orders. It is suggested that this is best solved by requiring the use of the price contained in the order; if the order does not contain a price (e.g. a 'at best' execution order), then the current market price on the day when the order is transmitted must be used. The draft RTS include the requirement

that, for the purposes of measuring COH when an investment firm has received and transmitted a client order, the investment firm must measure that order using the price in the order or, if there is no such price, using the current market price for the order on the day of transmission.

48. Recital (24) of the IFR states that 'K-COH captures the potential risk to clients of a firm which executes its orders (in the name of the client, and not in the name of the firm itself), for example as part of execution-only services to clients or when a firm is part of a chain for client orders'. Therefore, the draft RTS do not need to clarify this aspect.

2.4.10 Executing a client order received

49. The performance of the investment service of 'reception and transmission' of point (1) of Section A of Annex I to the MiFID is when the investment firm must both receive and transmit the order, i.e. essentially, it must act as an intermediary between the client and the recipient of the order. As a result, when an investment firm, e.g. a broker, receives the client order and then executes it, it is not normally carrying on the MiFID service of 'reception and transmission', although it will normally be carrying on the separate MiFID service of execution of client's orders. Therefore, the executed order will fall within K-COH (provided it is executed in the client's name) for that IF, but the fact that it has received the order from another investment firm (that might be carrying on reception and transmission) is irrelevant for the purposes of COH.

50. The draft RTS therefore clarify this aspect to prevent any confusion over the unintended risk of double counting of an order in the context of an investment firm calculating K-COH (because in the ordinary course of business, an investment firm cannot simultaneously transmit and execute the same order for the MiFID purposes), recognising that, for the purpose of calculating K-COH under Article 20 of the IFR, whereby an investment firm executes client orders (in the name of the client) that are received from another investment firm, the executing investment firm must include such orders in its total of orders measured for the purposes of the execution of client orders and must exclude such orders from its total of orders measured for the purposes of reception and transmission of orders.

2.4.11 K-DTF

51. When measuring DTF for the purposes of calculating K-DTF, Article 33(2) of the IFR distinguishes between cash trades and derivatives. For cash trades, the value is 'the amount paid or received on each trade' and should, in general, be straightforward to determine. However, for derivatives the value of the trade is the 'notional amount of the contract', and (apart from an adjustment for duration) there is no further content in the IFR concerning how this 'notional amount' should be measured. This contrasts with the more developed text on 'notional amount' in Article 29 for K-TCD.

52. Accordingly, it is proposed that similar clarity be provided on how the 'notional amount' is to be measured, in this case for the purposes of DTF. This would introduce consistency, and the text should clarify that, when measuring DTF for the purpose of calculating K-DTF under Article 33 of the IFR, the 'notional amount' must be determined according to the provisions of Article 29(3)

of the IFR. That cross reference avoids the full text being repeated in the draft RTS for each of the appropriate treatment in Article 29(3) of the IFR.

53. Furthermore, to avoid ambiguity and ensure harmonisation, it is suggested that clarification should be provided on what is included under a 'cash trade' (whereby the higher coefficient applies accordingly) for the purposes of measuring DTF and COH. For the purpose of measuring DTF under Article 33(2) of the IFR and measuring COH under Article 20(2) of the IFR, an investment firm should include as 'cash trades' transactions in which a counterparty undertakes to receive or deliver a transferable security, money-market instruments, units in a collective investment undertakings or exchange traded options at a market standard settlement or delivery date. For trades that are executed, the cash value should be the amount paid or received; for exchange traded options, it should be the premium; and for orders that are transmitted, it should be the amount that would be paid or received if the trade were to be subsequently executed at the price contained in the order or the current market price if there is no clear price in the order.

54. The above-mentioned list of instruments, referring to the transactions, is based on the financial instruments listed in Section C of Annex I to the MiFID.

55. A 'cash trade' or 'cash contract' is often understood by the market participants as a trade of a security or a derivative whereby settlement occurs on the same trading day. In the above-mentioned clarification, this is extended by the requirement for there to be market standard or settlement dates. The reason for including exchange traded options, along with premium paid for such options, is related to how the trading occurs simultaneously with the settlement of a security (stocks or bonds). For example, when trading a security, the buyer is buying the security (financial instrument) and settling the market value of that security according to the market standard. The same applies to the trading of an exchange traded option, as the buyer is buying the option (financial instrument) and settling the market value of that option, which is the premium of the option.

56. Other types of derivatives, however, would not draw the same parallel in terms of trading of the instrument and could not therefore be referred to as a 'cash' trade. It should also be noted that Article 7(2) of Delegated Regulation (EU) 2017/565 extends a settlement period (of 2 days) to a longer period 'generally accepted in the market' while still not defining the financial instrument as a derivative; this is a further example of the blurred lines that can occur between cash and derivatives, and therefore warrants a tailored clarification for the specific purposes of the measurement of DTF and COH under the IFR.

57. As noted previously, for consistency purposes and to avoid arbitrage between the two, the above-mentioned suggestions for the measurement of DTF for the purpose of Article 33 of the IFR should also be applied to the measurement of COH for the purpose of Article 20 of the IFR.

2.4.12 K-TCD

58. The IFR dedicates eight articles to the K-TCD requirement that captures risk for the firm itself and hence comprises some of the most detailed and comprehensive technical provisions in the IFR. Given this, the draft RTS aknowledge that there is nothing that needs to be added for clarifying a K-TCD measurement.

2.4.13 K-CMG

59. Point (3) of Article 23 of the IFR contains a separate mandate in respect of requirements on K-CMG. This requires work on specific aspects, such as the method of calculation of the amount of total margin, in particular on a portfolio basis. In case there is anything additional to clarify in respect of the measurement of K-CMG under the mandate in point (a) of Article 15(5) of the IFR, it might make sense to cover this alongside the material for Article 23(3) of the IFR, rather than provide two separate sets of drafts on the same K-factor.

2.4.14 K-NPR

60. For the K-NPR, the IFR simply refers to the market risk requirements set out in the CRR and Regulation (EU) 2019/876 (CRR 2). Under Article 22 of the IFR, for the calculation of the K-NPR three methods can be used: the Standardised Approach (SA), the Alternative SA and an Internal Model Approach. Pursuant to Article 57(2) of the IFR, the Alternative SA and the Alternative Internal Model approach will not be applicable until 26 June 2026 or the date of application of the requirements to the credit institutions.

61. For the calculation of K-NPR under the Standardised Approach, investment firms must include all trading book positions as well as positions other than those in the trading book if they give rise to foreign exchange risk or commodity risk.

62. The draft RTS therefore aknowledge that there is nothing that needs to be further clarified in the draft RTS for the purposes of measuring K-NPR.

2.5 Draft RTS to specify the notion of segregated accounts (Article 15(5)(b) of the IFR)

63. The mandate under point (b) of Article 15(5) of the IFR asks the EBA to specify the notion of segregated accounts for the purpose of the IFR for the conditions ‘that ensure the protection of client money in the event of the failure of an investment firm’. The term ‘segregation’ is not used in the MiFID text notwithstanding that it is a bedrock of the MiFID regime for protecting client money. Point (33) of Article 4(1) of the IFR already defines ‘segregated accounts’ for the purposes of Table 1 of Article 15(2): ‘accounts with entities where client money held by an investment firm is deposited in accordance with Article 4 of Commission Delegated Directive (EU) 2017/593 and where applicable national law provides that, in the event of insolvency or entry into resolution or administration of the investment firm, the client money cannot be used to satisfy claims in relation to the investment firm other than claims by the client’.

64. The above-mentioned statement seems to be comprehensive in specifying the notion of segregated accounts. However, it may be still possible to draw from other parts of Delegated Directive 2017/593 that are not covered explicitly by the above-mentioned definition or Article 4 of that directive. When considered together, points (a) to (c) and (e) to (f) of Article 2(1) of that directive are relevant. In particular, points (e) and (f) of paragraph 1 and paragraphs 2 and 3 of Article 2 seem to be the most directly relevant. Note, however, that paragraphs 2 and 3 set out a situation in which a firm might still hold client money without complying with the safeguarding requirements set out in paragraph 1.

65. It is therefore proposed that the draft RTS clarify that, when calculating K-CMH, investment firms must only apply the coefficient for segregated accounts in Table 1 of paragraph 2 of Article 15 of the IFR on client money held if the conditions in paragraph 1 of Article 2 of Delegate Directive 2017/593 are applied. For all other client money held, investment firms must apply the coefficient for unsegregated accounts provided in the same Table 1. The consequence of all this is that, if an investment firm is already in compliance with the relevant aspects of Article 2(1) of that directive, it will be in compliance with this provision in the draft RTS and so may take advantage of the lower calibration for calculating K-CMH on amounts held in segregated accounts.

66. Without that distinction, the IFR would not lead to all client money held being treated the same, without delving into specific national differences arising from legal and accounting practices.

2.6 Draft RTS to specify adjustments to the K-DTF coefficients (Article 15(5)(c) of the IFR)

67. Point (c) of Article 15(5) of the IFR concerns the development of draft RTS to 'specify adjustments to the K-DTF coefficients referred to in Table 1 of paragraph 2 in the event that, in situations of market stress as referred to in Commission Delegated Regulation (EU) 2017/578[15], the K-DTF requirements seem overly restrictive and detrimental to financial stability'. Therefore, the mandate states that adjusted K-DFT coefficients must be used only in exceptional cases, which are referred to in the Commission Delegated Regulation (EU) 2017/578.

2.6.1 Context and market making under Commission Delegated Regulation (EU) 2017/578

68. The MiFID allows an investment firm that wishes to operate as market makers on regulated markets and other trading venues (MTF and OTF) to benefit from certain incentives, in exchange for which the investment firm has to agree to a market making agreement. The Delegated Regulation (EU) No. 2017/578 sets out the detailed obligation for investment firms to enter into such a market making agreement and its content, as well as obligations placed on trading venues for having market making schemes in place. This regulation also specify that market participants are exempt from market making requirements under exceptional cases, which cover two situations – exceptional circumstances and stressed market conditions.

[15] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32017R0578.

69. Therefore, exceptional cases for the purpose of adjusted K-DFT may cover situations of 'exceptional circumstances', as referred to in Article 3 of Regulation (EU) 2017/578, or stressed market conditions, as referred to in Article 6(2) of that regulation.

70. Article 3 of Regulation (EU) 2017/578 describes 'exceptional circumstances' as being situations in which the obligation for investment firms to provide liquidity on a regular and predictable basis set out in the MiFID must not apply. The EBA has considered that only situations of extreme volatility (Article 3(a)) outlined in that regulation could be taken into account for the purpose of adjusting K-DTF. The other situations (Article 3, points (b) to (e)) outlined in that regulation appear to either prevent the trading venue from operating effectively or involve the investment firm being prevented from doing so. In such circumstances, it is unlikely that trading volumes would be so unusual as to lead to an overly high/restrictive K-DTF requirement (and ones that would also affect the DTF average calculation). However, such exceptional circumstances take place extemely rarely; therefore, adjusted K-DTF would be barely used.

71. Article 6(2) of Regulation (EU) 2017/578 states that 'stressed market conditions' must be identified by trading venues in terms of significant short-term changes of price and volume. Since the aim of the usage of adjusted K-DTF is to incentivise trading during periods of higher volatility, the stressed market conditions, for the purpose of adjusted K-DFT, should cover only such stressed market conditions that lead to increased trading volume.

72. The EBA also considered the possibility of defining 'stressed market conditions' for the purposes of these draft RTS. However, that would clearly exceed the mandate that refers only to the calculation of the adjusted coefficient. Therefore, any statistical or qualitative characterisation of the stress market conditions cannot be included in the draft RTS.

73. The start and end time of stressed market conditions should be in line with the identification of stressed market conditions by trading venue, as referred to in Article 6 of the Regulation (EU) 2017/578.

74. All the aforementioned elements have been considered when developing the draft RTS for the calculation of the adjusted coefficient for K-DTF.

2.6.2 Calculation of the adjusted coefficient

75. The IFR mandate is to adjust the K-DTF coefficients (referred to in Table 1 of paragraph 2 of Article 15 of the IFR). However, how an adjustment to the coefficients is made is not a straightforward matter, given that, according to Article 24 of the IFR, the K-DTF is equal to DTF measured in accordance with Article 33 of the IFR, multiplied by the corresponding coefficient set out in Article 15(2) of the IFR, such that a single coefficient applies to the whole of the total DTF for the relevant monthly calculation, which in turn is based on the averaging of daily observations over a 6-month period.

76. This means that, whatever adjustment may be made to the coefficient, it would then apply to the whole of the trading values for a given calculation. Furthermore, a given trading day that gives rise to the use of an adjusted coefficient could then apply for six monthly calculations in a

row, as that event would remain part of the daily observations over a 6-month period being averaged.

77. The calculation does not provide for the possibility of adjusting the coefficient on a daily basis and does not provide for using more than one coefficient (other than the distinction between cash and derivatives trades) for a given monthly calculation. It follows from the above that care is therefore required in proposing any adjustment, as any different (i.e. lower) coefficient would have to apply to the whole calculation taking into account periods which can be less than one day and potentially for a long period.

78. The suggested means of achieving this is to be proportional in terms of the volume of daily observations that might be affected by a period of stressed market conditions related to the total daily observations for the calculation period.

79. The draft RTS therefore provide formulae for both the cash trades and derivatives that take into account all the aforementioned elements and provides the necessary instructions for its calculation.

2.7 Draft RTS to specify the amount of total margin for the calculation of K-CMG (Article 23(3) of the IFR)

80. The K-CMG provides an alternative to the K-NPR for calculating the risk-to-market requirement for the trading book positions for an investment firm dealing on own account. According to Article 23 of the IFR, the competent authority must allow an investment firm to use the K-CMG for positions that are subject to clearing or margining under the responsibility of a clearing member, provided that a number of conditions are satisfied. In the event that these conditions are fulfilled, K-CMG must be calculated as the third highest amount of total margin required on a daily basis by the clearing member from the investment firm over the preceding 3 months multiplied by a factor of 1.3.

81. The EBA, in consultation with ESMA, has been given the mandate to develop draft RTS to specify the calculation of the amount of the total margin required, the method of calculation of K-CMG, in particular when K-CMG is applied on a portfolio basis, and the conditions for the fulfilment of the provisions in point (e) of paragraph 1 of Article 23 of the IFR. These provisions concern the assessment carried out by the competent authority to ensure that the choice of the portfolios subject to K-CMG has not been made with a view to engaging in regulatory arbitrage of own funds in a disproportionate or prudentially unsound manner.

82. These aspects are discussed in the next sub-sections.

2.7.1 Calculation of total margin required

83. For the purposes of specifying the calculation of the amount of the total margin required, it is clarified that this must be the amount of collateral required to be posted by the investment firm to the clearing member, based on the clearing member's margin model,. Furthermore,

paragraph 2 of Article 23 of the IFR refers to a calculation of total margin required 'on a daily basis'. Given that clearing members may adapt their margin requirements within 1 day, it is clarified that the highest amount of margins required per day should be used for the calculation of total margin required.

2.7.2 Method of calculation of K-CMG in the event that multiple clearing members are used

84. Investment firms may use the clearing services of multiple clearing members. For the cases in which an investment firm uses K-CMG for positions that are subject to clearing by multiple clearing members, it is clarified in the draft RTS how K-CMG must be calculated on a portfolio basis of trading book positions of the clearing members.

85. The amount of total margin required must be calculated by accordingly summing up the total margin required to be posted by the investment firm to all clearing members before determining the third highest amount of total margin required on a daily basis, as required by Artice 23(2) of the IFR.

86. The above-mentioned calculation method avoids double counting, which could arise when an investment firm uses several clearing members for the same positions, over time, and does not artificially increase own funds requirements. This approach would lead to the same own funds requirements for an investment firm using only one clearing member for the same positions.

2.7.3 No arbitrage criteria

87. With regard to the specification of conditions for the fulfilment of the provision that the choice to useK-CMG approach has not been made with a view to engaging in regulatory arbitrage of the own funds requirements in a disproportionate or prudentially unsound manner, it is required that the investment firm is able to demonstrate, to its competent authority, that applying K-CMG would be an appropriate methodology that reflects the nature of its trading book positions.

88. It is also required that the investment firm would compare its own risk assessment with the margins required by clearing members, for the purpose of assessing whether the margins required by the clearing members are still a good indicator of the level of risk to market of the investment firm. The outcome of the the K-CMG calculation should be used in the investment firm's risk management framework.

89. At the point of assessment by the competent authority, the investment firm must make a comparison between the own funds requirements calculated under K-NPR and the own funds requirements calculated under K-CMG. It should be able to justify adequately the difference between these capital requirements to its competent authority when the trading desk (e.g. because of a change in trading strategy) or margin model of the clearing member is changing significantly.

90. To achieve a proper balance between the need to ensure regulatory arbitrage of own funds requirements and proportionality, it is reasonable to identify the cases in which an investment

firm has to compare K-CMG with K-NPR. The competent authority has to assess the outcome of such comparison for the purposes of point (e) of Article 23(1) of the IFR. Those cases can be triggered if an investment firm's business strategy of trading desks changes and this leads to a change in the capital requirement of 20% or more based on the K-CMG; or if a clearing member's margin model changes and this results in a change of 10% or more in the margin's requirement. The percentage changes of 20% and 10%, respectively, are considered significant, and thus the proper balance would be achieved.

91. For the purpose of applying K-CMG on a portfolio basis, the draft RTS clarify that competent authorities, after granting permission, must allow an investment firm to use K-CMG for the portfolio of all positions assigned to a trading desk, on the conditions mentioned in paragraph 1 of Article 23 of the IFR. Given this, a portfolio of cleared positions assigned to one trading desk can make use of K-CMG, and, at the same time, a portfolio of cleared positions assigned to another trading desk can make use of K-NPR. To prevent arbitrage, the use of K-CMG and K-NPR across trading desks must be consistent, which means that the same approach must be used for similar trading desks in terms of business strategy and type of trading book positions.

92. Arbitrage must also be prevented by limiting the switches between the use of K-NPR for a trading desk and the use of K-CMG for a trading desk. In principle, an investment firm should continuously use one of these methods for a trading desk for at least 24 months. Only in exceptional cases (e.g. a business restructuring), the competent authority could allow an investment firm to change methods within this 24-month period.

2.8 Draft RTS on the criteria for subjecting certain investment firms to the CRR (threshold of EUR 5 billion) (Article 5(6) of the IFD)

93. Article 5 of the IFD provides competent authorities with the discretion to decide to apply the requirements of the CRR to certain investment firms. This discretion may be used with regard to investment firms for which all of the following applies:

(a) The investment firm has a total value of consolidated assets equal to or exceeding EUR 5 billion.
(b) The investment firm performs activities of dealing on own account, underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis.
(c) One or more of the criteria set out in points (a), (b) and (c) of paragraph 1 of Article 5 of the IFD applies to the investment firm.

The EBA, in consultation with ESMA, has been given the mandate to develop the draft RTS to further specify the criteria set out in points (a) and (b) of paragraph 1 of Article 5 of the IFD. Criterion (a) of this article refers to the carrying out of activities on such a scale that the failure or the distress of the investment firm could lead to systemic risk. Criterion (b) of this article refers to the statute of the clearing member. These elements are summarised in the next sub-sections.

94. No mandate has been provided to specify the criteria set out in point (c) of paragraph 1 of Article 5 of the IFD, which therefore provides the competent authority with the discretion to subject other investment firms to the requirements of the CRR should it consider that this is justified in the light of the size, nature, scale and complexity of the activities of the investment firm concerned.

2.8.1 Scale of activities

95. To specify when an investment firm carries out its activities on such a scale that the failure or distress of the investment firm could lead to systemic risk, four quantitative thresholds are provided in Article 2 of the draft RTS. If any of these thresholds are exceeded, an investment firm's activities should be considered to be of a significant scale, which could lead to a systemic risk. Consequently, criterion (a) of paragraph 1 of Article 5 of the IFD must be deemed to apply, and the competent authority may apply the requirements of the CRR to the particular investment firm.

96. The quantitative thresholds are based on the indicators of the EBA Guidelines on criteria for the assessment of O-SIIs ('EBA/GL/2014/10'[16]). The focus is on activities that result in credit risk and bilateral counterparty credit risk and that lead to bank-like exposures. The level of the threshold for the notional value of OTC derivatives is derived from the phase-in threshold of the initial margin requirements of Regulation (EU) No 648/2012, as per 1 September 2020.

97. The four thresholds should not necessarily be considered an exhaustive list of indicators for competent authorities to consider in order to use of the discretion outlined in Article 5 of the IFD. Criterion (c) of paragraph 1 of Article 5 of the IFD provides room for judgement to competent authorities so that they can consider additional indicators or a combination of indicators if these relate to the size, nature, scale and complexity of the activities of the investment firm.

2.8.2 Requirements related to the provision of clearing services

98. The definition of a clearing member is provided in point (3) of Article 4(1) of the IFR. This statute of a clearing member is further specified in the draft RTS. The fact that the investment firm offers its clearing services to other financial institutions that are not clearing members themselves, suggests that an investment firm should be considered to be more interconnected with the financial sector. If a clearing member provides such clearing services, criterion (b) of paragraph 1 of Article 5 of the IFD must be deemed to apply, and the competent authority may apply the requirements of the CRR to that particular investment firm.

99. A competent authority may still use the discretion outlined in Article 5 of the IFD for investment firms that are clearing members and that are not offering their clearing services to other financial institutions if criterion (c) of paragraph 1 of that article applies.

16 https://eba.europa.eu/sites/default/documents/files/documents/10180/930752/964fa8c7-6f7c-431a-8c34-82d42d112d91/EBA-GL-2014-10%20%28Guidelines%20on%20O-SIIs%20Assessment%29.pdf?retry=1.

3. Draft RTS on the information to be provided for the authorisation of investment firms as credit institutions (Article 8a(6) point (a) of the CRD)

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supplementing Directive 2013/36/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the information to be provided by an undertaking in the application for authorisation in accordance with Article 8a of Directive 2013/36/EU

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,
Having regard to Directive (EU) 2019/2034 of the European Parliament and of the Council of 27 November 2019 on the prudential supervision of investment firms and amending Directives 2002/87/EC, 2009/65/EC, 2011/61/EU, 2013/36/EU, 2014/59/EU and 2014/65/EU, and in particular Article 62[(6)] thereof,
Whereas:

(1) Under Article 8a of Directive 2013/36/EU, investment firms that meet the conditions set out in point (1)(b) of Article 4(1) of Regulation (EU) No 575/2013 should apply for an authorisation as credit institutions. Those undertakings should provide sufficient information to the competent authorities as to enable them to carry out a comprehensive assessment of the applicant credit institutions.

(2) The list of information to be provided in an application by entities seeking to obtain the authorisation referred to in Article 8a of Directive 2013/36/EU should be specified in a regulation. Such information should include the identification details and historical information of the applicant credit institution, including its existing licensing, activities proposed, current financial situation, programme of operations and initial capital.

(3) To ensure consistency and harmonisation of the authorisation information required for applicant credit institutions, this Regulation should refer to the existing [draft EBA regulatory technical standards (RTS) 2017/08] on the information to be provided for the authorisation of credit institutions, the requirements applicable to shareholders and members with qualifying holdings and obstacles which may prevent the effective exercise of supervisory powers and should aim to expand its scope to the investment firms that classify as credit institutions.

(4) Regulation (EU) 2019/2033 amends Article 4(1) of Regulation (EU) No 575/2013 by identifying two types of credit institutions - one as per point (1)(a), which takes deposits or other repayable funds from the public and grants credits for its own account; and one as per point (1)(b); this Regulation only targets the latter. Differently, credit institutions whose business consists of taking deposits or other repayable funds from the public and granting credits for its own account shall follow the requirements of [EBA RTS 2017/08].

(5) The list of information requirements provided in this Regulation for the applicant credit institutions should take into consideration the specificities of the investment firms' business model and any prior licences granted by a competent authority.

(6) Competent authorities may need to expand the requested information in order to be in a position to thoroughly assess the applicant credit institution, taking into account the range of different business models and legal forms that applicant institutions may take. This Regulation should enable competent authorities to require additional information from an investment firm when assessing the application for a credit institution.

(7) The competent authority may consider waiving some information requirements in light of the size, nature, scale and complexity of the activities of the applicant credit institution concerned, and taking into account the principle of proportionality and the implementation burden on the institutions. However, this should not compromise the possibility of conducting a comprehensive assessment of the application for a credit institution.

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

(9) The EBA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, has analysed the potential related costs and benefits and has requested the opinion of the Banking Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1093/2010[17],

HAS ADOPTED THIS REGULATION:

Article 1

Scope of required information

1. An application for the authorisation of a credit institution as per point (1)(b) of Article 4(1) of Regulation (EU) No 575/2013 shall comply with the following requirements from the draft RTS 2017/08 on information for the authorisation of credit institutions:

   (a) Article 3 - Presentation of the applicant credit institution, place of head office and history;

   (b) Article 4 - Programme of activities, paragraph (1) and paragraph (3);

[17] 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, 15.12.2020, p. 12).

(c) Article 5 - Financial information, with the exception of paragraph (7)(e) and (7)(f);

(d) Article 6 - Programme of operations, structural organisation, internal control systems and auditors;

(e) Article 7 - Initial capital;

(f) Article 8 - Effective direction;

(g) Article 9 - Shareholders or members with qualifying holdings; and

(h) Article 10 - 20 largest shareholders or members.

2. Competent authorities may require information, which is additional to that which is set out in paragraph 1, provided that such information is proportionate and relevant for the purposes of the authorisation assessment.

3. Unless the competent authority requires otherwise, an application is not required to provide the information set out in paragraph 1 where the information is already held by the competent authority, including where it has been requested and obtained from another competent authority, provided that the applicant certifies that such information gives a true, accurate and complete account of its situation to date to the point of authorisation.

4. An applicant credit institution may omit from the application information which is solely relevant to activities not indicated in the information set out in the programme of activities pursuant to Article 4(1) of the RTS 2017/08, provided that the applicant identifies in the application the information omitted and cites this provision as the basis for the omission.

5. Following the assessment of the information submitted in the application, the competent authority may require the applicant to provide supplemental information, or additional explanations, where the authority considers it necessary for the purposes of verifying whether all requirements for authorisation have been satisfied.

6. The information in an application shall remain true, accurate and a complete account of the applicant credit institution's situation regarding the requirements set out in paragraphs (1) to (4).

Article 2

Entry into force

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

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

Done at Brussels,

For the Commission
The President

For the Commission
On behalf of the President

[Position]

4. Draft RTS to specify the calculation of the fixed overheads requirement and to specify the notion of a material change (Article 13(4) of the IFR)

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supplementing Regulation (EU) 2019/2033 of the European Parliament and of the Council on prudential requirements of investment firms and amending Regulations (EU) No 575/2013, (EU) 600/2014 and (EU) No 1093/2010 with regard to regulatory technical standards for own funds requirements for investment firms based on fixed overheads

THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EU) 2019/2033 of the European Parliament and of the Council of 27 November 2019 on the prudential requirements for investment firms and amending Regulations (EU) No 1093/2010, (EU) No 575/2013, (EU) No 806/2014 and in particular the fourth subparagraph of Article 13(4) thereof,

Whereas:

(1) Given that not all investment firms are required to have audited financial statements, rules specifying own funds requirements for investment firms based on fixed overheads should allow investment firms to calculate fixed overheads requirements also on the basis of non-audited financial statements, where investment firms are not obliged to have audited financial statements. Further, where the audited financial statements do not cover a period of twelve months, a calculation should be performed to produce an equivalent annual amount, in order to ensure consistency with the requirement of Article 13(1) of Regulation (EU) 2019/2033.

(2) Given that the differences between the gross and net profits with regard to a firm's financial situation are represented by the fixed costs of running the firm's business, the deduction from the total costs of an investment firm of the employees', directors' and partners' shares in profit referred to in Article 13(4) of Regulation (EU) 2019/2033 should be understood to refer to the net profits.

(3) Moreover, since payment of staff bonuses and other remuneration may be deferred over time and could follow different agreement structures, these should be considered as dependent on net profit where this would have no impact on the firm's capital position, either due to payments having already been made or due to the absence of the obligation of payment in case of absence of net profit.

(4) Investment firms should include fixed costs of third parties in the calculation of their total expenses. However, where these costs are not fully incurred on behalf of the investment firms, these should be included up to the amount attributable to the investment firm.

(5) Considering that not all investment firms use International Financial Reporting Standards and there are differences in the applicable accounting standards in the calculation of the total costs, elements to be deducted, in addition to those provided in Article 13(4) of Regulation (EU) 2019/2033, should be further specified in order to ensure comparability in the calculation of the fixed overheads requirements.

(6) Consistently with the particularity of the business of commodity and emission allowance dealers, recognised in various provisions throughout Regulation (EU) 2019/2033, expenses related to raw materials should be deducted from the total expenses used in calculation the fixed overheads requirements.

(7) Fixed overheads can evolve at a similar pace as the activities of the investment firm, which, as a result, should not be considered material changes for the purposes of Article 13(2) of Regulation (EU) 2019/2033. However, there may be circumstances where changes, such as shifts in the business models or mergers and acquisitions, may occur and result in significant variations in the projected fixed overheads. Therefore, rules specifying own funds requirements for investment firms based on fixed overheads should establish objective thresholds based on the projected fixed overheads for the purpose of specifying the notion of material change.

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

(9) The European Banking Authority has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Banking Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1093/2010. The European Banking Authority has also consulted the European Securities and Markets Authority before submitting the draft technical standards on which this Regulation is based,

HAS ADOPTED THIS REGULATION:

Article 1

Calculation of the fixed overheads requirement referred to in Article 13(1) of Regulation (EU) 2019/2033

1. For the purposes of Article 13(1) of Regulation (EU) 2019/2033, the ‘figures resulting from the applicable accounting framework’ shall refer to figures of an investment firm’s most recent audited annual financial statements after distribution of profits or in annual financial statements where investment firms are not obliged to have audited financial statements.

2. Where the investment firm’s most recent audited financial statements do not reflect a twelve month period, the firm shall divide the amounts included in those statements by the number of months that are reflected in those financial statements and shall subsequently multiply the result by twelve, so as to produce an equivalent annual amount.

3. For the purposes of Article 13(4)(b) of Regulation (EU) 2019/2033 employees', directors' and partners' shares in profits shall be calculated on the basis of the net profits.

4. For the purposes of Article 13(4)(a) of Regulation (EU) 2019/2033, staff bonuses and other remuneration shall be considered to depend on the net profit of the investment firm in the respective year where both of the following conditions are met:

   (a) the staff bonuses or other remuneration to be deducted have already been paid to employees in the year preceding the year of payment, or the payment of the staff bonuses or other remuneration to employees will have no impact on the firm's capital position in the year of payment;

   (b) with respect to the current year and future years, the firm is not obliged to award or allocate further bonuses or other payments in the form of remuneration unless it makes a net profit in that year.

5. Where fixed expenses have been incurred on behalf of the investment firms by third parties, including tied agents, and these fixed expenses are not already included within the total expenses included in the annual financial statement referred to in paragraph 1, these shall be added to the total expenses of the investment firm. Where a breakdown of the third party's expenses is available, an investment firm shall add to the figure representing the total expenses only the share of those fixed expenses applicable to the investment firm. Where such a break-down is not available, an investment firm shall add to the figure representing the total expenses only its share of the third party's expenses as it results from the business plan of the investment firm.

6. In addition to the items for deduction referred to in Article 13(4) of Regulation (EU) 2019/2033, the following items shall also be deducted from the total expenses, where they are included under total expenses in accordance with the relevant accounting framework:

   (a) fees, brokerage and other charges paid to central counterparties, exchanges and other trading venues and intermediate brokers for the purposes of executing, registering or clearing transactions, only where they are directly passed on and charged to customers. These shall not include fees and other charges necessary to maintain membership or otherwise meet loss-sharing financial obligations to central counterparties, exchanges and other trading venues;

   (b) interest paid to customers on client money, where there is no obligation of any kind to pay such interest;

   (c) expenditures from taxes where they fall due in relation to the annual profits of the investment firm;

   (d) losses from trading on own account in financial instruments;

   (e) payments related to contract-based profit and loss transfer agreements according to which the investment firm is obliged to transfer, following the preparation of its annual financial statements, its annual result to the parent undertaking;

   (f) payments into a fund for general banking risk in accordance with Article 26(1)(f) of Regulation (EU) 2013/575;

(g) expenses related to items that have already been deducted from own funds in accordance with Article 36(1) of Regulation (EU) 2013/575.

Article 2

Calculation of the fixed overheads requirement referred to in Article 13(1) of Regulation (EU) 2019/2033 for commodity and emission allowance dealers

Commodity and emission allowance dealers may deduct expenditure on raw materials in connection with an investment firm trading in derivatives of the underlying commodity.

Article 3

The notion of material change for the purposes of Article 13(2) of Regulation (EU) 2019/2033

A material change referred to in Article 13(2) of Regulation (EU) 2019/2033 shall be considered to have occurred where either of the following conditions are met:

(a) a change, either in the form of an increase or in the form of a decrease, in the business activity of the firm results in a change of 30% or greater in the firm's projected fixed overheads of the current year;

(b) a change, either in the form of an increase or in the form of a decrease, in the business activity of the firm results in changes in the firm's own funds requirements based on projected fixed overheads of the current year equal to or greater than EUR 2 million.

Article 4

Entry into force

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

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

Done at Brussels,

For the Commission
The President
[For the Commission
On behalf of the President

[Position]

5. Draft RTS to specify the methods for measuring the K-factors (Article 15(5) point (a) of the IFR)

COMMISSION DELEGATED REGULATION (EU) No …/..

of XXX

[…]

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

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, Having regard to Regulation (EU) 2019/2033 of the European Parliament and of the Council of 27 November 2019 on the prudential requirements of investment firms and amending Regulations (EU) No 1093/2010, (EU) No 575/2013, (EU) No 600/2014 and (EU) No 806/2014[18], and in particular the third subparagraph of Article 15(5) thereof,
Whereas:

(1) Some of the K-factors do not require further specifications as Regulation (EU) 2019/2033 elaborates in detail the methods for measuring them; this is the case with the K-NPR, which is derived from Regulation (EU) No 575/2013, as well as with the K-CON and K-TCD, which use a simplified application of the corresponding requirements under that Regulation. However, in other cases such as AUM, CMH, COH, ASA and DTF, the methods for measuring those factors would benefit from further clarifications.

(2) For the purposes of calculating the level of AUM and ASA, financial instruments should be valued at their fair value in accordance with applicable accounting standards. This is because it allows the reflection of the market value of the financial instruments, where there is one, but it also covers cases where there is no such market value readily available in the market, ensuring a consistent application of the measuring of the AUM and ASA.

(3) Since the calibration of the CMH coefficient in Table 1 of Article 15 of Regulation (EU) 2019/2033 already takes into account the risk to client associated with the management of that cash, the amounts included in the measuring of the CMH should not be included in the measuring of the AUM. Further, in order to avoid any double counting

[18] OJ L 314, 5.12.2019, p. 1.

in the calculation of the capital requirements, the amounts already considered for the measuring of the CMH should not be included in the measuring of the ASA.

(4) The definition of CMH in Article 4(1)(28) of Regulation (EU) 2019/2033 together with recital 24 of that Regulation clarify the amounts to be considered for the measuring of CMH. Therefore, this Regulation should only further specify the remaining operational aspects of the method for measuring the CMH with the view to ensuring the robustness of the CMH figures, in particular by avoiding overreliance on external reporting and focusing on the investment firm's internal accounting records and figures used for the internal reconciliation.

(5) The methods for measuring the amounts to be included as reception and transmission of orders and execution of orders in the COH should include specific rules for the case where market prices are not readily available because they are not contained in the orders. Such rules should reflect the differences between the case of execution of orders and the case of reception and transmission, as prices and timing at which the orders should be recorded for the measuring of COH may differ in each case. Further, in the case of reception and transmission, in particular, the transmitted orders are a better reference for the measuring than the received ones, as the received orders may fail to be transmitted.

(6) Since an investment firm may provide the services referred to in points (7) and (8) of Annex I of Directive 2014/65/EU[19], operating a MTF or an OTF as sole service or in addition to other services, rules specifying the methods for measuring the K-factors should ensure that an investment firm avoids mistakenly counting third party orders in the calculation of the K-factors, when acting in its capacity of operating a MTF or OTF, as these do not constitute services of execution of orders or services of reception and transmission.

(7) Since the capital requirements for investment firms under Regulation (EU) 2019/2033 are based on the K-factors which cover all the services in Annex I of Directive 2014/65/EU, rules specifying the methods for measuring those K-factors should include rules adapting those methods in those cases where otherwise there could be double counting. This is the case, in particular, of certain ancillary services, which can be performed only in conjunction with the services referred to in Part A of Annex I of that Directive. Therefore, orders related to the ancillary service referred to in point (3) of Section B of Annex I of Directive 2014/65/EU, which relate to advice on transactions between investors, in case of corporate finance or private equity transactions, should not be included in the measuring of the AUM nor in that of the COH, as those K-factors already account for them.

(8) Since Regulation (EU) 2019/2033 provides for two different coefficients for the measuring of COH in Table 1 of Article 15, one for cash trades and a separate one for derivatives, then further clarifications should be provided on how to allocate trades between the two classes of instruments and the valuation method to be used in each case. In particular, derivatives should be included in the measuring of K-factors based on the notional value and the cash trades at market value because the coefficients of the K-factors are calibrated on that basis.

[19] 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).

(9) As there are no rules in Regulation (EU) 2019/2033 specifying how the notional value of derivatives should be calculated for the purposes of measuring the DTF, rules specifying the methods for measuring the K-factors should include rules that set out that calculation. Given that Article 29(3) of Regulation (EU) 2019/2033 provides rules on how to calculate the notional value of derivatives for the purposes of the calculation of the TCD, and in order to ensure consistency in the measuring of the TCD and the DTF, the same rules for measuring the notional value of derivatives should apply also for the measuring of the TCD.

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

(11) The EBA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Banking Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1093/2010[20]. The European Banking Authority has also consulted the European Securities and Markets Authority before submitting the draft technical standards on which this Regulation is based,

HAS ADOPTED THIS REGULATION:

SECTION 1

Methods for measuring the RtC K-factors

Article 1

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

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

Article 2

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

1. For the purpose of measuring its RtC K-factor in accordance with Article 16 of Regulation (EU) 2019/2033, an investment firm shall not include within its AUM, referred to in Article 17 of that Regulation, any amounts of assets that relate to the advisory activities referred to in paragraph 3 of Section B of Annex I to Directive 2014/65/EU.

[20] 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, 15.12.2020, p. 12).

2. Where an investment firm is providing non-discretionary advisory arrangements of an on-going nature to another financial sector entity that undertakes discretionary portfolio management, it shall include within its AUM referred to in Article 17 of Regulation (EU) 2019/2033 any amounts of assets that relate to those non-discretionary advisory arrangements.

Article 3

Methods for measuring the AUM in case of discretionary portfolio management

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

(a) the calculation shall include the value of financial instruments calculated at fair value in accordance with the applicable accounting standards;

(b) financial instruments with a negative fair value shall be included in absolute value;

(c) the calculation shall include cash except any amounts covered under CMH in accordance with Article 4.

Article 4

Methods for measuring CMH

For the purposes of Article 18 of Regulation (EU) 2019/2033, the measurement of CMH shall be made in accordance with both of the following:

(a) it shall be based on balances that the investment firm would use for its internal reconciliations;

(b) it shall use the values contained in the investment firm's accounting records.

Article 5

Methods for measuring ASA

For the purpose of Article 19 of Regulation (EU) 2019/2033, the measurement of total daily ASA shall be made on accordance with both of the following:

(a) the calculation shall include the value of all client financial instruments safeguarded and administered, calculated at fair value in accordance with the applicable accounting standards;

(b) the calculation shall exclude CMH referred to in Article 4.

Article 6

Methods for measuring the execution of orders in COH

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

2. Where an investment firm executes client orders in the name of the client that are received from another investment firm, the executing investment firm shall calculate COH in accordance with both of the following:

   (a) it shall include such orders within its total of orders measured for the purposes of execution of client orders;

   (b) it shall exclude such orders from its total of orders measured for the purposes of reception and transmission of orders.

Article 7

Methods for measuring the reception and transmission of orders in the COH

1. For the purposes of calculating K-COH in accordance with Article 20 of Regulation (EU) 2019/2033 where an investment firm is receiving and transmitting a client order, such an order shall be included at the point at which the investment firm transmits the order to another investment firm or executing broker.

2. An investment firm shall not include orders received and transmitted in the measurement of COH where it is bringing together two or more investors to bring about a transaction between those investors, such as in the case of corporate finance or private equity transations.

3. An investment firm shall include in the measurement of COH orders received and transmitted using the price contained in the orders. Where no price is contained in the orders, including where these are limit orders, the investment firm shall use the market price of the financial instrument at the day of transmission.

4. Third party buying and selling interests which come about due to the operation of a 'multilateral trading facility' or of an 'organised trading facility' as defined in points (22) and (23) respectively of paragraph 1 of Article 4 of Directive 2014/65/EU shall not be included in the measurement of COH.

Article 8

Methods for measuring cash trades for the purpose of COH

1. For the purposes of measuring COH under Article 20 of Regulation (EU) 2019/2033 an investment firm shall include as cash trades any transactions where a counterparty undertakes to receive or deliver any of the following:

   (a) transferable securities;

   (b) money-market instruments;

   (c) units in collective investment undertakings;

   (d) exchange traded options.

2. Where the transferable security is an exchange traded option referred to in paragraph 1(d), the investment firm shall use the options premium used for the execution of that exchange traded option.

Article 9

Methods for measuring derivatives for the purpose of COH

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

SECTION 2

Methods for measuring the RtF K-factors

Article 10

Methods for measuring cash trades for the purpose of DTF

1. For the purposes of measuring DTF under Article 33 of Regulation (EU) 2019/2033 regarding cash trades, an investment firm shall include as cash trade any transaction where a counterparty undertakes to receive or deliver any of the following:

   (a) transferable securities;

   (b) money-market instruments;

   (c) units in collective investment undertakings;

   (d) exchange traded options.

2. Where the transferable security is an exchange traded option referred to in paragraph 1(d), the investment firm shall use the options premium used for the execution of that exchange traded option.

Article 11

Methods for measuring derivatives for the purpose of DTF

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

Article 12

Entry into force

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

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

Done at Brussels,

For the Commission
The President

For the Commission
On behalf of the President

[Position]

6. Draft RTS to specify the notion of segregated accounts (Article 15(5) point (b) of the IFR)

COMMISSION DELEGATED REGULATION (EU) No …/..

of XXX

[…]

supplementing Regulation (EU) 2019/2033 of the European Parliament and of the Council with regard to regulatory technical standards to specify the notion of segregated accounts for the purposes of that Regulation

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,
Having regard to Regulation (EU) 2019/2033 of the European Parliament and of the Council of 27 November 2019 on the prudential requirements of investment firms and amending Regulations (EU) No 1093/2010, (EU) No 575/2013, (EU) No 600/2014 and (EU) No 806/2014 [21], and in particular the third subparagraph of Article 15(5) and in connection with point (b) of Article 15(5) thereof,
Whereas:

(1) Segregated accounts are defined in point (49) of Article 4 of Regulation (EU) 2019/2033 for the purposes of Table 1 in Article 15(2) of that Regulation, where reference is made to client money being deposited in accordance with Article 4 of Commission Delegated Directive (EU) 2017/593[22]. That Commission Delegated Directive aims to protect client money by specifying organisational requirements for investment firms. In particular, Article 2(1) of that Directive establishes requirements which relate to the concept of segregated accounts. Given the notion of segregated accounts referred to in point (b) of Article 15(5) of Regulation (EU) 2019/2033 has the same objective of protecting client money, the organisational requirements referred to above should be met in the context of prudential requirements. Therefore, this Regulation should establish a subset of the same

[21] (OJ L 314, 5.12.2019, p. 1

[22] Commission Delegated Directive (EU) 2017/593 supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to safeguarding of financial instruments and funds belonging to clients, product governance obligations and the rules applicable to the provision or reception of fees, commissions or any monetary or non-monetary benefits.

requirements as in the Commission Delegated Directive which are relevant for the notion of segregation.

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

(3) The EBA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Banking Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1093/2010[23],

HAS ADOPTED THIS REGULATION:

Article 1

Notion of segregated accounts for the purposes of point (b) of paragraph 5 of Article 15 of Regulation (EU) 2019/2033

For the conditions that ensure the protection of client money in the event of failure of an investment firm, the notion of segregated accounts shall mean that the investment firm shall meet all of the following requirements:

(a) keep records and accounts enabling them at any time and without delay to distinguish assets held for one client from assets held for any other client and from their own assets;

(b) maintain their records and accounts in a way that ensures their accuracy and in particular their correspondence to the funds held for clients, and that they may be used as an audit trail;

(c) conduct, on a regular basis, reconciliations between their internal accounts and records and those of any third parties by whom those assets are held;

(d) take the necessary steps to ensure that client funds deposited are held in an account or accounts identified separately from any accounts used to hold funds belonging to the investment firm;

(e) introduce adequate organisational arrangements to minimise the risk of the loss or diminution of client assets, or of rights in connection with those assets, as a result of misuse of the assets, fraud, poor administration, inadequate record-keeping or negligence.

Article 2

Entry into force

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

[23] 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, 15.12.2020, p. 12).

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

Done at Brussels,

For the Commission
The President

For the Commission
On behalf of the President

[Position]

7. Draft RTS to specify adjustments to the K-DTF coefficients (Article 15(5) point (c) of the IFR)

COMMISSION DELEGATED REGULATION (EU) No …/..

of XXX

[…]

supplementing Regulation (EU) 2019/2033 of the European Parliament and of the Council with regard to regulatory technical standards to specify adjustments to the K-DTF coefficients

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,
Having regard to Regulation (EU) 2019/2033 of the European Parliament and of the Council of 27 November 2019 on the prudential requirements of investment firms and amending Regulations (EU) No 1093/2010, (EU) No 575/2013, (EU) No 600/2014 and (EU) No 806/2014][24], and in particular point (c) of Article 15(5) thereof,
Whereas:

(1) Given that the daily trading flow (DTF) is calculated based on the volume of transactions, the constraints that the default capital requirement for investment firms trading on own account, including market makers, bears the risk of a reduction on trading activities, leading to a risk of less market liquidity, with potential detriments to financial stability. Consequently, where circumstances lead to higher trading volume, the K-DTF coefficients should be adjusted in a way which incentivises trading activities. Where circumstances lead to lower trading volume, those considerations do not apply. Therefore, for the purposes of this Regulation, the adjustments to the K-DTF coefficients should be calculated on the basis of the volumes of trades during circumstances that lead to higher trading volume.

(2) If in stressed market conditions the K-DTF requirements seem overly restrictive and detrimental to financial stability, the coefficient referred to in Article 15(2) of Regulation (EU) 2019/2033 should be adjusted smaller than the one provided in Table 1 of the same article, in order for the K-DTF not to become a disincentive to trading.

[24] OJ L 314, 5.12.2019, p. 1.

(3) Given that point (c) of Article 15(5) of Regulation (EU) 2019/2033 refers, for the purpose of calculation of the adjusted K-DFT, to stressed market conditions as referred to in Commission Delegated Regulation (EU) 2017/578, the start and end time of stressed market conditions should be in line with the identification of stressed market conditions by trading venues as referred to in Article 6 of that Delegated Regulation. In addition, for the purposes of calculating the adjusted K-DTF, stressed market condition should relate to significant short term changes of trading volume and price.

(4) For the reasons that stressed market conditions may last for an indeterminate period of time, including intra-day and even for as short a period as a matter of minutes, the adjustments to the coefficients shall be capable of reflecting the value of daily trading flow that takes place during each of these periods of different duration.

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

(6) The EBA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Banking Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1093/2010[25],

HAS ADOPTED THIS REGULATION:

Article 1

Adjustments to the K-DTF coefficients

1. The adjustments to the K-DTF coefficients referred to in Table 1 of paragraph 2 of Article 15 of Regulation (EU) 2019/2033, in the event that in stressed market condition as referred to in Commission Delegated Regulation (EU) 2017/578[26] the K-DTF requirements seem overly restrictive and detrimental to financial stability as referred to in point (c) of Article 15(5), shall be determined with the following formula:

   (a) for the coefficient of the K-DTF cash trades:

   Cadj = C * (DTFexcl/DTFincl)

   where:

   Cadj = adjusted coefficient

   C = coefficient in Table 1 of paragraph 2 of Article 15 of Regulation (EU) 2019/2033

[25] 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, 15.12.2020, p. 12).

[26] Commission Delegated Regulation (EU) 2017/578 of 13 June 2016 supplementing Directive 2014/65/EU of the 13 June 2016 (OJ L 87, 31.3.2017, p. 183).

DTFexcl = the DTF of cash trades measured in accordance with Article 33 of Regulation (EU) 2019/2033, excluding the value of any cash trade that occurred during stressed market condition as referred to in Article 2; and

DTFincl = the DTF of cash trades measured in accordance with Article 33 of Regulation (EU) 2019/2033, including the value of any cash trade that occurs during stressed market condition as referred to in Article 2.

(b) for the coefficient of the K-DTF derivatives:

Cadj = C * (DTFexcl/DTFincl)

where:

Cadj = adjusted coefficient

C = coefficient in Table 1 of paragraph 2 of Article 15 of Regulation (EU) 2019/2033

DTFexcl = the DTF of derivatives measured in accordance with Article 33 of Regulation (EU) 2019/2033, excluding the value of any derivatives trade that occurred during stressed market condition as referred to in Article 2; and

DTFincl = the DTF of derivatives measured in accordance with Article 33 of Regulation (EU) 2019/2033, including the value of any derivatives trade that occurs during of stressed market condition as referred to in Article 2.

2. The calculation of DTFexcl shall include only the value of daily trading flow that relates to financial instruments or underlyings of financial instruments traded on a trading segment within the relevant trading venue during an event for which stressed market condition has been deemed to occur by that trading venue.

Article 2

Period of stressed market condition

For the purposes of Article 1, an event of stressed market condition shall be a situation where the parameters referred to in paragraph 2 of Article 6 of Commission Delegated Regulation (EU) 2017/578 are met and where those stressed market conditions lead to increased trading volumes.

Its start and end times shall reflect the times for which the trading venue identifies in accordance with Article 6(2) of Commission Delegated Regulation (EU) 2017/578 the existence of such stressed market condition.

Article 3

Entry into force

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

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

Done at Brussels,

For the Commission
The President

For the Commission
On behalf of the President

[Position]

8. Draft RTS to specify the calculation of the amount of the total margin for the calculation of K-CMG (Article 23(3) of the IFR)

COMMISSION DELEGATED REGULATION (EU) No …/..

of XXX

[…]

supplementing Regulation (EU) 2019/2033 of the European Parliament and of the Council with regard to regulatory technical standards to specify the amount of total margin for the calculation of K-CMG

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,
Having regard to Regulation (EU) 2019/2033 of the European Parliament and of the Council of 27 November 2019 on the prudential requirements of investment firms and amending Regulations (EU) No 1093/2010, (EU) No 575/2013, (EU) No 600/2014 and (EU) No 806/2014[27], and in particular the third subparagraph of Article 23(3) thereof,
Whereas:

(1) For the purposes of specifying the calculation of the amount of the 'total margin required', referred to in Article 23(2) of Regulation (EU) 2019/2033, and in order to increase clarity and consistency in relation to its components, this Regulation should clarify that the amount of the total margin required includes any collateral required by the clearing member in accordance with its margin model.

(2) In accordance with Article 23(2) of Regulation (EU) 2019/2033, total margin required on a daily basis is required for the calculation of the K-CMG). Clearing members may adapt their margin requirements within one day, which would result in more than one margin requirement on one day. In order to avoid uncertainty about which of those margin requirements to use and considering that for the calculation of the K-CMG the third highest amount during a period of three months is sought, this Regulation should specify that the daily amount of margin required should be the highest of those margin requirements of a given day.

(3) Investment firms may use the clearing services of multiple clearing members. It is necessary that for positions for which the K-CMG is applied the determination of the

[27] OJ L 314, 5.12.2019, p. 1.

amount of total margin required from the investment firm is comprehensive and includes the full margin required by all clearing members. Therefore, where an investment firm uses K-CMG for positions that are subject to clearing by multiple clearing members, K-CMG should be calculated as the sum of the margins required across all clearing members. An investment firm should, accordingly, first calculate the total daily amount of margin required as the sum of the total margin required by all clearing members, before determining the third highest amount of total margins required on a daily basis as required by Article 23(2) of Regulation (EU) 2019/2033.

(4) The application of the K-CMG on a portfolio basis, where the whole portfolio is subject to clearing or margining, is conditional to the criteria referred to in of Article 23(1) of Regulation (EU) 2019/2033. Therefore, a portfolio of cleared positions assigned to one trading desk can make use of K-CMG while, at the same time, a portfolio of cleared positions assigned to another trading desk can make use of K-factor 'net position risk' (K-NPR). In order to prevent arbitrage, the use of K-CMG and K-NPR across trading desks should be consistent. Therefore, the same approach should be used for trading desks that are similar in terms of business strategy and trading book positions.

(5) In relation to the conditions for the fulfilment of the provision that the choice for K-CMG has not been made with a view to engaging in regulatory arbitrage of the own funds requirements in a disproportionate or prudentially unsound manner, this Regulation should prescribe that the competent authority assesses that an investment firm applies the K-CMG approach only if it is an appropriate methodology that reflects the nature of its trading book positions. It should also be required that the investment firm compares regularly its own risk assessment with the margins required by clearing members, for the purpose of assessing whether the margins required by the clearing members are still a good indicator of the level of risk to market of the investment firm. At the point of assessment by the competent authority, the investment firm should make a comparison between the capital requirements under K-NPR and K-CMG and should be able to adequately justify the difference between these capital requirements to its competent authority. The conditions of that assessment should be considered to be continously met, when the trading desk is changing, because of a change in trading strategy, or the clearing member's margin model changes, and the difference between the capital requirements under K-NPR and K-CMG is still justified.

(6) A high frequency of switching between the use of K-NPR and K-CMG is a strong indicator of potential disproportionate or unsound use of own funds requirements. It is possible to prevent regulatory arbitrage by constraining the frequency of switching positions between the use of K-NPR and K-CMG. A requirement to make continuous use of one of the two methods for a trading desk for at least two years would be proportionate to address the risk of regulatory arbitrage. However, in the exceptional cases (e.g. a business restructuring) that the trading desks change to the extent that they can be considered a different trading desk, the competent authority should allow an investment firm to change methods within this two year period.

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

(8) The EBA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Banking Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1093/2010[28],

HAS ADOPTED THIS REGULATION:

Article 1

Calculation of the amount of the total margin required

1. The amount of the total margin referred to in Article 23(2) of Regulation (EU) 2019/2033 shall be the required amount of collateral comprising the initial margin, variation margins and other collateral, as required by the clearing member's margin model from the investment firm for the trading desks subject to K-CMG.

2. Where the clearing member does not differentiate between margins that are required for the trading desk that is subject to K-CMG and margins that are required for other trading desks, the firm shall consider the total of margins required for all trading desks as margins under paragraph 1.

3. Fees paid by the investment firm to the clearing member for making use of its clearing member services shall not be considered as margins under paragraph 1.

4. Where the clearing member updates the total margin required once or more than once during a day, the total margin required on that day shall be highest of those amounts of total margins required by the clearing member during that day.

5. For the purposes of this Article and of Article 3 'trading desk' shall mean trading desk as defined in point (144) of Article 4(1) of Regulation (EU) No 575/2013.

Article 2

Method of calculation of K-CMG on a portfolio basis in case of multiple clearing members

Where investment firms make use of the services of more than one clearing member, the investment firm shall, for the purposes of calculating the K-CMG, add the amounts of the total margins required on a daily basis by all clearing members, before determining the third highest amount of total margin required on a daily basis over the preceding three months, before mulitplying the outcome by 1.3 as set out in Article 23(2) of Regulation (EU) 2019/2033.

[28] 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, 15.12.2020, p. 12).

Article 3

Prevention of arbitrage

1. The conditions in point (e) of Article 23(1) of Regulation (EU) 2019/2033 shall be deemed to be met, where the competent authority has positively assessed that all of the following criteria are met:

   (a) where the investment firm calculates K-CMG capital requirements on a portfolio of cleared positions assigned to one trading desk, it applies the same methodology to all the positions of that trading desk;

   (b) the investment firm uses the K-CMG consistently across trading desks that are similar in terms of business strategy and trading book positions;

   (c) the investment firm has policies and procedures in place showing that the choice of portfolio(s) subject to K-CMG would appropriately reflect the risks of an investment firm's trading book positions, including the expected holding periods, the trading strategies applied and the time it could take to hedge out or manage risks of its trading book positions;

   (d) the investment firm makes use of the outcome of the K-CMG calculation in its risk management framework and regularly compares the results of its own risk assessment to the margins required by clearing members;

   (e) the investment firm has compared the capital requirements calculated by K-CMG with the capital requirements calculated by K-NPR for each trading desk at the point of the assessment by the competent authority, and the difference is justified taking into account the factors set out in paragraph 3.

2. For the purposes of paragraph 1, the conditions under point (e) of Article 23(1) shall be continously considered to be met, where:

   (a) the investment firm uses the K-CMG calculation for a portfolio of positions assigned to a trading desk for a continous period of at least 24 months or, the business strategy or operations of that group of dealers has changed to the extent that they can be considered a different trading desk;

   (b) the investment firm compares the capital requirements calculated on the basis of the K-CMG with the capital requirements calculated on the basis of the K-NPR in each of the following cases and the difference between them is justified taking into account the factors set out in paragraph 3:

      i) where the business strategy of a trading desk changes and this leads to a change in 20% or more in the capital requirements for that trading desk based on the K-CMG approach;

      ii) where the clearing member's margin model changes and this results in a change in the margins required of 10% or more for the same portfolio of underlying positions for a trading desk.

3. For the purposes of point (b) paragraph 2 and point (e) of paragraph 1, the competent authority shall take into account the following factors in order to assess whether the

difference in capital requirements calculated in applicaton of the K-CMG and of the K-NPR is justified:

(a) the reference to the relevant trading strategies;

(b) the firm's own risk management framework;

(c) the level of the firm's overall own funds requirements calculated in accordance with Article 11 of Regulation (EU) 2019/2033;

(d) the results of the supervisory review and evaluation process, if available.

Article 4

Entry into force

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

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

Done at Brussels,

For the Commission
The President

For the Commission
On behalf of the President

[Position]

9. Draft RTS on the criteria for subjecting certain investment firms to the CRR (Article 5(6) of the IFD)

COMMISSION DELEGATED REGULATION (EU) No …/..

of XXX

[…]

supplementing Directive (EU) 2019/2034 of the European Parliament and of the Council with regard to regulatory technical standards to further specify criteria for the discretion of competent authorities to subject certain investment firms to the requirements of Regulation (EU) No 575/2013

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,
Having regard to Directive (EU) 2019/2034 of the European Parliament and of the Council of 27 November 2019 on the prudential supervision of investment firms and amending Directives 2002/87/EC, 2009/65/EC, 2011/61/EU, 2013/36/EU, 2014/59/EU and 2014/65/EU[29], and in particular Article 5(6) thereof,
Whereas:

(1) Some investment firms present comparable risks to financial stability as credit institutions. In accordance with Article 5 of Directive (EU) 2019/2034, competent authorities have the option of requiring such investment firms to remain subject to the same prudential treatment as credit institutions that fall within the scope of Regulation (EU) No 575/2013 and to comply with prudential supervision under Directive 2013/36/EU.

(2) Certain criteria that, in accordance with Directive (EU) 2019/2034, shall be taken into account by competent authorities when exercising the discretion that an investment firm should remain within the scope of Regulation (EU) No 575/2013 and Directive 2013/36/EU should be further specified in this Regulation.

(3) In particular, with reference to point (a) of paragraph 1 of Article 5 of Directive (EU) 2019/2034, it should be specified that if an investment firm carries out activities exceeding at least one out of four quantitative thresholds for over-the-counter (OTC) derivatives, financial instruments underwriting and/or placing of financial instruments on a firm commitment basis, granted credits or loans to investors, and debt securities

[29] OJ L 314, 5.12.2019, p. 64–114.

outstanding, those activities are carried out on such a scale that the failure or the distress of the investment firm could lead to systemic risk.

(4) Furthermore, by reference to point (b) of paragraph 1 of Article 5 of Directive (EU) 2019/2034, cognisant of the overall theme of sistemicity in Article 5 and aware of the potential significant impact of a contagion effect across the financial sector, it should be further specified that an investment firm that is a clearing member as defined in point (3) of Article 4(1) of Regulation (EU) 2019/2033 shall be taken into account by competent authorities, when exercising the discretion that that firm should remain within the scope of Regulation (EU) No 575/2013 and Directive 2013/36/EU, if that firm is providing clearing member services to other financial institutions, which are not clearing member themselves.

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

(6) The EBA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Banking Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1093/2010[30],

HAS ADOPTED THIS REGULATION:

Article 1

Scale of activities

For the purposes of point (a) of paragraph 1 of Article 5 of Directive (EU) 2019/2034, the activities of an investment firm shall be considered on such a scale that the failure or distress of the investment firm could lead to systemic risk where the investment firm exceeds any of the following thresholds:

(a) total gross notional value of non-centrally cleared OTC derivatives of EUR 50 billion;

(b) total value of financial instruments underwriting and/or placing of financial instruments on a firm commitment basis of EUR 5 billion;

(c) total value of granted credits or loans to investors to allow them to carry out transactions of EUR 5 billion; and

(d) total value of debt securities outstanding of EUR 5 billion.

Article 2

Clearing member

For the purposes of point (b) of paragraph 1 of Article 5 of Directive (EU) 2019/2034, an investment firm which is a clearing member as defined in point (3) of Article 4(1) of Regulation (EU) 2019/2033 shall be taken into account by competent authorities when

[30] 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, 15.12.2020, p. 12).

exercising the discretion that that firm should remain within the scope of Regulation (EU) No 575/2013 and Directive 2013/36/EU, where the investment firm offers its clearing services to other financial sector entities which are not clearing members themselves.

Article 3

Entry into force

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

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

Done at Brussels,

For the Commission
The President

For the Commission
On behalf of the President

[Position]

10. Accompanying documents

10.1 Draft cost-benefit analysis/impact assessment

100. Article 10(1) of the Regulation (EU) No 1093/2010 (the EBA Regulation) provides that any draft RTS developed by the EBA must be accompanied by an analysis of 'the potential related costs and benefits'. This analysis should provide an overview of the findings regarding the problem to be dealt with, the solutions proposed and the potential impact of these options.

101. The EBA has conducted two data collections to inform the impact assessment and policy choices in these draft RTS. The first data collection was addressed to all EEA competent authorities with the aim of collecting basic characteristics of the EEA population of investment firms [31]. The second data collection was addressed to all EEA investment firms authorised and supervised under the MiFID, as well as investment firm groups that would be subject to prudential consolidation under the IFR/IFD, with the aim of assessing the impact of the provisions proposed in these draft RTS.

102. This section presents the cost-benefit analysis of the main policy options considered during the development of these draft RTS.

A. Background and problem identification

103. The EEA population of investment firms is both large and extremely diverse. At the end of December 2019, there were 2 537 investment firms authorised and supervised under the MiFID in the EEA, with total assets amounting to EUR 557 billion (**Error! Reference source not found.Error! Reference source not found.**)[32]. In terms of the number of investment firms, the majority are located in Germany (28.6%), followed by Spain (9.2%), the Netherlands (8.9%) and Cyprus (8.8%). In terms of total assets[33], a large share is located in France (73.8%)[34], followed by Ireland (5.7%) and Germany (4.7%).

[31] Competent authorities were asked to report data for all investment firms, as defined in point (22) of Article 4(1) of the IFR, authorised and supervised under Directive 2014/65/EU in their jurisdiction (i.e. excluding firms operating in their jurisdiction through a MiFID passport) on an individual basis.

[32] Slovakia did not participate in the exercise.

[33] Total assets exclude assets under management but include client money and financial instruments if on-balance sheet. Data on total assets were not reported for around 4% of the total number of investment firms. Thus, the total assets displayed in **Error! Reference source not found.**1 and **Error! Reference source not found.** may be understimated in some cases.

[34] The large share is driven by a few very large investment firms. These statistics include investment firms that are part of banking groups and investment firms that may be reclassified as credit institutions once the IFD and the IFR become applicable.

Table 1: Number and total assets of EEA investment firms, by country

Country	Number of investment firms	Share in terms of EEA total number (%)	Total assets (EUR million)	Share in terms of EEA total assets (%)
AT	64	2.5	225	0.0
BE	33	1.3	1 152	0.2
BG	38	1.5	10 510	1.9
CY	223	8.8	8 012	1.4
CZ	22	0.9	1 037	0.2
DE	726	28.6	25 954	4.7
DK	49	1.9	645	0.1
EE	5	0.2	72	0.0
ES	234	9.2	9 662	1.7
FI	50	2.0	360	0.1
FR	90	3.5	411 257	73.8
EL	46	1.8	918	0.2
HR	7	0.3	8	0.0
HU	10	0.4	9 484	1.7
IE	97	3.8	31 617	5.7
IS	9	0.4	24	0.0
IT	62	2.4	1 870	0.3
LI	104	4.1	383	0.1
LT	8	0.3	9	0.0
LU	89	3.5	1 423	0.3
LV	3	0.1	2	0.0
MT	62	2.4	18 301	3.3
NL	225	8.9	18 979	3.4
NO	107	4.2	2 472	0.4
PL	38	1.5	1 537	0.3
PT	28	1.1	182	0.0
RO	18	0.7	173	0.0
SE	88	3.5	1 042	0.2
SI (*)	2	0.1	N.A[35]	N.A
Total (*)	**2 537**	**100.0**	**557 310**	100.0

Source: 2020 EBA data collection on EEA population of investment firms.

(*) To ensure confidentiality, figures by country breakdown are only shown if there are at least three entities in each specific country.

104. All these firms vary greatly in terms of size, business model, risk profile, complexity and interconnectedness, ranging from one-person companies to large internationally active groups. As shown in Table 2, the vast majority of investment firms (38.5%) are portfolio managers, followed by multi-service investment firms (20.4%) and investment advisors (20.0%). However, multi-service investment firms account for a significant share in terms of total assets (77.9%).

[35] Information not available

Table 2: Number and total assets of EEA investment firms, by business model

Business model	Number of investment firms	Share in terms of total number (%)	Total assets (EUR million)	Share in terms of total assets (%)
Commodity and emission allowance dealers	12	0.5	30 403	5.5
Custodians	27	1.1	1 350	0.2
Execution brokers	280	11.0	13 959	2.5
Firms placing financial instruments on a firm commitment basis	8	0.3	7 221	1.3
Investment advisors	507	20.0	1 630	0.3
MTF or OTF	25	1.0	817	0.1
Multi-service investment firms	517	20.4	433 984	77.9
Portfolio managers	978	38.5	13 034	2.3
Trading firms	125	4.9	45 338	8.1
Wholesale market brokers	55	2.2	3 009	0.5
Total	**2 537**	**100.0**	**557 378**	**100.0**

Source: 2020 EBA data collection on EEA population of investment firms.

Note: Business models may not sum to total due to missing information for some investment firms.

105. **Error! Reference source not found.** shows the number of investment firms by MiFID services/activities authorised and the number of investment firms that are authorised to perform only one specific investment service/activity. Almost 80% of the investment firms are authorised to perform MiFID service/activity (1) and/or (5). A sizeable share (around 60%) is authorised to perform MiFID service/activity (2) and/or (4). At the other end, only a few investment firms are authorised to perform MiFID service/activity (6), (8) and/or (9).

106. Most investment firms are authorised to perform multiple MiFiD services/activities rather than a single service/activity. MiFID service/activity (5) appears to be the investment service/activity that is most frequently authorised when only one investment service/activity authorisation is requested.

Table 3: Number of EEA investment firms, by MiFID services/activities authorised

MiFID services/activities	Number of firms authorised to perform this activity	Of which number of firms authorised to perform only this activity
(1) Reception and transmission of orders in relation to one or more financial instruments	2 026	63
(2) Execution of orders on behalf of clients	1 499	5
(3) Dealing on own account	433	50
(4) Portfolio management	1 551	83
(5) Investment advice	2 009	206

MiFID services/activities	Number of firms authorised to perform this activity	Of which number of firms authorised to perform only this activity
(6) Underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis	176	0
(7) Placing of financial instruments without a firm commitment basis	474	5
(8) Operation of an MTF	48	0
(9) Operation of an OTF	48	0
Total number of investment firms	**2 537**	**2 537**

Source: 2020 EBA data collection on EEA population of investment firms.

107. Most investment firms (65.1%) are stand-alone entities (see **Error! Reference source not found.**). Around 25% are part of an EU investment firm group, whereas 5.5% belong to an EU banking group[36].

Table 4: Number of EEA investment firms, by group structure

	Number of investment firms
Single entity	1 652
Part of an EU banking group	139
Part of an EU investment firm group	608
of which: subject to prudential consolidation under IFD/IFR	523
Total	**2 537**

Source: 2020 EBA data collection on EEA population of investment firms.

108. Currently, the prudential treatment of investment firms is set out in the CRD/CRR framework. Depending on the services and activities they provide or perform or their size, some investment firms are exempt from prudential regulation, some are subject to lighter prudential regulations, and others are subject to the full CRD/CRR rules. **Error! Reference source not found.** shows that the majority of investment firms (91.0%) are currently subject to EU prudential requirements derived from the CRR/CRD.

Table 5: Number of EEA investment firms currently subject to EU prudential requirements derived from the CRR/CRD

Current prudential framework	Number of investment firms
Subject to any EU prudential requirements derived from the CRR/CRD	2 309
Not subject to any EU prudential requirements derived from the CRR/CRD	224
Total	**2 537**

Source: 2020 EBA data collection on EEA population of investment firms.

[36] Some investment firms may be part of the same EU investment firm group or EU banking group; therefore, the figures presented should not be interpreted as the number of investment firm groups or banking groups in the EU.

109. Although this ensured a level playing field between investment firms and credit institutions conducting the same investment services and/or activities, the bank-centric nature of the CRD/CRR made the framework less relevant for the specific risks posed by investment firms. Moreover, continuous developments to strengthen the prudential regulation for banks made the framework overly complex and burdensome for many smaller and less sophisticated investment firms.

110. As a result, the European Commission put forward a proposal for a new tailored prudential framework for investment firms in the form of a regulation (IFR) and a directive (IFD).

B. Policy objectives

111. The objectives of the draft RTS are to set common requirements for the prudential categorisation and calculations of capital requirements for investment firms. In particular, these draft RTS aim to supplement, at a technical level, the provisions of the IFD/IFR and contribute to achieving legal clarity.

112. Generally, the draft RTS aim to create a level playing field, promote convergence of investment firms' practices and enhance the comparability of own funds requirements across the EU. Overall, the draft RTS are expected to promote the effective and efficient functioning of the EU's investment firm sector.

C. Baseline scenario

113. The baseline scenario is the scenario against which the impact is assessed. The baseline scenario is the current situation, in which investment firms are subject to the CRD/CRR requirements as well as the current RTS thereof.

114. Currently, the prudential framework applied to investment firms depends on the firms' categorisation within the CRD/CRR framework. This categorisation is primarily determined by the MiFID investment services and activities that a firm offers and undertakes, as well as its ability to hold money and securities belonging to its clients. The 2015 EBA report on investment firms identified at least 11 different prudential categories, ranging from no capital requirements to the application of the full CRD/CRR.

D. Options considered, cost-benefit analysis and preferred options

115. This section will discuss separately the main policy options considered in each draft RTS, as well as the results of the voluntary data collection exercise conducted with investment firms.

Data collection with investment firms

116. The quantitative analysis presented in this section is based on the second data collection exercise conducted with investment firms and investment firm groups. Given that the IFR/IFD

and the provisions in these draft RTS are not yet applicable, investment firms have provided quantitative data on a voluntary and best efforts basis. Hence, the results of the cost-benefit analysis should be interpreted with caution, taking into account data quality and several simplifying assumptions.

117. Overall, 393 individual investment firms and 37 consolidated investment firm groups participated in the exercise, resulting in a total of 430 submissions in the initial sample (**Error! Reference source not found.**; **Error! Reference source not found.**).

Table 6: Number of submissions (i.e. initial sample before application of data quality criteria), by countryand reporting scope

Country	Individual	Consolidated	Total
AT	9	-	9
BE	6	1	7
BG	3	1	4
CY	40	4	44
CZ	13	1	14
DE	20	2	22
DK	10	-	11
EE	3	1	4
ES	16	-	16
FI	1	1	2
FR	33	5	38
HR	2	-	2
HU	7	-	7
IE	52	5	57
IT	13	4	17
LT	3	-	3
LU	53	2	55
LV	3	-	3
MT	17	2	19
NL	55	4	59
PL	1	2	3
PT	1	1	2
RO	16	-	16
SE	6	-	6
SI	2	1	3
SK	7	-	7
Total	**393**	**37**	**430**

Source: 2020 EBA data collection for investment firms.

Notes: Reporting scope may not sum to total due to missing information for some investment firms.

Table 7: Number of submissions (i.e. initial sample before application of data quality criteria), by business modeland reporting scope

Business model	Individual	Consolidated	Total
Commodity and emission allowance dealers	2	-	2
Custodians	8	-	8
Execution brokers (including reception and trasmission)	64	6	70
Firms placing financial instruments on a firm commitment basis	1	-	1
Investment advisors	42	2	45
MTF or OTF	6	-	6
Multi-service investment firms	127	12	139
Portfolio managers	102	7	109
Trading firms	31	7	38
Wholesale market brokers	8	1	9
Total	**393**	**37**	**430**

Source: 2020 EBA data collection for investment firms.

Note: Business models and reporting scope may not sum to total due to missing information for some investment firms.

118. For individual investment firms, the initial sample covers around 15% of the total number and 35% of the total assets of EEA investment firms. It represents 26 EEA countries[37] and all the business models identified in **Error! Reference source not found.**.

119. Depending on the data quality and the scope of the impact assessment, different samples have been used across each draft RTS[38] [39]. More details are provided under the respective sections that follow.

Overall impact

120. The analysis presented in this section is restricted to individual investment firms subject to the IFR/IFD. Some of these firms have been excluded from the analysis due to data quality issues, resulting in a sample of 354 investment firms.

121. **Error! Reference source not found.** presents the overall capital impact of implementing the IFD/IFR and related draft RTS by class and constraining requirement [40]. At EU level, the capital impact would stand at 52%. However, there is significant heterogeneity across firms, with an interquartile range of 0% to 223% and the median firm experiencing an impact of 20%. Class 3 firms constrained by the FOR would be the most affected (152%), followed by Class 2 firms

[37] None of the individual investment firms in Greece, Iceland, Lichtenstein and Norway participated in the exercise.

[38] For each analysis, only data quality checks pertaining to the variables of interest have been applied to ensure the maximum possible sample in each draft RTS.

[39] All analyses presented in this report exclude firms with the business model 'commodity and emmission allowance dealers' due to the limited sample available for this type of business model and the particuliarity of their business. The data provided by these firms have been analysed separately and are not presented in this impact assessment due to confidentiality reasons (less than three entities in the sample).

[40] A requirement is referred to as constraining if it imposes the largest amount of capital requirements among the requirements under consideration (here the PMCR, the FOR and K-factors).

constrained by K-factors (67%). However, Class 2 firms constrained by the PMCR (-33%) and the FOR (-1%) would experience a negative impact.

Table 8: Capital impact on individual investment firms, by classification and constraining requirement

Class	Constraining requirement	Number of investment firms	5th percentile (%)	25th percentile (%)	Median (%)	75th percentile (%)	95th percentile (%)	Mean (%)	Weighted average (%)
Class 2	PMCR	46	-78	-15	3	19	20	5	-33
	FOR	80	-63	-18	0	54	1 585	610	-1
	K-factors	69	-61	-14	55	248	2 418	531	67
Class 3	PMCR	40	-3	3	50	50	150	40	13
	FOR	119	-16	0	143	587	1 756	520	152
Total	**Total**	**354**	**-61**	**0**	**20**	**223**	**1 729**	**421**	**52**

Source: 2020 EBA data collection for investment firms.

122. Notes: Capital impact is measured as the percentage change in Pillar 1 minimum total capital requirements relative to current levels.**Error! Reference source not found.** shows the number of firms by constraining requirement. For Class 2, most firms are constrained by the FOR (80), followed by K-factors (69) and the PMCR (46). For Class 3, the majority of firms are constrained by the FOR (118).

Table 9: Number of banks broken down by constraining requirement, by class

Class	PMCR	FOR	K-factors	Total
Class 2	46	80	69	**195**
Class 3	40	119	-	**159**
Total	**86**	**199**	**69**	**354**

Source: 2020 EBA data collection for investment firms.

Draft RTS on the information to be provided for the authorisation of credit institutions (Article 8a(6) point (a) of the CRD)

123. Currently, investment firms are authorised to provide investment services and activities under the MiFID. The information provided in the application for the authorisation of investment firms varies across the EU and differs from the information provided in the application for the authorisation of credit institutions.

124. Under the new framework, investment firms that will qualify as credit institutions according to point (1)(b) of Article 4(1) of the CRR are required to submit an application for authorisation as credit institutions when reaching certain quantitative thresholds.

Article 8a(6)(a) of the CRD mandates the EBA to specify the information to be provided to the competent authorities in the application for this authorisation.

125. The EBA has already developed a similar RTS dealing with the information to be provided to the competent authorities in the application for the authorisation of credit institutions (RTS 'EBA/2017/08' submitted to the Commission in 2017 by the EBA – not yet adopted formally). These RTS include a pre-defined list of information to be provided in an application by entities seeking to obtain the authorisation referred to in Article 8(1) of the CRD. An example of such information consists of identification details and historical information of the applicant credit institution, including its existing licensing, activities proposed, current financial situation, programme of operations and initial capital. Moreover, the RTS introduced some flexibility, whereby national competent authorities are allowed to request additional information or waive the request of information subject to specified conditions. However, these RTS did not take into consideration the specificities of the investment firms' business model that would fall under the definition of credit institutions or any information collected as part of prior licences granted by a competent authority to the investment firms (e.g. the MiFID).

126. The objective of these draft RTS is to harmonise the requirements relating to the submission of applications for the authorisation of credit institutions. Operationally, the RTS and the respective ITS would specify a detailed list of information to be provided to the competent authorities in the application for the authorisation of credit institutions according to point (1)(b) of Article 4(1) of the CRR.

Reliance on the existing draft RTS 'EBA/2017/08'

127. The RTS are relevant to the credit institutions as defined in point (2)(b) of Article 4(1) of the CRR. The EBA has considered the following options.

Option 1a: Rely on the existing draft RTS 'EBA/2017/08'.

Option 1b: Develop a new proposal.

128. Option 1a builds on the existing RTS 'EBA/2017/08', which deal with the information required for the authorisation of credit institutions whose business also consists of taking deposits or other repayable funds from the public and granting credits for their own account, but aims to expand their scope to account for the specificities of investment firms. Under this option, the RTS would request the same information to be provided to the competent authorities in the application for the authorisation of credit institutions as requested in RTS 'EBA/2017/08'. In addition, they would allow competent authorities to request additional information if needed in order to be in a position to thoroughly assess the applicant credit institution.

129. This option takes advantage of the provisions that already exist, which have proved to work well. In this way, it ensures consistency and harmonisation of the authorisation information required for applicant credit institutions across Member States. At the same time, it ensures the necessary flexibility, by allowing competent authorities to request additional information if necessary.

130. Under Option 1b, the EBA would develop a very new proposal. This could potentially be inconsistent with the RTS that already exist and would require competent authorities to rely on different information for very similar authorisations.

131. Option 1a has been retained.

Draft RTS to specify the calculation of the fixed overheads requirement and to define the notion of a material change (Article 13(4) of the IFR)

132. Under the CRR, only investment firms that are subject to Article 95 or Article 96 are required to calculate their own funds requirements based on fixed overheads. Under Article 97 of the CRR, the FOR is for relevant firms to hold eligible capital of at least one quarter of the fixed overheads of the preceding year.

133. The EBA has already developed the RTS to specify the calculation of the fixed overheads requirements under the CRR[41]. However, these RTS were developed having in mind only a specific subset of investment firms that have limited authorisation to provide investment services, or only perform deals on own account to execute clients' orders or only perform deals on own account and do not have external clients or hold client money/securities.

134. In the IFR/IFD, the FOR is one of the major components of the capital requirements calculation and serves as a floor to the capital requirements for all investment firms. Small and non-interconnected investment firms would be subject to the maximum of the FOR and the PMCR, whereas all other firms would be subject to the maximum of the FOR, the PMCR and the K-factor requirement. Only investment firms that are subject to the CRR would no longer be subject to the FOR.

135. The objective of these draft RTS is to supplement, at a technical level, the provisions of the IFD/IFR and clarify how an investment firm should calculate its fixed overheads and what constitutes a material change in the activities of an investment firm.

Deductions

136. Article 13(4) of the IFR lists a number of deduction items that at least need to be included in the draft RTS FOR. However, this list is not necessarily exhaustive and the EBA could consider further deduction items. The EBA considered the following options related to deduction items.

Option 1a: Include only the list of deduction items listed in Article 13(4) of the IFR.

Option 1b: Supplement the above list with additional deduction items.

137. Under Option 1b, eight additional deductions have been considered and some of the existing deductions included in Article 13(4) have been clarified. This option takes into account the broader role of the FOR under the new regime and the fact that all investment firms,

[41] RTS on own funds requirements for investment firms based on fixed overheads.

including trading firms, need to calculate it. The additional deductions considered are as follows:

(a) Losses from trading in financial instruments. Losses from trading activity are not a fixed overhead, and a firm winding down may reduce or stop its trading activity entirely. Such losses should already be deducted from own funds, and, as the FOR is generally calculated only annually, based on the previous year's financial statements, any losses from trading financial instruments that form part of any expenditure in that previous year's financial statements should also not be counted towards expenditure/fixed overheads in the subsequent (i.e. current) financial year. Otherwise, this would lead to 'double counting' and would unnecessarily penalise such an investment firm. In addition, these losses do not constitute an item that requires further support in the current financial year from own funds, as it will not represent a new expense incurred should the investment firm wind down or otherwise seek to exit the market.

(b) Total expenses related to expenditures from taxes to the extent that they fall due on annual profits of the investment firm. This deduction aims to account for the fact that a firm that is winding down is unlikely to make profits and therefore has to pay income tax on net profits.

(c) Fees, brokerage and other charges paid to central counterparties, exchanges and other trading venues and intermediate brokers for the purposes of executing, registering or clearing transactions, only if they are passed on and charged to customers. These should not include fees and other charges that are necessary to maintain membership or otherwise meet loss-sharing financial obligations to central counterparties, exchanges and other trading venues, which are considered to count among the fixed costs of an investment firm.

(d) Total expenses related to interest paid to customers on client money if there is no obligation of any kind to pay such interest.

(e) Payments related to contract-based profit and loss transfer agreements according to which the investment firm is obliged to transfer, following the preparation of its annual financial statements, its annual result to the parent undertaking. Depending on the national accounting system, these contract-based transfer profits could be considered an expense, although they are an alternative way to distribute profits. Given that the FOR is designed to ensure that the investment firm has enough money to run the business during the winding down period, transferring profits is not considered among the relevant costs. It constitutes variable costs and depends on the fact that the investment firm has made a profit. If there is any profit at the end of the winding down period, it may be transferred. If there is a loss at the end of the winding down period, the parent undertaking is obliged to compensate. As result, there is economically no need to provide for this risk.

(f) Payments into a fund for general banking risk in accordance with Article 26(1)(f) of the CRR. These payments represent a realised loss for the previous year.

(g) Expenses related to items that have already been deducted from own funds in accordance with Article 36(1) of the CRR to avoid double counting.

(h) Expenses related to raw materials to account for the particular business of commodity and emission allowance dealers.

138. Option 1b has been retained.

Results from the data collection

139. The analysis presented in this section is restricted to individual investment firms subject to the IFR/IFD that are constrained by the FOR. Some of these firms have been excluded from the analysis due to data quality issues, resulting in a sample of 194 investment firms.

140. **Error! Reference source not found.** shows the distribution of the ratio of total deductions to total expenses of the previous year after the distribution of profits[42]. At EU level, total deductions account for 37.0% of the total expenses of the previous year after the distribution of profits. The ratio is lower (10.9%) for the median bank, with an interquartile range of 1.0% to 32.4%. For a few outlier firms, deductions account for a substantial share of the total expenses, with the 95th percentile standing at 81.8%.

Table 10: Ratio of total deductions to total expenses of the previous year after distribution of profits, distribution across investment firms

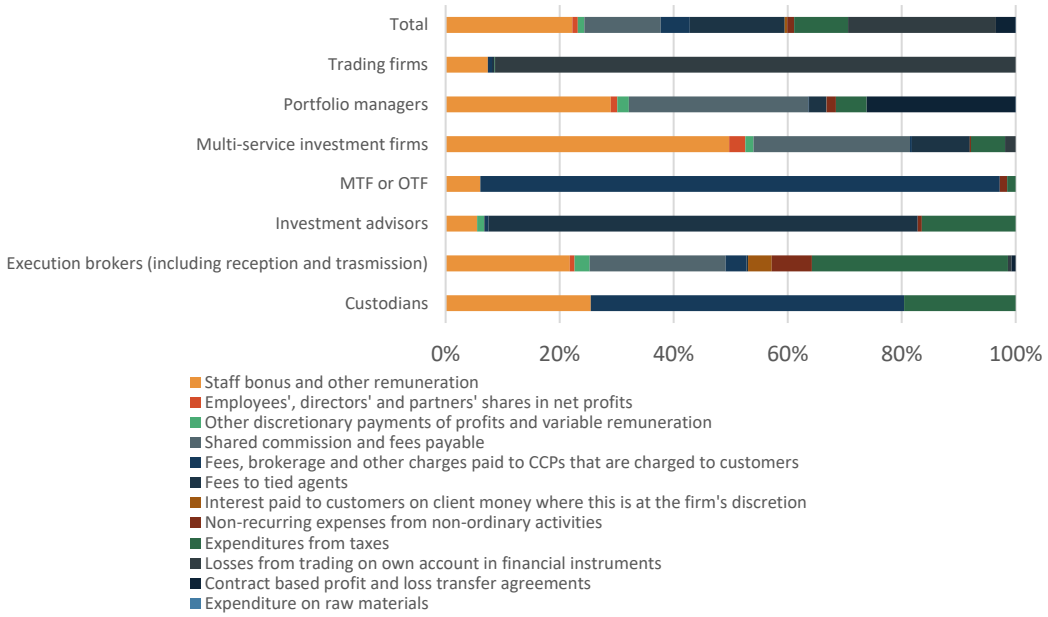
	Number of investment firms	5th percentile (%)	25th percentile (%)	Median (%)	75th percentile (%)	95th percentile (%)	Mean (%)	Weighted average (%)
Total	194	0.0	1.0	10.9	32.4	81.8	21.6	37.0%

Source: 2020 EBA data collection for investment firms.

141. **Error! Reference source not found.** shows the breakdown of total deductions by type and business model. Overall, losses from trading on own account in financial instruments, staff bonuses and other remuneration and fees to tied agents account for the larger share of total deductions at EU level. The type of deductions differs considerably among business models. For trading firms, the deductions come mainly from losses from trading on own account in fianancial instruments. For portfolio managers, staff bonuses and other remuneration, shared commission and fees payable and contract-based profit and loss transfer agreements are equally important and account for the largest share of deductions. For investment advisors, fees to tied agents appear to be the most material deduction. For multi-service investment firms, the deductions are mainly staff bonuses and other remuneration, shared commission and fees payable. However, fees, brokerage and other charges paid to CCPs that are charged to customers account for a large share of total deductions for MTF or OTF and custodians. Expenditures from taxes seem to be a relevant deduction item for execution brokers (including reception and transmission), together with staff bonuses and other remuneration and shared commission and fees payable.

[42] The ratio presented in this table may be somewhat underestimated, given that two more deduction items were added to the draft RTS after the consultation, for which data were not collected as part of the data collection.

Figure 1: Deductions by type and business model



Source: 2020 EBA data collection for investment firms.
Note: Sample of 194 investment firms; custodians (4), execution brokers (including reception and transmission) (26), firms placing financial instruments on a firm commitment basis (1)*, investment advisors (22), MTF or OTF (4), multi-service investment firms (53), portfolio managers (75), trading firms (7), and wholesale market brokers (2)*.
(*) To ensure confidentiality, figures by business model breakdown are only shown if there are at least three entities in each specific business model.

142. **Error! Reference source not found.** shows the absolute and relative variation in annual fixed overheads for the previous year after the distribution of profits and projected fixed overheads for the current year. For 18.5% of the firms in the sample, the absolute variation in fixed overheads is equal to or greater than EUR 2 million. For around 28.1% of the firms in the sample, the relative variation in fixed overheads is equal to or greater than 30%. Around 12.9% of the firms meet both aforementioned thresholds for the absolute variation and the relative variation, whereas 33.7% meet either of the two thresholds.

Table 11: Absolute and relative variation of fixed overheads

Absolute/relative variation	< 10%	[10%,20%)	[20%,30%)	[30%,40%)	[40%,50%)	≥ 50%	Total
< 1 million EUR	64	28	16	3	5	13	129
[1 million EUR, 2 million EUR)	6	2	2	3	-	3	16
[2 million EUR, 3 million EUR)	3	2	-	-	1	7	13
[3 million EUR, 4 million EUR)	1	1	-	-	-	3	5
[4 million EUR, 5 million EUR)	-	-	-	1	-	4	5

Absolute/relative variation	< 10%	[10%,20%)	[20%,30%)	[30%,40%)	[40%,50%)	≥ 50%	Total
≥ 5 million EUR	1	1	1	4	1	2	10
Total	**75**	**34**	**19**	**11**	**7**	**32**	**178**

Source: 2020 EBA data collection for investment firms.

Note: Negative variations are considered in absolute terms. An open interval does not include its endpoint and is indicated by a parenthesis. A close interval includes its entpoint and is indicated by a square brucket. For example, the interval [10%,20%) means greater than or equal to 10% and less than 20%.

Draft RTS to specify the methods for measuring the K-factors (Article 15(5) point (a) of the IFR)

143. According to the IFR, all investment firms that are not small and non-interconnected are required to calculate the K-factor capital requirements. Article 15(5) of the IFR requires the EBA to specify the methods for measuring these K-factors. It should be noted that the IFR already prescribes certain provisions regarding how to measure K-factors. Moreover, a separate mandate specifically for K-CMG exists under Article 23(3) of the IFR.

144. The objective of these draft RTS is to complement, at a technical level, these provisions and clarify further the scope of the K-factors. These clarifications will ensure a consistent calculation of K-factors across investment firms and enhance the level playing field in the EU.

K-AUM: Methods for measuring the AUM in the event of discretionary portfolio management

Option 1a: Allow offsetting of positions in financial instruments.

Option 1b: Do not allow offsetting of positions in financial instruments.

145. Investment firms are required to calculate the value of AUM based on the fair value of the financial instruments in accordance with the applicable accounting standards. This fair value can be negative, for example for derivative positions.

146. Under option 1a, investment firms can calculate the AUM by offsetting positive and negative positions. However, the purpose of K-AUM requirements are to capture the risk of harm to clients from incorrect discretionary management of client portfolios or poor execution. Such operational risk could be diluted under this option, because, for example, a firm with higher volumes of financial instruments may end up having lower K-AUM requirements, simply because some of them have negative values (and are therefore offset by positions with positive values), which lowers the AUM metric. This risk may be amplified in cases in which an investment firm uses derivatives or other means of leverage for client portfolios. As a result, although this option would be the simplest, it would also be the least prudent.

147. However, option 1b would be able to capture such operational risk. Under this option, investment firms are required to include the financial instruments with a negative fair value in absolute value. As a result, the AUM would capture the actual volume of discretionary portfolio management, irrespective of whether the financial instrument has a positive or negative value.

148. Option 1b has been retained.

Results from the data collection

149. The analysis presented in this section is restricted to individual investment firms subject to the IFR/IFD that are constrained by the K-factors. Some of these firms have been excluded from the analysis due to data quality issues, resulting in a sample of 69 investment firms.

150. **Error! Reference source not found.** shows the marginal contribution of each K-factor to the total K-factor requirements by business model. At EU level, most of the impact is driven by K-CMG (62%), followed by K-NPR (15%). This can be partly explained by the business model coverage in the sample; trading firms and multi-service investment firms represent 20.3% and 43.5%, respectively. These firms usually have larger requirements and, as a result, their contribution weighs more in the aggregate results.

151. Looking at the variation across business models, the results are generally in line with expectations. For execution brokers (including reception and transmission), the most important K-factor is K-COH cash (55%), followed by K-COH derivatives (30%). For portfolio managers, K-AUM (96%) has the largest contribution to total K-factor requirements, whereas for wholesale market brokers K-CMG (81%) appears to be the most material contributor.

Table 12 Marginal contribution of each K-factor to the K-factor capital requirements

Business model	Number of investment firms	% K-AUM	% K-CMH (segregated accounts)	% K-CMH (non-segregated accounts)	% K-ASA	% K-COH (cash)	% K-COH (derivatives)	% K-NPR	% K-CMG	% K-TCD	% K-DTF (cash)	% K-DTF (derivatives)	% K-CON
Execution brokers (including reception and transmission)	13	0	3	0	2	55	30	8	0	1	0	0	1
Multi-service investment firms	30	4	4	1	7	0	1	40	12	14	5	0	11
Portfolio managers	6	96	0	0	0	0	0	3	0	0	0	0	0
Trading firms	14	0	0	0	0	0	0	5	92	1	1	1	0
Wholesale market brokers	3	0	0	8	2	0	0	2	81	4	2	1	0
Total	**69**	**3**	**1**	**1**	**2**	**4**	**2**	**15**	**62**	**5**	**2**	**0**	**3**

Source: 2020 EBA data collection for investment firms.

Note: Sample of 69 investment firms; custodians (2)*, execution brokers (including reception and transmission) (13), firms placing financial instruments on a firm commitment basis (1)*, investment advisors (1)*, MTF or OTF (0)*, multi-service investment firms (30), portfolio managers (6), trading firms (14), and wholesale market brokers (3).

The marginal contribution of each K-factor is the sum of all investment firms' K-factor in the relevant business model divided by the sum of all investment firms' K-factor capital requirements in the relevant sample.

(*) To ensure confidentiality, figures by business model breakdown are only shown if there are at least three entities in each specific business model.

Draft RTS on the definition of segregated account (Article 15(5) point (b) of the IFR)

152. Under the K-factor requirement, the investment firm can assign different coefficients to K-CMH, depending on whether or not the client's money is held in segregated accounts. Segregated accounts are considered safer, because the client's money is separated from the investment firm's own money, and, in the event of the firm's default, it is easier for the client to retrieve their money. As a result, client money held in segregated accounts receives a lower coefficient (0.4%) than client money held in non-segregated accounts (0.5%).

153. Article 5(15) of the IFR requires the EBA to specify the notion of segregated accounts for the purposes of this regulation for the conditions that ensure the protection of client money in the event of failure of an investment firm.

154. The objective of these draft RTS is to harmonise the notion of segregated accounts for the purpose of calculating the K-factor requirements across the EU.

Segregated account conditions

155. Segregated accounts are already defined in point (49) of Article 4(1) of the IFR for the purposes of Table 1 set out in Article 15(2) of the IFR in which a reference is made to client money being deposited in accordance with Article 4 of the Commission Delegated Directive (EU) 2017/593. That Commission Delegated Directive aims to protect client money by specifying organisational requirements for investment firms.

156. Given that the notion of segregated accounts referred to in point (b) of Article 15(5) of the IFR has the same objective of protecting client money, the organisational requirements referred to previously should be met in the context of prudential requirements.

157. Therefore, these draft RTS have established a subset of the same requirements as those in the Commission Delegated Directive that are relevant to the notion of segregation. In particular, Article 2(1) of that directive establishes requirements that relate to the concept of segregated accounts.

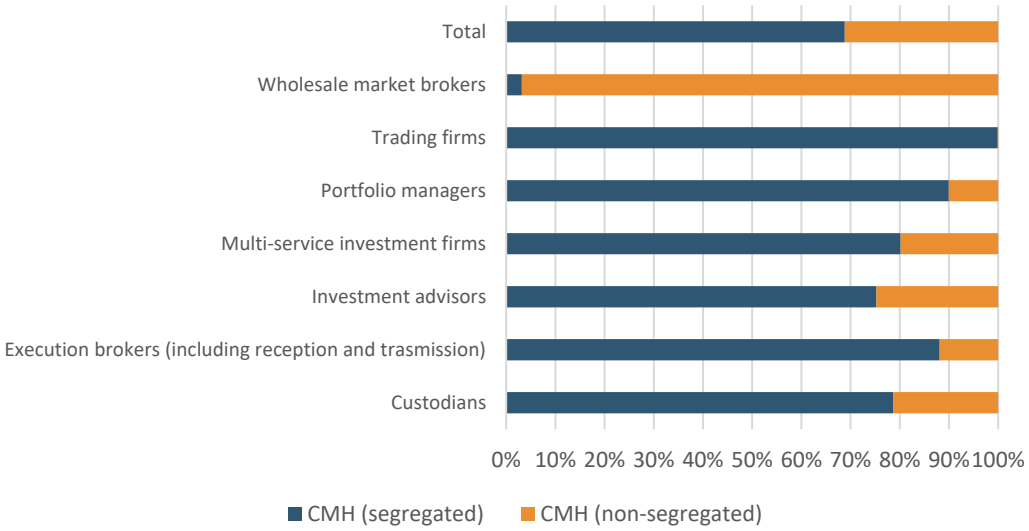
158. Additional provisions included in the Commission Delegated Directive have been considered but have not been retained for two main reasons. First, they were not relevant to the notion of segregation and the conditions that ensure the protection of client money in the event of failure of an investment firm. Second, they allowed Member States to prescribe national-specific requirements, whereby the provisions of Article 2(1) of that directive could not be met due to the applicable law of the jurisdiction. Although these requirements aim to have an equivalent effect in terms of safeguarding clients' rights and meet the same objectives as those of Article 2(1), they can impair the harmonisation of the notion of segregated accounts for the purposes of calculating the K-factor requirements and create an unlevel playing field across the EU.

Results from the data collection

159. The analysis presented in this section is restricted to individual investment firms subject to the IFR/IFD that hold client money. Some of these firms have been excluded from the analysis due to data quality issues, resulting in a sample of 108 investment firms.

160. Figure 2 shows that, on an aggregated level, CMH segregated accounts encompass the larger share of total CMH (68.8%). This holds true across business models with the exception of wholesale market brokers, for which CMH segregated accounts encompass only a very small share of the total (3.2%). However, the results for wholesale market brokers are driven by an outlier. The majority of wholesale market brokers have their CMH in segregated accounts.

Figure 2: CMH broken down by segregated and non-segregated accounts, by business model



Source: 2020 EBA data collection for investment firms.
Note: Sample of 69 investment firms; custodians (5), execution brokers (including reception and transmission) (29), firms placing financial instruments on a firm commitment basis (0)*, investment advisors (3), MTF or OTF (0)*, multi-service investment firms (53), portfolio managers (6), trading firms (7), and wholesale market brokers (5).
(*) To ensure confidentiality, figures by business model breakdown are only shown if there are at least three entities in each specific business model.

Draft RTS to specify adjustments to the K-DTF coefficients (Article 15(5) point (c) of the IFR)

161. Under the K-factor requirement, investment firms are required to capitalise the operational risk stemming from their daily trading flow, which could result from inadequate or failed internal processes, people and systems or from external events. K-DTF captures the volume of transactions – both cash and derivatives trades – that the investment firm concluded for its own account or for its clients in its own name. The K-DTF capital requirement is linear to this volume of trades.

162. In exceptional cases, investment firms are allowed to apply an adjustment to the K-DTF coefficients when the K-DTF requirements seem overly restrictive and detrimental to financial stability. The rationale behind such an adjustment is to avoid situations in which investment firms are faced with unusually high capital requirements due to stressed market conditions, which can force them to reduce their trading activities and consequently market liquidity. Article 15(5) of the IFR requires the EBA to specify such adjustments.

163. The objective of these draft RTS is to harmonise the way investment firms can adjust the K-DTF coefficients in the event of stressed market conditions across the EU. Operationally, the draft RTS provide a formula that investment firms can use to calculate the adjusted coefficients.

Exceptional cases

The Delegated Regulation 2017/578 sets out the detailed obligation for investment firms to enter into a market making agreement, as well as its content, and obligations placed on trading venues for having market making schemes in place. Under such an agreement, investment firms are obliged to provide liquidity on a regular and predictable basis. However, in exceptional cases, such an obligation should not apply. These exceptional cases for the purpose of adjusted K-DTF may include situations of exceptional circumstances as set out in Article 2 of the Delegated Regulation 2017/578. The EBA has considered that only situations of extreme volatility (Article 3(a)) outlined in Regulation 2017/578 should be considered for the purpose of adjusting K-DTF. The other situations (Article 3(b) to (e)) outlined in that regulation appear to either prevent the trading venue from operating effectively or involve the investment firm being prevented from doing so. In such circumstances, it is unlikely that trading volumes would be so unusual as to lead to an overly high/restrictive K-DTF requirement (and that would also affect the DTF average calculation). However, such exceptional circumstances take place extemely rarely; therefore, adjusted K-DTF would be barely used.

164. Exceptional cases may, for the purpose of adjusted K-DTF, include situations of stressed market conditions as referred to in Article 6(2) of the Delegated Regulation 2017/578. Those situations are identified by trading venues. However, adjusted K-DFT must be used only in cases in which requirements seem overly restvictive and detrimental to financial stability; therefore, stressed market conditions should cover only those situations that lead to increased trading volume.

165. The EBA has assessed whether an adjustment to the K-DTF coefficients is desirable under all of these circumstances or only a subset of them. In particular, the draft RTS specify that the adjustment coefficient should be based on the DTF after excluding the value of any trade that occurred during periods of stressed market conditions.

Option 1a: Consider exceptional cases a subset of ‘exceptional circumstances’ as set out in Article 2 of the MiFID Delegated Regulation (EU) 2017/578.

Option 1b: Consider exceptional cases 'stressed market conditions' that lead to increased trading volume as set out in Article 6(2) of the MiFID Delegated Regulation (EU) 2017/578.

166. Under option 1a, the situation appears to be the most directly relevant to financial stability considerations but could be used in extremely rare cases.

167. Under option 1b, the situation could be used when trading venues identify such stressed market conditions.

168. Option 1b has been retained.

Draft RTS to specify the calculation of the amount of the total margin for the calculation of K-CMG (Article 23(3) of the IFR)

169. An investment firm can calculate the RtM K-factor requirement using K-CMG instead of K-NPR under certain conditions and upon the approval of its competent authority. K-NPR relies on the market risk approaches prescribed in the CRR and CRR II, whereas K-CMG is based on the amount of total margin required by the clearing member from the investment firm.

170. Article 23(3) of the IFR requires the EBA to specify the calculation of the amount of the total margin required, the method of calculation of K-CMG, in particular in the event that K-CMG is applied on a portfolio basis, and the criteria to avoid regulatory arbitrage.

171. The objective of these draft RTS is to harmonise the way investment firms calculate K-CMG across the EU and establish minimum requirements to ensure that the method for calculating K-CMG has not been made with a view to engaging in regulatory arbitrage.

Portfolio interpretation

172. K-CMG can be calculated for all positions that are subject to clearing, or on a portfolio basis, if the whole portfolio is subject to clearing or margining. Given that there is no definition of 'portfolio' in the IFD/IFR, the EBA has considered the following options:

Options 1a: Align the interpretation of a 'portfolio' with the notion of 'trading desk' in point (144) of Article 4(1) of CRR II.

Option 1b: Allow a flexible definition of a 'portfolio' subject to supervisory approval.

173. CRR II, following the Fundamental Review of the Trading Book standards, introduced an alternative internal model approach. Investment firms should ask permission to use this approach at the trading desk level; a trading desk in this regard means a well-identified group of dealers set up by the institution to jointly manage a portfolio of trading book positions in accordance with a well-defined and consistent business strategy and operating under the same risk management structure.

174. Option 1a considers that each trading desk constitutes a whole portfolio for which K-CMG can be calculated. By aligning the notion of a portfolio with these trading desks, some trading desks would be allowed to apply K-CMG and others would not (i.e. they would use K-NPR).

The advantage of this option is that trading desks clearly identify and separate parts of the trading business that are mostly aligned with the day-to-day practice of trading business.

175. Option 1b presents a more flexible approach, whereby an investment firm could determine the choice of the portfolio subject to supervisory approval. This option would require the competent authority to assess individually whether the allocation of cleared positions to a portfolio is appropriate for the purposes of calculating K-CMG and has not been made with a view to engaging in regulatory arbitrage. This would create an additional burden for the competent authority and potential inconsistencies in the definition of 'portfolio' across the EU, given that competent authorities may have different practices for assessing and approving such an allocation.

176. Option 1a has been retained.

K-CMG calculation when investment firms use multiple clearing members

177. K-CMG must be calculated for the total margin required for each portfolio of trading book positions of the clearing member. Investment firms can use multiple clearing members. If an investment firm uses K-CMG for positions that are subject to clearing by multiple clearing members, K-CMG must cover all amounts of the total margin required of all clearing members.

178. The amounts of the total margin of all clearing members can be calculated by using several different methods. One method would be determining the third highest amount of the total margin required of each clearing member. However, this method might incentivise investment firms to use only one clearing member.

179. Another method for the calculation of K-CMG when an investment firm uses multiple clearing members is to calculate the amount of the total margin required by adding all total margins required by all clearing members and then determining the third highest amount.

Options 1a: Calculate K-CMG by determining the third highest amount of the total margin required across all clearing members.

Option 1b: Calculate K-CMG by first determining the third highest amount for each of the clearing members and then adding these amounts together.

Option 1a for positions for which K-CMG is applied is comprehensive and included the full margin required by all clearing members, and does not limit the use of several clearing members.

Option 1a has been retained (whereas option 1b was suggested in the consultation paper).

Results from the data collection

180. The analysis presented in this section is restricted to individual investment firms subject to the IFR/IFD and to K-RtM. Some of these firms have been excluded from the analysis due to data quality issues, resulting in a sample of 83 investment firms.

181. **Error! Reference source not found.** shows that the majority of firms in the sample use K-NPR only (74.7%), with a few using K-CMG only (12.0%) and some both (13.3%). However, Figure 4 shows that K-CMG accounts for a larger share of K-RtM overall (78.8%). This is particularly true for wholesale market brokers and trading firms, whereas for the rest of the business models K-NPR has a dominant role.

Figure 3 Number of firms using K-NPR and/or K-CMG

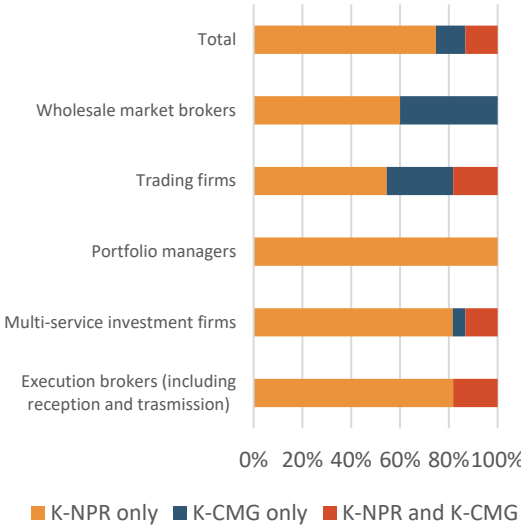
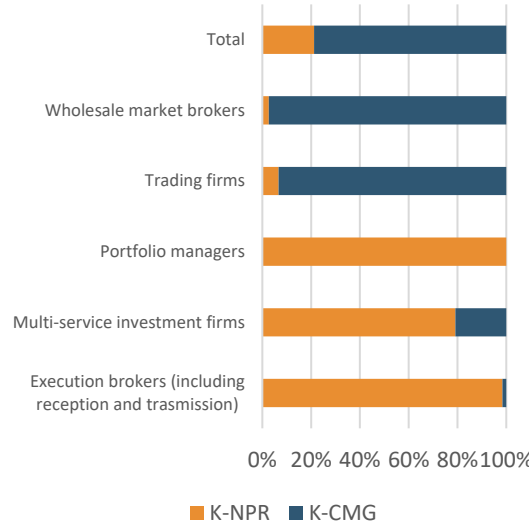


Figure 4 Marginal contribution of K-NPR and K-CMG to K-RtM



sSource: 2020 EBA data collection for investment firms.

Note: Sample of 84 investment firms; custodians (1)*, execution brokers (including reception and transmission) (11), firms placing financial instruments on a firm commitment basis (1)*, investment advisors (2)*, MTF or OTF (0)*, multi-service investment firms (38), portfolio managers (3), trading firms (23), and wholesale market brokers (5).

(*) To ensure confidentiality, figures by business model breakdown are only shown if there are at least three entities in each specific business model.

Draft RTS on the criteria for subjecting certain investment firms to the CRR (Article 5(6) of the IFD)

182. Some investment firms present comparable risks to financial stability as credit institutions. Article 5(1) of the IFD allows competent authorities to apply the CRR to an investment firm that (i) performs the activities of dealing on own account or underwriting, (ii) has total assets that exceed EUR 5 billion and (iii) poses a systemic risk or is a clearing member or whose activities justify such treatment in the light of their size, nature, scale and complexity .

183. Article 5(6) of the IFD requires the EBA to further specify the criteria for systemic risk and clearing members. However, no mandate has been provided to specify the criterion for the size, nature, scale and complexity of activities. This provides the competent authorities with the discretion to subject other investment firms to the CRR requirements should they consider that this is justified in the light of the size, nature, scale and complexity of the activities of the investment firm concerned. Given that this discretion provides competent authorities with a considerable degree of flexibility in reflecting national specificities, these draft RTS have given a greater emphasis on simplicity and harmonisation.

184. The objective of these draft RTS is to provide a set of common criteria for subjecting an investment firm to the CRR. Operationally, the draft RTS would facilitate competent authorities in deciding which investment firm should be subject to the CRR by setting up precise quantitative criteria and the respective methodology.

Quantitative criteria for investment firms posing systemic risk

185. The EBA has developed a list of quantitative criteria for identifying investment firms posing systemic risk. To assess the levels of such risk, the EBA has considered two types of thresholds.

Option 1a: Use absolute thresholds.

Option 1b: Use relative thresholds.

186. Under option 1a, the competent authority would need to check if the investment firm exceeds one or more absolute thresholds, to assess if it can apply the CRR to that particular firm. This option has the advantage of being simple and harmonised and requiring a limited amount of data.

187. Option 1b follows a similar approach to the other systematically important insititution methodology, which is also based on the relative size of an individual firm compared with the total size of banks and/or investment firms in a Member State. This option has the benefit of taking into account the heterogeneous market landscape of the EU. Under this option, the question arises of whether the reference group (i.e. the scope of the denominator of the relative threshold) is both banks and investment firms or solely investment firms. In the former case, the competent authority would need to have data for both banks and investment firms, which may be unlikely in cases in which there is a different supervisory authority responsible for banks and investment firms in a Member State. In the event that the reference group is only investment firms, there is the risk that, in Member States with few investment firms, some investment firms may exceed the thresholds even if they do not pose a systemic threat to the domestic economy. In any case, option 1b is considered to be more burdensome and is likely to result in higher administrative costs for both competent authorities and investment firms.

188. Given that the benefits of option 1b in reflecting the specificities of each Member State's investment firm sector can be achieved through the national discretion provided in point (c)

of Article 5(1) of the IFD, the EBA is proposing to use only absolute thresholds to avoid unnecessary complexity and reduce the administrative burden for competent authorities.

189. Option 1a has been retained.

Clearing member criterion

190. Article 5(6) of the IFD requires the EBA to further specify the criteria for being a clearing member for the purposes of subjecting an investment firm to the CRR. The EBA has considered the following options as further criteria for the purposes of meeting point (b) of Article 5(1) of the IFD:

Option 2a: Specify a quantitative threshold.

Option 2b: Clarify the conditions under which a clearing member could represent a systemic threat.

191. Under option 2a, the draft RTS could set a minimum threshold for the amount of clearing business that needs to be exceeded before investment firms can be considered to have met the criteria under point (b) of Article 5(1) of the IFD. However, the EBA has considered that an investment firm that was able to become a clearing member of a CCP should already have a sufficient number of clearing positions to make them systemically relevant, and thus a quantitative threshold may be less appropriate for this purpose.

192. Option 2b would distinguish between clearing members that offer their clearing services to other financial institutions that are not clearing member themselves. This option takes into account the fact that clearing members that clear positions for other financial sector entities that are not clearing members themselves are more interconnected with the financial sector and therefore pose a greater systemic threat.

193. The EBA considered that the aspect of interconnectedness was more important than a quantitative threshold for the purposes of subjecting an investment firm to the CRR.

194. Option 2b has been retained.

Results from the data collection

195. The analysis presented in this section is restricted to individual investment firms that carry out any of the activities listed in points (3) and (6) of Section A of Annex I to Directive 2014/65/EU, and that are not commodity and emission allowance dealers, collective investment undertakings or insurance undertakings. Some of these firms have been excluded from the analysis due to data quality issues, resulting in a sample of 111 investment firms.

196. The total value of the consolidated assets of 8 of these 111 firms is equal to or exceeds EUR 5 billion, and one or more of the criteria in Article 5(1)(a) and (b) apply to these 8 firms (as further specified in the draft RTS).

Additional results on the overall impact of investment firm groups

197. The analysis presented in this section is restricted to individual investment firm groups. Some of these groups have been excluded from the analysis due to data quality issues, resulting in a sample of 34 investment firm groups.

198. Table 13 presents the overall capital impact of implementing the IFD/IFR and related draft RTS by class and constraining requirement [43]. At EU level, the capital impact would stand at -26%[44]. However, there is significant heterogeneity across firms, with an interquartile range of -42% to 43% and the median firm experiencing an impact of -2%. Class 3 firms constrained by the FOR would be the most affected (55%). However, Class 2 firms constrained by the FOR would experience a negative impact.

Table 13: Capital impact on individual investment firms, by classification and constraining requirement

Class	Constraining requirement	Number of investment firms	5th percentile (%)	25th percentile (%)	Median (%)	75th percentile (%)	95th percentile (%)	Mean (%)	Weighted average (%)
Class 2	PMCR(*)	3	-	-	-	-	-	-7	-10
	FOR	15	-70	-53	-4	21	478	20	-47
	K-factors	12	-50	-39	-22	71	325	29	-9
Class 3	FOR(*)	4	-	-	-	-	-	321	55
Total	Total	34	-70	-42	-2	43	478	56	-26

Source: 2020 EBA data collection for investment firms.

Notes: Capital impact is measured as the percentage change in Pillar 1 minimum total capital requirements relative to current levels(*) To ensure confidentiality, percentile figures are only shown if there are at least five entities in each specific country.

199. Table 14 shows the number of firms by constraining requirement. For Class 2, most firms are constrained by the FOR (15), followed closely by K-factors (12). For Class 3, the majority of firms are constrained by the FOR (19).

Table 14: Number of investment firms broken down by constraining requirement, by class

Class	PMCR	FOR	K-factors	Total
Class 2	3	15	12	30
Class 3	0	4	-	4

[43] A requirement is referred to as constraining if it imposes the largest amount of capital requirements among the requirements under consideration (here the PMCR, the FOR, K-factors).

[44] The wegihted average is driven by some large outlier firms.

Class	PMCR	FOR	K-factors	Total
Total	**3**	**19**	**12**	**34**

Source: 2020 EBA data collection for investment firms.

10.2 Views of the Banking Stakeholder Group

The EBA Banking Stakeholder Group provided no comment on these draft RTS.

10.3 Feedback on the public consultation

The EBA publicly consulted on the draft proposal contained in this paper.

The consultation period lasted for 3 months and ended on 4 June 2020. Overall, 26 responses were received, of which 21 were published on the EBA website.

This paper presents a summary of the key points and other comments arising from the consultation, the analysis and discussion triggered by these comments and the actions taken to address them if deemed necessary.

In many cases, several industry bodies made similar comments or the same body repeated its comments in its responses to different questions. In such cases, the comments and the EBA analysis are included in the section of this paper that the EBA considers most appropriate.

Changes to the draft RTS have been incorporated as a result of the responses received during the public consultation.

Summary of key issues and the EBA's response

200. Stakeholders provided general comments on various issues of the draft RTS. If relevant, the EBA has addressed these issues and changed the draft RTS accordingly. The following paragraphs summarise the key issues.

201. With regard to the draft RTS to specify the calculation of the amount of the total margin for the calculation of K-CMG (Article 23(3) of the IFR), many respondents disagreed with provisions regarding the prevention of regulatory arbitrage. Respondents argued that the difference between K-CMG and K-NPR should not limit the use of K-CMG as an alternative to risk to market. In addition, respondents suggested replacing the 24-month period for the consistent use of one of the factors with a 12-month period. The EBA considers that provisions of the draft RTS limit the opportunity to engage in regulatory arbitrage; in addition, frequent switching between factors can indicate regulatory arbitrage.

202. With regard to the draft RTS to specify adjustments to the K-DTF coefficients (Article 15(5) point (c)), respondents had two main concerns. The first concern relates to adjustments to the K-DTF coefficients. One respondent mentioned that, for the K-DFT calculation, using a 9-month rolling average is not enough to smooth out volume spikes during trading spikes, and one respondent suggested, for the adjusted K-DTF factor, deleting data points of days of period of stressed market conditions. However, such a suggestion is inconsistent with the mandate set out in the IFR and cannot be considered. One respondent pointed out that the formula is confusing, since it includes the term 'cash trades' for derivatives and otherwise.

The provisions clarifying the formula have been amended.The second issue regarding these draft RTS concerns the scope of stressed market conditions. Respondents disagreed with the limited approach of using exhaustive stressed market conditions and suggested using a statistical historical method; however, such a suggestion is inconsistent with the mandate set out in the IFR and cannot be considered. The EBA is of the view that adjusted K-DTF must be used only in situations that lead to increased trading volumes. Therefore, the draft RTS have been amended to change the scope of stressed market conditions by referring to stressed market conditions that lead to increased trading volumes as referred to in Article 6(2) of the Commission Delegated Regulation 2017/578.

10.3.1 Draft RTS on the information to be provided for the authorisation of investment firms as credit institutions (Article 8a(6) point (a) of the CRD)

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
Thresholds	It is our understanding that large investment firms that (i) deal on own account, underwrite financial instruments or place financial instruments on a firm commitment basis, and that (ii) exceed the threshold of EUR 15 billion as stipulated in Article 1(2) of the IFR but that (iii) do not exceed the threshold of EUR 30 billion taken from Article 4(1)(1)(b) of the CRR (as amended) will continue to qualify as investment firms while being obligated to comply with the prudential requirements in the CRR/CRD instead of the IFR/IFD. For complete certainty and clarity, it would be desirable to have a recital inserted that confirms that such firms do not need to seek authorisation as a credit institution according to Article 8a of the CRD (as amended).	Level 1 text is clear on the outcome of going beyond the threshold.	No action taken

10.3.2 Draft RTS to specify the calculation of the fixed overhead requirement and to define the notion of a material change (Article 13(4) of the IFR)

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
Article 1(1) – calculation based on applicable accounting framework	Two respondents recommended clarifying the starting point for the calculation of the FOR. One respondent elaborated that the figures 'resulting from the applicable accounting framework' would not sufficiently do so. Currently, there is the potential for firms to use different figures to base their calculations on, resulting in the potential for erroneous calculations and firms not holding the correct amount of own funds. The respondent recommended a clear starting point, such as all expenditure incurred by the firms as disclosed in the audited financial statements to arrive at net profit for the financial year. This would provide clarity and should provide a greater level of consistency in the application of the requirement.	Not all investment firms are required to have audited financial statements. Although the K-factor requirements were specifically designed for larger investment firms to calculate their own funds requirements, the FOR acts as a minimum requirement that needs to be calculated by all investment firms. The FOR therefore needs to be calculated on the basis of non-audited financial statements if audited statements are not available.	No action taken
Article 1(1) – subtractive method of calculating	One respondent suggested explicitly defining the subtractive method, proposing the following wording in Article 1 of Section 7: '(1) For the purposes of Art. 13 (1) of Regulation (EU) 2019/2033, firms shall calculate their fixed overheads of the preceding year, using the figures resulting from the applicable accounting framework and ~~shall~~ referring to figures of an investments firm's most recent audited annual financial statements ~~after distribution of profits~~ or of ~~in~~ annual financial statements where audited statements are not available. The calculation shall be made after	The subtractive method is already specified in Article 13(4) of the IFR, according to which specific items have to be deducted from the amount required for determining the fixed overheads. Additional clarification of this method is not necessary.	No action taken

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	distribution of profits and by subtracting at least the items defined Article 13(4) of Regulation (EU) 2019/2033 and in paragraph 6 of this Article.'		
Article 1(2) – calculation on a cost-by-cost basis	One respondent asked for clarification on whether a similar pro rating, as drafted in Article 1(2) of Section 6 of EBA/CP/2020/06, should also be applied on a cost-by-cost-basis, even if financial statements cover a 12-month period, i.e. when a contract that incurs a fixed cost is entered part way through the financial year that is the reference period of the FOR calculation.	Neither the IFR nor the draft RTS allow for a pro rata calculation on a cost-by-cost basis. Aiming to provide a simple calculation method for own funds requirements, the FOR is based on average values of historic costs incurred in the previous fiscal year. The methodology favours simplicity. Cases in which costs are entered later in the year and cases in which costs end before the closing of the year will balance each other out. The wording of the draft RTS establishes a clearly defined method by referring to the annual financial statements as a basis for the calculation.	No action taken
Article 1(4)(a) – staff bonuses or other remuneration	Three respondents asked for the wording of the reference to staff bonuses or other remuneration, which 'have already been paid out to employees in the year preceding the year of payment', to be clarified or simplified, as it is be unclear. One respondent deemed the wording concerning deductibility of bonus payments overly complex, and thus believes it complicates interpretation and application in practice. This could create uncertainty about the treatment for costs associated with the deferred element of the bonus. Two respondents recommend amending the provision and reverting to	The reference to the remuneration to be deducted having already been paid in the year preceding the year of payment is already clarified by the following reference 'or the remuneration having no impact on the firm's capital position in the year of payment'. What is decisive for the deductibility of a bonus is its lack of potential impact on the capital position in the relevant year, e.g. the year it is awarded for ('year of payment'), for example because the bonus has already been paid out in the preceding year. The need for a deductible bonus or other remuneration to be discretionary is described by the chosen wording in Article 1(4)(b) so it can actually be easier to understand.	No action taken

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	'fully discretionary' bonuses. One respondent added that the link to net profits can be used, where it can be added, not only as an example where discretion exists but also as the mandatory condition to meet. Another respondent pointed out that Article 1(4)(b) of Section 6 articulating that, to deduct the cost, a firm must not be obligated to pay a future bonus, and therefore has discretion to make future awards, is worded in a complicated manner. Another respondent understood that the requirements regarding the deduction of bonus payments are meant to ensure that firms can only pay bonuses when net profits are available to do so without affecting the firm's capital position. However, the respondent acknowledged that Article 1(4)(a) does not clearly support this objective by stating that bonuses to be deducted 'have already been paid to employees in the year preceding the year of payment'. Investment firms could potentially review remuneration policies to ensure that discretionary bonuses are settled in a way that allows the deduction of the expense. In the event of deferred bonuses such as in the form of shares, the current wording could also lead to uncertainty over whether the costs associated with the deferred element of the bonus would be allowable in the calculation of the fixed overheads.	If investment firms review remuneration policies in such a way that payments of bonuses or remuneration do not affect the firm's capital position in the relevant year, this would actually not be a circumvention of the requirement. The straightforward wording of Article 1(4) should be kept rather than be amended by addressing specific single case issues of application, as further argued by the respondents.	

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	The respondent further stated that, even if it is seemingly irrelevant in normal cases, the proposal could have a knock-on effect on the calculations of material changes in the FOR, which would lead to a recalculation of requirements. Based on the current wording, the calculation of a projected FOR would not include a deduction of bonuses in most cases, meaning that the calculation of previous years and the current year are technically different. As a result of this, firms might breach the thresholds in Article 3 and have to calculate a FOR based on these projected figures.		
Article 1(5) – third party expenses	One respondent thought that the approach required in the cases in which a breakdown of third party expenses to be settled by the investment firm is not available is not clear. The respondent would only expect non-variable expenses to be included in the FOR, thus limiting the need for the calculation referenced in Article 1(5) sentence 3 of Section 6. The respondent would also welcome further guidance or a non-exhaustive list of the factors/attributes that would be a reasonable basis for calculating the attributable amount according to Article 1(5) Section 7.	Indeed, only fixed expenses incurred by third parties on behalf of the investment firm are attributed to the investment firm if these expenses were not already included in the annual financial statements of the investment firm. The basis for calculating the attributable amount would be, if available, the breakdown of third party expenses, identifying the amount applicable to the investment firm. If such a breakdown is not available (the expectation is that, with the induction of this possibility, investment firms will arrange for third parties to do so in the future), the business plan of the investment firm should offer a reasonable basis for deducting the attributable amount. Further guidance would only cause more questions than answers, as investment firms' business plans would tend to be rather different from one another.	No action taken

10.3.3 Draft RTS to specify the methods for measuring the K-factors (Article 15(5) point (a) of the IFR)

Comments	Summary of feedback received	EBA analysis	Amendments to the proposals
Question 1. Is the proposed articulation of the K-factors calculation methods, in particular between AUM and CMH and ASA, exhaustive or should any other element be considered?			
Notion of the term 'financial entity'	Several respondents mentioned that, in the text of the draft RTS to specify the methods for measuring the K-factors (point (a) of Article 15(5) of the IFR) as well as in the Level 1 text of the IFR, the term 'financial entity' is being used without a definition being provided in either of these legal texts. Further clarification is being sought on the definition of this term.	The respondents' description is correct. Both the draft RTS as well as the IFR use the term 'financial entity' without providing any definition for this term. The problem actually seems to be a the misleading use of the term in the Level 1 text of the IFR – which initially introduced the term in its Articles 17 and 19 – that was then transferred to the draft RTS. The EBA is of the view that the term that was intended to be used was 'financial sector entity', which is defined in point 17 of Article 4(1) of the IFR and references point 27 of Article 4(1) lit. 27 of the CRR.	Article 2(2) of the draft RTS has been amended as follows: 'Where an investment firm is providing non-discretionary advisory arrangements of an on-going nature to another financial **sector** entity that undertakes discretionary portfolio management, it shall include within its AUM referred to in Article 17 of Regulation (EU) 2019/2033 any amounts of assets that relate to those non-discretionary advisory arrangements.'

Comments	Summary of feedback received	EBA analysis	Amendments to the proposals
Double counting of AUM with regard to tied agents	One respondent expressed concern that the use of tied agents could lead to double counting of relevant AUM if both the tied agent and the investment firm were to be MiFID investment firms.	Any MiFID investment firm will have to obtain an authorisation and therefore comply with its requirements, and cannot be a tied agent to another investment firms in the sense context of this regulation The EBA has a limited mandate and cannot redefine K-factors or their scope.	No action taken
Non-discretionary advisory arrangements of an ongoing nature for another financial entity	Many respondents recommended that an investment firm providing non-discretionary advice of an ongoing nature to another investment firm undertaking discretionary management of clients' portfolios should not have to include the amount of affected assets in its calculation of AUM. In the view of the respondents, Article 2(2) of the draft RTS would actually lead to double counting of the assets in question, since both the advisor and the portfolio manager would have to include these in their AUM calculations. This would actually contradict the initial intention of the draft RTS to avoid double counting (as mentioned on page 16, recital (50)). In addition, one respondent suggested including only a percentage of relevant assets in the AUM calculation, since the advisor only gives advice on a possible investment and it is the decision of the portfolio manager whether or not to follow the advice being given and perform the actual execution of the transaction.	The definition of AUM in Article 4(27) of the IFR explicitly includes non-discretionary arrangements constituting investment advice of an ongoing nature. As a result, whenever an investment firm is providing this form of investment advice, this has to be reflected in its calculation of AUM. The wording of Article 2(2) of the draft RTS therefore simply reflects the provisions set out in the Level 1 text of the IFR. Although this leads to a form of double counting of AUM for both the investment firm providing the discretionary portfolio management and the investment firm providing the non-discretionary investment advice of an ongoing nature, it is technically two services that are being provided by two independent investment firms, and therefore this differs substantially from the kind of double counting that the draft RTS tries to avoid with regard to the delegation of assets. It is also not possible to implement a certain percentage rate for relevant assets to be included in the AUM calculation of the investment firm providing the non-discretionary investment advice in order to reflect the reduced contribution in the execution of the deal. Article 17(1) of the IFR explicitly states that 'AUM shall be the rolling average of the total monthly assets under	No action taken

Comments	Summary of feedback received	EBA analysis	Amendments to the proposals
		management'. Therefore, the Level 1 text does not allow any room for percentages for the measurement of only certain parts of AUM to be introduced.	
Use of the term 'financial instruments' instead of the term 'assets'	One respondent suggested that the term 'financial instruments' should replace the term 'assets' in Article 2 of the draft RTS so that they are in line with the MiFID definition of investment advice.	This proposal would contradict the wording of the Level 1 text, which solely talks about assets and not financial instruments.	No action taken
The scope of K-AUM, K-CMH and K-ASA factors	Several respondents made comments on the scope of K-AUM, K-CMH and K-ASA factors. One respondent considered that, for these three factors, only assets for which the account holder is responsible for the return of the assets should be taken into account in the calculation of the different ratios. Conversely, when the custodian has only a position-keeping role, the amounts should not be taken into account in the calculation. Two respondents suggested excluding clients' cash positions from the K-AUM factor in the case of discretionary portfolio management. One respondent argued that an investment firm providing a portfolio management service does not have disposition of	K-AUM, K-CMH, K-ASA are defined in point 27, 28 and 29 of Article 4(1) of the IFR, respectively. The mandate under Article 15(5)(a) states that the 'EBA shall specify the methods for measuring the K-factors in Title II of Part Three of the IFR'. Therefore, the EBA has a limited mandate and cannot redefine K-factors or their scope.	No action taken

Comments	Summary of feedback received	EBA analysis	Amendments to the proposals
	clients' money, and the investment firm does not have access to client money via a third party mandate. One respondent pointed out that it should be clarified that the type of cash being excluded from the management authority of the portfolio manager should also be excluded from the calculation of AUM. One respondent pointed out that clients' money of which an investment firm has full ownership should not be included in the K-CMH factor, and it should be clarified that collateral should be excluded from this K-factor. One respondent suggested redrafting Article 8 of the draft RTS to clarify that repos and securities lending transactions are not included in cash trades.		
Value of the measurement of K-AUM, K-CMH and K-ASA factors	Several respondents commented on the measurement value of the K-AUM, K-CMH and K-ASA factors. One respondent suggested that derivatives with negative value, for the purpose of the calculation of K-AUM, should be included at market value. The respondent argued that this would be consistent with current market practices and clients' expectations for discretionary portfolio management, and it would be	Fair value accounting provides an accurate valuation of assets. As stated in recital (2) of the draft RTS, fair value not only allows a reflection of the market value of the financial instruments, if there is one, but it also covers cases in which there is no such market value readily available in the market, ensuring a consistent application of the measuring of the AUM and ASA. The term 'absolute value' is used across the IFR and a definition of it is not provided. The EBA is of the view that it is a general term and must be	No action taken

Comments	Summary of feedback received	EBA analysis	Amendments to the proposals
	very burdensome to implement a new, different methodology. Several respondents questioned the method for measuring the level of AUM (fair value of financial instruments, using the absolute value if the fair value is negative) contained in the draft RTS. They believe that using the net value of financial instruments to measure AUM is the generally accepted method in the industry and also reflects the risks to the client more adequately. One respondent also pointed out that K-AUM measuring would enable investment firms to use existing client reporting. One respondent noted that the term 'absolute value' is not clearly defined in either the IFR or the draft RTS. One respondent expressed concern that using the current market price for the calculation of K-COH is inaccurate and may cause considerable deviations in the own funds and liquidity requirements.	understood under national or international accounting standards. With regard to the measurement of K-COH, the method is provided in the IFR. Therefore, it is out of scope of the EBA mandate.	
Exchange traded options	Two respondents argued that the wording in Article 8(2) and 11(2) of the draft RTS is not clear and that it is not clear if all exchange traded options should be included as cash trades or derivatives, because the term derivative already includes exchange traded options.	The EBA would like to point out that exchange traded options should be included as cash trades only. Article 8(1) and 10(1) of the draft RTS specify that exchange traded options shall be included as cash trades.	Article 10(2) of the draft RTS has been amended as follows: 'Where the transferable security is an exchange traded option as referred to in

Comments	Summary of feedback received	EBA analysis	Amendments to the proposals
	Two respondents highlighted that further amendments would be required to subject all exchange traded options (including options on futures) to the charges for cash trades described in Article 8(2) of the draft RTS. In addition, it is not clear what kind of exchange traded options would fall under the definition of cash trades – those with an underlying position on securities or other kinds. One respondent recommended to clarify that it is not intended that the adjustment for the time to maturity available under Article 33(2)(b) of the IFR would apply only to 'true' derivative transactions, i.e. excluding exchange traded options, that are counted as cash transactions.	The EBA has no mandate to further specify that point (b) of Article 33(2) of the IFR would not apply for exchange traded options. However, Article 10(2) of the draft RTS contains a misleading reference has been amended.	paragraph 1(~~a~~**d**), the investment firm shall use the option premium used for the execution of that exchange traded option or, where the option forms part of a portfolio, the aggregate net option premium of that portfolio.'
Options premium of exchange traded options for the purpose of calculating K-DTF and K-COH	Two respondents stated that it is unclear how the provisions of Article 8(2) and Article 10(2) of the draft RTS relate to portfolios. To calculate the option premium to be used not on a leg-by-leg basis, as suggested by the draft RTS, but based on the spread of the options taken as a portfolio would be more reflective of the way the market operates in practice. The respondent suggested the following amendment: 'Where the transferable security is an exchange traded option as referred to in paragraph 1(d), the investment	The EBA is seeking to reflect risks to client appropriately. Proposed methods for exchange traded options capture all risks more appropriately. Using an aggregate net option premium method would reduce the risk-to-firm K-factors and would therefore not properly reflect risk in the event of a negative value of aggregate net option premium.	No action taken

Comments	Summary of feedback received	EBA analysis	Amendments to the proposals
	firm shall use the option premium used for the execution of that exchange traded option or, where the option forms part of a portfolio, the aggregate net option premium of that portfolio.'		

10.3.4 Draft RTS to specify the notion of segregated accounts (Article 15(5) point (b) of the IFR)

Comments	Summary of feedback received	EBA analysis	Amendments to the proposals
Notion of segregated and non-segregated accounts (Article 15(5)(b))	Two respondents proposed that the EBA should clarify further the definition of segregated and non-segregated accounts. The draft RTS provide clarity; however, the definition of what constitutes a segregated account and a non-segregated account remains ambiguous. One respondent pointed out that, even if Article 15(5)(b) of the IFR sets five key requirements for the notion of segregated accounts, points (a), (b), (c) and (e) are criteria for segregated accounts and do not define the concept of segregated accounts. As it was pointed out by one respondent, it is not clear what is held in a non-segregated account and what would constitute a breach.	The definition of 'segregated accounts' is already provided in point 49 of Article 4(1) of the IFR. The EBA does not have a mandate to provide a definition of non-segregated accounts. The mandate under Article 15(5)(b) of the IFR is to 'specify the notion of segregated accounts for the purposes of this Regulation for the conditions that ensure the protection of client money in the event of the failure of an investment firm'.	No action taken

10.3.5 Draft RTS to specify adjustments to the K-DTF coefficients (Article 15(5) point (c) of the IFR)

Comments	Summary of feedback received	EBA analysis	Amendments to the proposals
Question 3. Is there any example of situations of market stress which would not been taken into account applying the proposed approach but would be relevant for the measurement of the K-DTF?			
K-DTF calculation	One respondent thought that the 9-month rolling average mandated in Article 33 of the IFR is still not enough to smooth out volume spikes during trading spikes.	Level 1 text, more specifically Article 33(1) of the IFR sets requirements for measuring DTF for the purpose of calculating K-DTF. Therefore the EBA has no mandate to further specify the measurement of K-DTF.	No action taken
Adjustments to the K-DTF coefficients	Two respondents considered that the adjustments to the K-DTF coefficients, which lead in fact to the reduction of the coefficient in the event of market stress, are quite complicated to set up. The respondents would like the EBA to consider whether it would it be possible to use the coefficients without adjustments – with a deletion of data points corresponding to days of market stress.	Under Article 15 of the IFR, the EBA is mandated to specify adjustments to the K-DTF coefficients in the event of stressed market conditions. Therefore, under the mandate, the EBA cannot specify an adjustment to the measurement of daily trading flow that is taken into account for calculating K-DTF, since that is outside the mandate of the EBA.	No action taken
Adjustments to the K-DTF coefficients	One respondent thought that it would be helpful to add additional explanatory guidance for the definition of 'DTFexcl' and 'DTFincl' as proposed in Article 1(1) of draft RTS, since the concept behind the formulas that include derivatives trades in the case of calculating K-DTF for cash trades and cash trades in the case of calculating K-DTF for derivatives trades might not be immediately clear to everyone.	The wording of the draft RTS has been amended, since the formula for derivatives should only include derivatives traded (not cash trades) and the formula for cash trades should only include cash trades (not derivatives).	The EBA amended the text accordingly.

Comments	Summary of feedback received	EBA analysis	Amendments to the proposals
The scope of stressed market conditions	Several respondents contested the draft RTS provisions on stressed market conditions. Respondents suggested adopting a more flexible approach and, for the K-DTF factor, replacing the reference to 'exceptional circumstances' with 'stressed market conditions'. Some of the respondents suggested using a conservative approach and suggested that it might be considered appropriate to include, in the definition of 'extreme volatility', those situations referred to in Article 3(b) and (c) of the Regulation (EU) 2017/578. Several respondents argued that the EBA's mandate is limited to finding a solution for the adjustment to the coefficients for K-DTF based on the definition of Article 6(2) of Delegated Regulation (EU) 2017/578 alone. Besides, as pointed out by another respondent, although this would still result in reduced capital requirements during times of high volatility, spikes in capital requirements would be significantly smoothened and hence investment firms would be albe to continue to provide liquidity during times of market stress. Several respondents suggested using a statistical method that takes into consideration the historical norms of trading activity to determine whether the stressed market conditions are of a type that should result in a coefficient adjustment. One respondent pointed out that the approach based on an objective	The EBA is seeks to capture risk to firm properly and considers that the approach proposed in the draft RTS is conservative, however, it reflects the purpose of adjusted K-DTF coefficients adequately, which is that adjusted K-DTF would be used only in an exceptional situation. The view of the EBA is that the respondents' suggestion to expand the stressed market conditions to the ones referred to in Article 6 (2) of the Regulation (EU) 2017/578 reaches the best policy choice between purpose of limited use of adjusted K-DFT coefficient and prudentially sound requirements.	Article 2 of the draft RTS has been amended as follows: '**For the purposes of Article 1, an event of stressed market condition shall be a situation where the parameters referred to in paragraph 2 of Article 6 of Commission Delegated Regulation (EU) 2017/578 are met and where those stressed market conditions lead to increased trading volumes.** **Its start and end times shall reflect the times for which the trading venue identifies in accordance with Article 6(2) of Commission Delegated Regulation (EU) 2017/578 the existence of such**

Comments	Summary of feedback received	EBA analysis	Amendments to the proposals
	statistical methodology will most effectively deliver on the targeted objective. Another respondent argued that, as a simpler alternative to the adjustment linked to MiFID market making definitions for stressed markets, a more generic statistical method reducing deviations could be defined by the EBA, to avoid market makers having to identify stressed markets, which may vary across products and exchanges. However, one respondent supported the proposal of extreme volatility stressed market conditions and pointed out that other exceptional events should not be considered for the K-DTF factor, as they most likely reduce trading flow. Respondents did not identify other situations of market stress that should be taken into account for this K-factor.		**stressed market condition.'**

10.3.6 Draft RTS to specify the calculation of the amount of the total margin for the calculation of K-CMG (Article 23(3) of the IFR)

Comments	Summary of feedback received	EBA analysis	Amendments to the proposals
Question 4. What would be appropriate thresholds or events that should trigger the comparison between the calculation under the K-CMG and the one under the K-NPR? **Question 5. Which other conditions should be considered to avoid double counting or to prevent regulatory arbitrage in the use of the K-CMG approach?**			

Comments	Summary of feedback received	EBA analysis	Amendments to the proposals
The scope of clearing members	Two respondents suggested extending the scope of clearing members. As mentioned by one respondent, the definition of 'clearing member' in Article 4(1)(3) of the IFR is limited to clearing members established in the EU. As a result, investment firms' clients that are subject to K-factors and that clear through a non-EU clearing member (often on a non-EU CCP) cannot benefit from Article 23 of the IFR (K-CMG), as K-CMG is limited to client clearing arrangements that include an EU clearing member. Two respondents noted that the K-CMG approach is limited only to clearing clients if they are direct clients of an EU clearing member. Respondents would like to raise this with the EBA, with a view to exploring whether Article 23 of the IFR can be interpreted such that K-CMG can also be available to investment firms that are indirect clients (i.e. clients of (EU) direct clients of clearing members) and to those that are direct members of the CCP, as the nature of the underlying market risk and exposure that K-factors for risk-to-market cover are comparable to those that direct clients face when clearing through a clearing member. One respondent considered that the draft RTS should recognise the variety of models used by different general clearing members. The respondent believes	Article 23 of the IFR indicates that K-CMG can only be used when the clearing and settlement of transactions take place under the responsibility of a clearing member of a qualifying CCP, and from the definition of clearing member it is clear that the clearing member must also be established in a Member State. This automatically excludes the use of K-CMG for firms that are not clients of a clearing member. This is outside the scope of this consultation.	No action taken

Comments	Summary of feedback received	EBA analysis	Amendments to the proposals
	that it should be possible to use K-CMG for trading strategies between the EU and third country markets.		
K-CMG where covering other risks	Two respondents argued that the clearing member's margin model may cover other types of risks. Since other types of risk are already captured by other K-factors, these should not be included in the K-CMG factor.	In case the investment firm uses K-NPR and K-CMG simultaneously for separate trading desks, K-CMG must only be based on the total margins required for the respective trading desks that are subject to K-CMG, provided that this is clearly identifiable. The draft RTS clarify that amount of the total margin must be the required amount of collateral in the collateral account comprising the initial margin, variation margins and other financial collateral, as required by the clearing member's margin model from the investment firm for the trading desks subject to CMG. Thus, all margins are taken into account, independent of which types of risk exposures are covered and independent of whether these risks have also been covered by other K-factors.	No action taken
Clarification of the term 'trading desk'	One respondent encouraged the EBA to clarify further the term of 'trading desk' in a recital. This should clarify that an investment firm is able to treat any relevant variation of one of the factors (such as the trading objectives, the type of products traded, the maturity of the products and the market traded) as a different trading strategy and therefore a different trading desk.	The draft RTS contain a definition of 'trading desk' that should allow a uniform interpretation. Definitions must be clarified in the articles, and not in recitals, to prevent any legal uncertainty.	No action taken

Comments	Summary of feedback received	EBA analysis	Amendments to the proposals
Scope of total margin required	Several respondents recommended a drafting change to simplify and clarify the proposed calculation of the amount of the total margin required in Article 2(1) of the draft RTS. One respondent noted that the draft RTS introduce an exhaustive list of margins and suggested not using the exhaustive list. An open formulation would ensure that all forms of collateral requested by clearing firms would be part of the margin required. As the investment firm can have several collateral accounts with the clearing member and because the requirement is linked to 'required amount' of collateral, the reference to 'collateral account' is not required. As pointed out by another respondent, explicit references to initial margin, variation margin and other financial collateral may also be superfluous and possibly limiting, because clearing members may not use the same terminology and may also accept non-financial collateral as margin, such as gold and other commodities. The proposed drafting also attempts to define 'total margin required' such that it is limited to those trading desks that use K-CMG methodology. One respondent argued that the proposed approach would limit the ability of different trading desks in the	The starting point for measuring the total margin for K-CMG is the amount of collateral that is required by the clearing member's margin model. The reference to initial margin, variation margin and financial collateral aims to clarify what forms of collateral should be considered in this regard. This should not be considered a closed list, since 'other collateral' captures all remaining forms of collateral. In case clearing members also require and accept non-financial collateral, this must also be taken into account. With regard to the collateral accounts, the EBA acknowledges that an investment firm can have several accounts. To avoid uncertainties in this regard, the reference to collateral account has been deleted in line with the suggestion. The RTS clarify that the amount of total margin required is based on the required amount of collateral, as required by the clearing member's margin model. Therefore, it should be clear that this does not refer to the total collateral deposited by an investment firm, since overcollateralization should not be part of the K-CMG calculation. In the event of an erroneous margin figure that is corrected by the clearing member, this alternative, new margin figure is the actual amount of required collateral and should thus be automatically considered the total margin required for the purpose of calculating K-CMG. In general, the draft RTS place no requirements (not even monitoring, reporting or publication requirements) directly	Article 2(1) of the draft RTS has been amended by deleting 'in the collateral account': 'The amount of the total margin referred to in Article 23(2) of Regulation (EU) 2019/2033 shall be the required amount of collateral ~~in the collateral account~~ comprising the initial margin, variation margins and other ~~financial~~ collateral, as required by the clearing member's margin model from the investment firm, for the trading desks subject to CMG.'

Comments	Summary of feedback received	EBA analysis	Amendments to the proposals
	same investment firm to simultaneously use K-CMG and K-NPR, which would be at odds with the intention of the IFR. One respondent suggested including in the RTS that the calculation of total margin required should include a reference to 'exposures resulting from change in the market value of net positions'. Besides, it is unclear whether the margin requirement or the collateral deposited by an investment firm to fulfil their margin requirement in relation to a clearing member should form the basis of the K-CMG calculation. One respondent argued that the materiality threshold of the margin model changes in draft K-CMG RTS Article 4(2)(b)(ii). In terms of practical implementation of this requirement, the clearing members believe that it is up to each clearing member to monitor whether and when changes to its own margin model trigger a change of 10% or more in the margin required, and that the requirement does not introduce an additional recording or publication requirement to capture all margin model changes (i.e. also those that fall below the 10% threshold). Finally, one respondent pointed out that, if in the event of operational risk a clearing member publishes an erroneous margin figure, the draft RTS should clarify	on clearing members. Nevertheless, investment firms will likely request the assistance of their clearing members to be able to fulfil the requirements of K-CMG. In particular, it is up to the investment firm to monitor whether and when changes to the clearing member's margin model result in a change in the margin required of 10% or more for the same portfolio of underlying positions for a trading desk.	

Comments	Summary of feedback received	EBA analysis	Amendments to the proposals
	that the margin requirement must be replaced with the correct number.		
K-CMG initial margin	One respondent noted that the initial margin of the respective K-CMG portfolio needs to be clearly identifiable and not mixed with K-NPR portfolios. It seems very uncommon to have this set-up.	The starting point for measuring the total margin for K-CMG is the amount of collateral that is required by the clearing member's margin model. In case K-NPR is used for other trading desks and it is not identifiable which part of the initial margin belongs to the respective K-CMG portfolio, it is a prudent approach to take into account the total of initial margin required for the respective K-CMG portfolio.	New paragraph 2 to be inserted in Article 2 of the draft RTS: '2. Where the clearing member does not differentiate between margins that are required for the trading desk that is subject to K-CMG and margins that are required for other trading desks, the firm shall consider the total of margins required for all trading desks as margins under paragraph 1.'
Scope of margin of K-CMG	Two respondents noted that total margin required, as drafted, would include a variation margin that has been subject to the settlement to market treatment under Article 274(2)(c) of the CRR. The effect of the settlement to market treatment is that the relevant settlement payment provided to the CCP should not be considered a 'variation margin', because it is not an	Based on the Level 1 text, K-CMG relies on total margin required as an indicator of position risk exposure. To exclude part of the variation margin would go against the text of the IFR. Furthermore, regardless of whether the variation margin has been subject to settlement to market, it is an indicator of past market risk and can be used as an indicator for future market risk.	No action taken

Comments	Summary of feedback received	EBA analysis	Amendments to the proposals
	asset of the clearing member investment firm recorded on the books and records of the CCP, and so there is no exposure to the CCP with respect to such payments. The following amendment has been suggested: '4. Any amounts due or paid under contracts in order to settle the outstanding exposure to market, where the terms are reset so that the market value of the contract is re-set to zero as referenced in point (c) of Art. 274(2), Regulation (EU) No 575/2013, shall be excluded from the scope of variation margin for the purposes of paragraph 1.'		
K-CMG in the case of different timestamps	One respondent suggested using a uniform timestamp for K-CMG.	The draft RTS clarify that, if the clearing member updates the total margin required once or more than once during a day, the total margin required on that day must be the highest of those amounts of total margins required by the clearing member during that day. This implies that no combination of requirements with different timestamps is needed, since only the highest amount of total margin required will be used to calculate K-CMG.	No action taken
CMG calculation where multiple clearing members are used	Several respondents suggested changing provisions in Article 3 of the draft RTS regarding the total margin calculation if investment firms use multiply clearing members. Respondents suggested calculating the total margin requirement by first calculating the third highest margin requirements across all of the	The EBA agrees that the initial proposal in the draft RTS is more conservative; however, it captures the risk-to-market requirement fully. However, the EBA acknowledges that, if an investment firm makes use of several clearing members, the approach suggested by respondents may also be used and capture risk-to-market requirements properly and would not	Article 3 of the draft RTS should be amended as follows: 'Where investment firms make use of the services of more than one clearing member,

Comments	Summary of feedback received	EBA analysis	Amendments to the proposals
	investment firm's clearing members and then using the third highest requirement for the K-CMG calculations. One respondent argued that the EBA proposed approach would incentivise investment firms to limit the number of clearing members they use. Another respondent argued that such an approach would put investment firms with multiple clearing members at un unjustified systemic disadvantage. Investment firms must be able to make use of more than one clearing member, and it should be incentivised rather than penalised by comparably disadvantageous capital requirements. As noted by another respondent, the use of multiple clearing members is advantageous for the overall market. One respondent argued that such an approach would lead to disproportionally high capital restrains for the investment firms. One respondent stated that the proposed approach would be inconsistent with risk management, since the risk management framework is based on risks being added up across different days; the use of the third highest margin requirement, which is based on the margining model of the clearing member for the same type of risks, is already a more conservative approach. The 1.3 multiplying factor allows an additional degree of prudence. Using the aggregation based on days only	incentivise investment firms to use only one clearing member.	the method of calculation of K-CMG as set out in Article 23(2) of Regulation (EU) 2019/2033 shall be carried out as follows: (a) The total margin required shall be calculated for each portfolio of trading book positions of the clearing members. (b) Investment firms shall add the amounts of the total margins required on a daily basis of all clearing members, before determining the third highest amount of total margin required on a daily basis over the preceding 3 months, before multiplying the outcome by 1.3 as set out in Article 23(2) of Regulation (EU) 2019/2033.'

Comments	Summary of feedback received	EBA analysis	Amendments to the proposals
	would mitigate such an effect. The proposed approach would incentivise investment firms to use only one clearing firm, and the proposed calculation could affect the level of liquidity that investment firms would be able to provide to the market.		
Difference between K-CMG and K-NPR in some trading strategies must not prevent the use of K-CMG	One respondent suggested that it would be clearer if Article 4 were to capture separately the different types of conditions that are captured in Article 23(1)(e) of the IFR, those being conditions at the point of granting permission, general no arbitrage conditions and regular assessment of conditions.	The provision of Article 4 of the draft RTS is drafted in a way that is consistent with law experts.	No action taken
Prevention of regulatory arbitrage	Respondents disagreed with the provision regulating the prevention of regulatory arbitrage. One respondent suggested clarifying that the mere existence of a (significant) difference between the amounts calculated under K-CMG and K-NPR is to be expected for certain investment firms and business models and that this difference is in itself no indication of an attempted engagement in regulatory arbitrage. Respondents suggested deleting point (e) of Article 4(1) of the draft RTS and establishing that differences between K-NPR and K-CMG do not indicate	In case there is a difference between the capital requirements calculated by K-NPR and the capital requirements calculated by K-CMG, this does not automatically imply that K-CMG cannot be used. After all, Article 4(1)(e) implies that, if the competent authority has positively assessed that the difference between the capital requirements is well justified, K-CMG can still be used. Frequent switches between different approaches can generally be considered an indicator of regulatory arbitrage. In case an investment firm has received permission to use K-CMG and wants to use K-NPR within 24 months, without a significant change in the underlying trading desk, this may be an indicator of the fact that the firm is aiming for the lowest capital requirements.	No action taken

Comments	Summary of feedback received	EBA analysis	Amendments to the proposals
	that an investment firm has engaged in regulatory arbitrage. Respondents questioned whether switching from K-CMG to K-NPR raises any concerns, since the K-NPR methods are also deemed appropriate for credit institutions. One respondent suggested the 24-month period should be applied only if a firm that has switched from K-CMG to K-NPR previously wishes to re-implement the K-CMG approach. One respondent suggested replacing the 24-month period with a 12-month period to align with the annual assessment capital adequacy and risks of investment firms. One respondent suggested defining exceptional circumstances, as stated in recital (6) of the draft RTS, in which an investment firm may switch methods.	With regard to the annual assessment of investment firms' capital adequacy and risks, no fixed frequency is set in Article 24 of the IFD, which instead refers to 'sound, effective and comprehensive arrangements, strategies and processes to assess and maintain on an ongoing basis the amounts, types and distribution of internal capital and liquid assets'. Recital (6) is covered in Article 4(2)(a); therefore, the 'exceptional circumstances' are interpreted in the sense that 'the business strategy or operations of that group of dealers has changed to the extent that they can be considered a different trading desk'. An exhaustive list of exceptional circumstances risks not including all scenarios that can justify the need to switch between methods.	
Comparison between K-CMG and K-NPR	Several respondents disagreed on provisions regarding a comparison between K-CMG and K-NPR. Several respondents argued that it is pointless to compare K-NPR with K-CMG, as they measure completely different things.	K-NPR and K-CMG are both alternative K-factors for risk to market, as established by the Level 1 text of the IFR, which is outside the scope of this consultation. To assess whether the choice for K-CMG has not been made with a view to engaging in regulatory arbitrage, it is relevant to compare the requirements under K-CMG with those under K-NPR. In this regard, the EBA considers an unjustified difference between the capital requirements calculated by K-CMG and	Point (e) of paragraph 3 of Article 4 of the draft RTS has been deleted. Point (i) and (ii) of point (b) of paragraph 2 of Article 4(2) has been amended as follows:

Comments	Summary of feedback received	EBA analysis	Amendments to the proposals
	One respondent suggested considering extreme volatility periods an additional trigger event to compare K-CMG with K-NPR. One of the respondents was of opinion that the thresholds that would trigger a comparison between K-CMG and K-NPR are calibrated too low. The respondent is of the opinion that only decreasing K-CMG capital requirements resulting from changes in business strategy (and not from general market activity) or changes in the clearing member's margin model should be regarded as trigger events for a mandatory comparison between K-CMG and K-NPR. Besides that, costs of the practical implementation of the comparison would be too burdensome for certain investment firms. One respondent suggested that competent authorities should assess the qualitative criteria proposed and whether these lead to material changes in relation to K-CMG, and based on the assessment competent authorities should then determine if there are reasons to require a comparison between K-CMG and K-NPR. One respondent proposed the deletion of points (c) and (e) of paragraph 3 of Article 4 of the draft RTS, as the level of own funds and the excess over capital requirements have no relationship with any potential	those calculated by K-NPR as an indication that K-CMG is chosen for regulatory arbitrage reasons. Extreme volatility periods may temporarily change the capital requirements calculated by both K-CMG and K-NPR, but they will not have a permanent impact on the difference between the K-factors. Such temporary events are not suitable to add as trigger events for a new comparison between the K-factors, since it is likely that the K-factors will return to their 'normal' states before the investment firm can even make a comparison and justify these. In case there are significant changes in the situation, in particular because of a change in business strategy or the clearing member's margin model, the difference between K-CMG and K-NPR can also change, which may increase the risk of regulatory arbitrage if this cannot be clarified. The difference between K-CMG and K-NPR depends on the developments in both K-factors. For example, the difference can also increase if the rise in K-CMG requirements is combined with an even higher increase in K-NPR. The calculation of and comparison between K-CMG and K-NPR capital requirements are only triggered in the cases that are mentioned in Article 4(2) of the draft RTS. In case an investment firm is unable to make such parallel calculations for these cases, it may also decide to use only K-NPR and not ask for the use of K-CMG.	'i) where the business strategy of a trading desk changes and this leads to a change of 20% or more in the capital requirements for that trading desk based on the K-CMG approach; ii) where the clearing member's margin model changes and this results in a change in the margins required of 10% or more for the same portfolio of underlying positions for a trading desk.'

Comments	Summary of feedback received	EBA analysis	Amendments to the proposals
	justification of a difference between K-NPR and K-CMG.	The quantitative criteria and qualitative criteria of Article 4(2)(b) must be considered two cumulative conditions that, if both are met, trigger the need to compare K-CMG with K-NPR once more. The information on changes in the trading strategy and margin model and consequences for the margin requirements will not be known to the competent authority and therefore need to be monitored by the investment firm. In addition, to have a uniform approach, the EBA proposes setting fixed criteria for a new comparison between K-CMG and K-NPR. The level of the firm's overall own funds requirements calculated in accordance with Article 11 of Regulation (EU) 2019/2033 can be relevant to justifying the difference between K-CMG and K-NPR, because it can show the portion and relative impact of applying either K-CMG or K-NPR to the overall level of the firm's overall own funds requirements. 'The level of surplus own funds held by the investment firm' has been deleted from the list of factors that should be taken into account to assess whether the difference in capital requirements calculated in the application of K-CMG and K-NPR is justified.	

10.3.7 Draft RTS on the criteria for subjecting certain investment firms to the CRR (Article 5(6) of the IFD)

There were no specific responses for these draft RTS.