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 (Text with EEA relevance)

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

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the European Commission,

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

Having regard to the opinion of the European Central Bank[(1)],

Having regard to the opinion of the European Economic and Social Committee[(2)],

Acting in accordance with the ordinary legislative procedure[(3)],

Whereas:

(1) Robust prudential supervision is an integral part of the regulatory conditions under which financial institutions provide services within the Union. Investment firms are, together with credit institutions, subject to Regulation (EU) No 575/2013 of the European Parliament and of the Council[(4)] and to Directive 2013/36/EU of the European Parliament and of the Council[(5)] as regards their prudential treatment and supervision, while their authorisation and other organisational and conduct requirements are set out in Directive 2014/65/EU of the European Parliament and of the Council[(6)].

(2) The existing prudential regimes under Regulation (EU) No 575/2013 and Directive 2013/36/EU are largely based on successive iterations of the international regulatory standards set for large banking groups by the Basel Committee on Banking Supervision and only partially address the specific risks inherent to the diverse activities of a large number of investment firms. The specific vulnerabilities and risks inherent to those investment firms should therefore be further addressed by means of effective, appropriate and proportionate prudential arrangements at Union level which help to provide a level playing field across the Union, which guarantee effective prudential supervision while keeping compliance costs in check, and which ensure sufficient capital for the risks of investment firms.

(3) Sound prudential supervision should ensure that investment firms are managed in an orderly way and in the best interests of their clients. It should take into account the potential for investment firms and their clients to engage in excessive risk#taking and the different degrees of risk assumed and posed by investment firms. Equally, such prudential supervision should aim to avoid imposing a disproportionate administrative burden on investment firms. At the same time, such prudential supervision should make it possible to strike a balance between ensuring the safety and soundness of investment firms and avoiding excessive costs that might undermine the viability of their business activities.

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

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

(6) A specific prudential regime is therefore required for investment firms which are not systemic by virtue of their size and their interconnectedness with other financial and economic actors. Systemic investment firms should, however, remain subject to the existing prudential framework under Regulation (EU) No 575/2013 and Directive 2013/36/EU. Those investment firms are a subset of investment firms to which the framework laid down in Regulation (EU) No 575/2013 and in Directive 2013/36/EU currently applies and which do not benefit from dedicated exemptions from any of their principle requirements. The largest and most interconnected investment firms have business models and risk profiles that are similar to those of significant credit institutions. They provide “bank#like” services and underwrite risks at significant scale.

Furthermore, systemic investment firms are large enough to, and have business models and risk profiles which, represent a threat for the stable and orderly functioning of financial markets on a par with large credit institutions. Therefore it is appropriate that those investment firms remain subject to the provisions set out in Regulation (EU) No 575/2013 and Directive 2013/36/EU.

(7) It is possible that investment firms which deal on own account, which underwrite financial instruments or place financial instruments on a firm commitment basis on a significant scale, or which are clearing members in central counterparties, have business models and risk profiles that are similar to those of credit institutions. Given their size and activities, it is possible that such investment firms present comparable risks to financial stability as credit institutions. Competent authorities should have the option of requiring them to remain subject to the same prudential treatment as credit institutions that fall within the scope of Regulation (EU) No 575/2013 and to compliance with prudential supervision under Directive 2013/36/EU.

(8) There may be Member States in which the authorities competent for the prudential supervision of investment firms are different from the authorities that are competent for the supervision of market conduct. It is therefore necessary to create a mechanism of cooperation and exchange of information between those authorities in order to ensure harmonised prudential supervision of investment firms across the Union which functions promptly and efficiently.

(9) An investment firm may trade via a clearing member in another Member State. Where it does so, a mechanism for sharing information between the relevant competent authorities in the different Member States should be put in place. Such a mechanism should allow the sharing of information between the competent authority for the prudential supervision of the investment firm and either the authority supervising the clearing member or the authority supervising the central counterparty on the model and parameters used for the calculation of the margin requirements of the investment firm where such method of calculation is used as the basis for the investment firm's own funds requirements.

(10) To foster the harmonisation of supervisory standards and practices within the Union, the European Supervisory Authority (European Banking Authority) established by Regulation (EU) No 1093/2010 of the European Parliament and of the Council[7] (EBA) should, in close cooperation with the European Supervisory Authority (European Securities and Markets Authority) established by Regulation (EU) No 1095/2010 of the European Parliament and of the Council[8] (ESMA), retain primary competence for the coordination and convergence of supervisory practices in the area of prudential supervision over investment firms within the European System for Financial Supervision (ESFS).

(11) The required level of initial capital of an investment firm should be based on the services and activities which that investment firm is authorised to provide and perform, respectively, according to Directive 2014/65/EU. The possibility for Member States to lower the required level of initial capital in specific situations, as provided for in Directive 2013/36/EU on the one hand, and the situation of uneven implementation of

that Directive on the other hand, have led to a situation where the required level of initial capital diverges across the Union. To end that fragmentation, the required level of initial capital should be harmonised for all investment firms in the Union. With a view to reducing barriers to market entry that currently exist for the multilateral trading facilities (MTFs) and organised trading facilities (OTFs), the initial capital of investment firms that operate an MTF or an OTF should be set at the level referred to in this Directive. Where an investment firm authorised to operate an OTF has been permitted to also engage in dealing on own account under the conditions provided for in Article 20 of Directive 2014/65/EU its initial capital should be set at the level referred to in this Directive.

(12) Although investment firms should no longer fall within the scope of Regulation (EU) No 575/2013 or Directive 2013/36/EU, certain concepts used in the context of those legislative acts should retain their well#established meaning. To enable and facilitate the consistent reading of such concepts in Union legal acts when used, references in such acts to the initial capital of investment firms, to the supervisory powers of competent authorities for investment firms, to the internal capital adequacy assessment process of investment firms, to the supervisory review and evaluation process of competent authorities for investment firms, and to governance and remuneration provisions applicable to investment firms should be construed as referring to the corresponding provisions in this Directive.

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

(14) For information and supervisory purposes, and in particular to ensure the stability of the financial system, competent authorities of host Member States should be able, on a case#by#case basis, to carry out on#the#spot checks and inspect the activities of branches of investment firms on their territory, and to require information about the activities of those branches. Supervisory measures for those branches should, however, remain the responsibility of the home Member State.

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

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

(17) For the purposes of this Directive, personal data should be processed in accordance with Regulation (EU) 2016/679 of the European Parliament and of the Council[(9)], and with Regulation (EU) 2018/1725 of the European Parliament and of the Council[(10)].

In particular, where this Directive allows for exchanges of personal data with third countries, the relevant provisions of Chapter V of Regulation (EU) 2016/679 and Chapter V of Regulation (EU) 2018/1725 should apply.

(18) To safeguard compliance with the obligations laid down in this Directive and Regulation (EU) 2019/2033 of the European Parliament and of the Council[(11)], Member States should provide for administrative sanctions and other administrative measures which are effective, proportionate and dissuasive. In order to ensure that administrative sanctions have a dissuasive effect they should be published except in certain well# defined circumstances. To enable clients and investors to make an informed decision about their investment options, those clients and investors should have access to information on administrative sanctions and other administrative measures imposed on investment firms.

(19) To detect breaches of national provisions transposing this Directive and breaches of Regulation (EU) 2019/2033, Member States should have the necessary investigatory powers and should establish effective and rapid mechanisms to report potential or actual breaches.

(20) Investment firms which are not considered to be small and non#interconnected should have available internal capital which is adequate in quantity, quality and distribution to cover the specific risks to which they are or may be exposed. Competent authorities should ensure that investment firms have adequate strategies and processes in place to assess and maintain the adequacy of their internal capital. Competent authorities should also be able to request small and non#interconnected investment firms to apply similar requirements where appropriate.

(21) Supervisory review and evaluation powers should continue to remain an important regulatory tool that allows competent authorities to assess qualitative elements, including internal governance and controls, risk management processes and procedures and, where needed, to set additional requirements, including in particular in relation to own funds and liquidity requirements, in particular for investment firms which are not considered to be small and non#interconnected, and where the competent authority deems it to be justified and appropriate also for small and non#interconnected investment firms.

(22) The principle of equal pay for male and female workers for equal work or work of equal value is laid down in Article 157 of the Treaty on the Functioning of the European Union (TFEU). That principle should be applied in a consistent manner by investment firms. To align remuneration with the risk profile of investment firms and to guarantee a level playing field, investment firms should be subject to clear principles with regard to corporate governance arrangements and remuneration rules, which are gender neutral and which take into account the differences between credit institutions and investment firms. Small and non#interconnected investment firms should, however, be exempt from those rules because the provisions on remuneration and corporate governance laid down in Directive 2014/65/EU are sufficiently comprehensive for those types of investment firms.