

Opinion of the European Banking Authority on the European Commission's amendments relating to the final draft Regulatory Technical Standards for own funds requirements for investment firms based on fixed overheads in line with Article 13(4) of Regulation (EU) 2019/2033

Introduction and legal basis

The EBA's competence to deliver an opinion is based on the sixth subparagraph of Article 10(1) of Regulation (EU) No 1093/2010¹, as the specification of the calculation of the fixed overheads requirement and of the notion of a material change relates to the EBA's area of competence and indeed is an area where the EBA has been entrusted to develop draft regulatory technical standards.

In accordance with Article 14(7) of the Rules of Procedure of the Board of Supervisors², the Board of Supervisors has adopted this opinion which is addressed to the European Commission.

General comments

1. On 16 December 2020, the EBA submitted the final draft regulatory technical standards (RTS) on own funds requirements for investment firms based on fixed overheads in accordance with Article 13(4) of Regulation (EU) No 2019/2033. With its letter of 29 November 2021, the European Commission informed the EBA of its intention to endorse the draft RTS with amendments and submitted to the EBA a modified version of the draft

¹ Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority) amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ L 331, 15.12.2010, p. 12).

² Decision adopting the Rules of Procedure of the European Banking Authority Board of Supervisors of 22 January 2020 (EBA/DC/2020/307).

RTS with its envisaged changes.

2. With regard to those amendments envisaged by the European Commission which are of a substantive nature, the EBA consider that they alter the draft RTS in a significant manner from the policy perspective and therefore warrant a formal opinion as set out in Article 10 of the EBA Regulation. The EBA is however also of the view that the amendments, despite the substantive nature of the changes, continue to maintain a good balance between the flexibility and risk sensitivity required for the calculation of the fixed overheads requirement and the need for a harmonised regulatory framework. Consequently, the EBA has no concerns in terms of the proposed amendments.
3. The EBA also agrees with the remaining changes summarised in the subsection 'Non-substantive changes', due to their nature as non-substantive and given their usefulness in clarifying the text.

Specific comments

Substantive changes: additional point for deduction from total expenses in the case of investment firms that are market makers

4. Article 1(6) of the draft RTS submitted by the EBA on 16 December 2020 adds further elements for deduction from total expenses to the list of deductions detailed in Article 13(4) of Regulation (EU) No 2019/2033. The European Commission has added a supplementary element to this list. This element specifically concerns investment firms that are market makers and targets fees that would be incurred by the firm in the context of a wind-down. Thus, an amount for deduction (A) is proposed based on the following formula:

$$A = B - 4 * C$$

where:

B = trading fees paid by the market maker for transactions executed for the sole purpose of providing liquidity to the market or markets for which the market maker provides market-making activities (yearly amount), where those fees have not directly been passed on and charged to customers;

C = trading fees that would be incurred to sell a portfolio of securities equivalent to the largest end-of-day inventory of securities, held by the market maker for market-making purposes, over the preceding year.

5. The EBA notes that this change is based on the fact that, in the particular case of market makers, the provision in Article 1(6)(a) of the submitted draft RTS stating that the deduction of trading fees is allowed 'only where they are directly passed on and charged to customers' cannot be applied as, in line with the notion of market maker in Directive (EU) No 2014/65, when an investment firm is acting as market maker, its counterparties are not considered as 'customers'.

6. The EBA considers that the addition made by the European Commission is enabling the investment firms acting as market makers to benefit from the principle of deduction of trading fees in a comparable manner as for non-market makers. Fees incurred during transactions executed for the sole purpose of providing liquidity to the market(s) for which market-making activities are provided are represented by the *B* amount in the formula above. However, in the case of a wind-down, a market maker may have to liquidate a portfolio of securities equivalent to the end-of-day inventory of securities held for market-making purposes and these trading fees should indeed be included in the fixed overheads requirements (FOR) – as reflected by the amount *C* in the formula above.
7. Nonetheless, the EBA recommends eliminating the phrase ‘executed for the sole purpose of providing liquidity to the market or markets’ as these RTS should only clarify the type of activity undertaken by investment firms with regard to the FOR and should not elaborate on the purpose or intentions of investment firms when performing their activities.

Non-substantive changes

8. Drafting amendments: The European Commission has also provided several drafting amendments meant to ease the reading of the draft RTS and that follow the EBA’s proposed wording. The EBA considers that the changes in drafting do not imply a change in policy and represent non-substantive changes.

This opinion will be published on the EBA’s website.

Done at Paris, 11 February 2022

[Signed]

José Manuel Campa

Chairperson
For the Board of Supervisors