



Deutsche Börse Group Response

to consultation EBA/CP/2020/09

Draft Regulatory Technical Standards on criteria to identify categories of staff whose professional activities have a material impact on an investment firm's risk profile or assets it manages under Directive (IFD) 2019/2034 of the European Parliament and Council on the prudential supervision of investment firms

published for consultation on 4 June 2020

Eschborn, 3 September 2020

Contact: Servaas De Beer
Telephone: +49 69 211 12821
Email: servaas.de.beer@deutsche-boerse.com

Deutsche Börse AG

60485 Frankfurt/Main
Germany

Phone +49-(0) 69-2 11-0
Fax +49-(0) 69-2 11-1 20 05
E-mail info@deutsche-boerse.com

Members of the Board:
Theodor Weimer (CEO)
Christoph Böhm
Thomas Book
Heike Eckert
Stephan Leithner
Gregor Pottmeyer

German stock corporation
registered in Frankfurt/Main
HRB No. 32232
Local court: Frankfurt/Main
VAT/Sales Tax ID No.:
DE 114151950
Legal Entity Identifiers (LEIs):
529900G3SW56SHYNPR95

A. Introduction

Deutsche Börse Group (“DBG”) welcomes the opportunity to comment on EBA’s consultation paper on Draft Regulatory Technical Standards on criteria to identify categories of staff whose professional activities have a material impact on an investment firm’s risk profile or assets it manages under Directive (IFD) 2019/2034 of the European Parliament and Council on the prudential supervision of investment firms (hereinafter referred to as the “Draft Risk-Taker RTS”).

DBG is operating in the area of financial markets along the complete chain of trading, clearing, settlement and custody for securities, derivatives and other financial instruments and as such as a provider of regulated financial market infrastructures.

Within DBG, three group entities qualify as an investment firm as defined in point (4) of Article 4(1) of Directive 2014/65/EU (MiFID2), making them subject to the new prudential regime on investment firms: (i) Eurex Repo, which is a leading provider for international financing in the secured money market business in Europe (repo and securities lending); (ii) 360 Treasury Systems, which offers a full range of services across the entire trading workflow of foreign-exchange and short-term money-market products and (iii) Eurex Securities Transactions Services, which will enable market participants to comply with the buy-in process introduced by the new European regulation on settlement discipline for securities trading transactions. In accordance with Article 25(1) IFD, Eurex Repo, which qualifies as a small and non-interconnected investment firm pursuant to Article 12(1) of Regulation (EU) 2019/2033 (“IFR”), does not need to comply with the remuneration requirements set out in IFD.

Our response contains our comments to the questions open for consultation (section B) as well as a general remark on the application date of the Draft Risk-Taker RTS (section C).

B. Questions open for consultation

➤ Question 1: Are the definitions in Article 1-3 sufficiently clear?

In our view, the definition of managerial responsibility (rf. Article 1 of the Draft Risk-Taker RTS) is too broad due to the lack of reference to decision-making power as well as duties and authorities of the staff member in relation to the investment firm’s risk profile. In practice, this definition might lead to an inappropriate extension of the number of identified risk-takers as non-executive employees (e.g., team leaders with tasks coordinating responsibilities but without any authorities for approving/vetoing budgets or for legally representing the company externally) as well as general coordination functions (e.g., head of project offices) might be identified solely due to their reporting line to the management body (n-1 reporting line). According to their assigned authorities and duties, the professional activities of these functions are in general not considered to have a material impact on the investment firm’s risk profile. It would be appreciated if EBA specifies the definition of managerial responsibility by excluding staff who reports to the management body but does not have any decision-making power.

However, considering the aforementioned and the principle of proportionality, it is welcomed that, in contrast to the risk-taker identification criteria applicable for large institutions (outlined in EBA/RTS/2020/05, hereafter “CRD Risk-Taker RTS”), staff who heads a subordinate business unit or control function and report to the level below the management body (n-2 reporting line) are not per se assigned with managerial responsibility according to the definition.

In Article 2, it is not sufficiently clear which other control functions shall be identified except for the functions entrusted with risk management, internal audit and compliance, as no further definition is provided in the Draft Risk-Taker RTS. The current description of a “control function” includes but is *not limited to* these three functions. We understand that this wording aims to include separate or additional functions covering specific aspects of the risk management, internal audit or compliance function, such as an AML officer or a staff member entrusted with the responsibility for IT security risks. The current wording should be adapted in this regard, by limiting this identification criterion solely to the staff members accountable and responsible towards the management board for risk management (in the sense of the 2nd line of defense), internal audit and compliance *or any additional function which is entrusted with responsibility and decision-making power for specific sub-aspects of such function*. This should ensure consistency in application.

It is welcomed that the definition of business units applicable for investment firms (rf. Article 3 of the Draft Risk-Taker RTS) remains unchanged compared to the requirements currently in force.

➤ **Question 2: Is the Article 4 on the application of criteria appropriate and sufficiently clear?**

The principle of proportionality is being stipulated throughout the CRD/CRR as well as IFD/IFR and was further strengthened with the revised banking package by, among others, introducing the terms of “systemic and non-systemic investment firms” (rf. Article 1(2) IFR) and “small and non-interconnected investment firms” (rf. Article 12 IFR). Based on this, it is highly welcomed that the principle of proportionality is also relevant for the application of the Draft Risk-Taker RTS by excluding small and non-interconnected investment firms from the requirement to identify risk-takers (rf. Article 4(2) of the Draft Risk-Taker RTS).

With respect to Article 4(2) and (3) in conjunction with points (a) and (b) of Article 6(1) concerning the identification of staff members with a total remuneration equal or greater than the defined absolute and relative thresholds, it is understood that this criterion shall be applied both on individual (investment firm) level and, where applicable, on consolidated (group) level. In consideration of Article 25(4) IFD, it is our understanding that on individual level, in case a staff member is employed by another legal entity (which is not an investment firm or an institution) in the same consolidation scope (e.g., staff in shared service companies for administrative functions) and renders services to the investment firm performing the process on the identification of risk-takers, this criterion is not applicable. Furthermore, in case a staff member receives remuneration from several legal entities within the same consolidation scope, only the remuneration awarded by the investment firm performing the process on the identification of risk-takers calculated on a

full-time equivalent basis is relevant for the application of this criterion. However, when applying point (a) of Article 6(1) on consolidated level, all remuneration awarded to staff by all legal entities within the group's consolidation scope shall be considered. It would be appreciated if EBA confirms this understanding.

Article 4(4) in conjunction with point (a) of Article 6(1) and Article 6(2) of the Draft Risk-Taker RTS generally requires the assessment of the individual risk impact of all employees in scope of the analysis, who are not identified as risk-takers pursuant to the qualitative criteria and who were awarded a total remuneration package which equals or is greater than the lowest remuneration package awarded to a risk-taker identified under certain qualitative criteria. If the assessment indicates a material impact of the individual's professional activities, the employee is identified as risk-taker. This identification approach is similar to the approach currently in force and set out in point (c) of Article 4(1) and in Article 4(2) of Commission Delegated Regulation (EU) No 604/2014. In practice, the application of this criterion leads to tremendous administrative and documentation efforts which seem inappropriate to the outcome of risk-takers solely identified under this criterion. In particular in investment firms with a lean and empowered organizational structure (e.g., delegation of credit authorities, membership in relevant committees such as risk or new product committees), the lowest total remuneration package awarded to a risk-taker identified pursuant to the qualitative criteria might be rather low and far below the absolute threshold of EUR 500,000 set by the Draft Risk-Taker RTS. This leads to a vast number of employees subject to an assessment of their individual risk impact, while only very few of these employees are finally identified as risk-taker. Considering the principle of proportionality as well as that the CRD Risk-Taker RTS applicable for institutions do not foresee this quantitative criterion at all, it would be highly appreciated if the risk-taker criteria for investment firms are harmonized with the criteria set out in the CRD Risk-Taker RTS, i.e. the quantitative criterion of Article 4(4) in conjunction with point (a) of Article 6(1) of the Draft Risk-Taker RTS remains fully unconsidered.

➤ **Question 3: What would be the appropriate percentage of own funds to determine that a business unit has a material impact on the risk profile of the investment firm?**

Article 5(4) of the Draft Risk-Taker RTS deems a staff member to have a material impact on an investment firm's risk profile or assets if this staff member has a managerial responsibility for a business unit that contributes to more than 10-20% (number to be defined) of the investment firm's total own funds requirement.

Considering the overarching principle of proportionality in the new prudential regime for investment firms, we propose to delete this criterion. Firstly, we consider that any function covered by this requirement should also be identified through the other qualitative and/or quantitative requirements from Article 5 or 6 of the Draft Risk-Taker RTS. Additionally, implementing this requirement is complex and would entail a high effort in terms of collecting necessary data, calculating the requirement and monitoring ongoing compliance with it. Even in the case where this criterion would identify staff beyond the persons already identified through the other qualitative and quantitative requirements (which we assume will not be the case), this would be in complete disproportion to the expenditures to implement the requirement.

➤ **Question 4: Are the qualitative criteria within Article 5 appropriate and sufficiently clear?**

It is welcomed that the qualitative risk-taker identification criteria for investment firms outlined in Article 5 of the Draft Risk-Taker RTS are similar to the risk-taker identification criteria for institutions (outlined in the CRD Risk-Taker RTS), while also considering characteristics specific to investment firms. In corporate groups with central functions involved in the risk-taker analysis of both investment firms and institutions, this high degree of similarity avoids inadequate management and administrative challenges when performing the risk-taker analysis and ensures group-wide consistency of the identification approaches as far as adequate. Moreover, the consistency in the identification criteria might enhance the transparency of identification for employees who are identified as risk-takers.

Article 5(7) of the Draft Risk-Taker RTS requires the identification of staff members with managerial responsibility (i.e., n-1 reporting to the management body) for a material risk the investment firm needs to report to the management body in line with Article 28(3) IFD. According to the Article 5(5) in conjunction with Article 2 of the Draft Risk-Taker RTS staff members with managerial responsibility for the risk management function in the sense of a control function are already selected as risk-takers. In this respect, it is our understanding that Article 5(7) of the Draft Risk-Taker RTS aims for identifying the staff members accountable to the management body for a risk management function which is not considered as control function in line with Article 2 of the Draft Risk-Taker RTS, but as a risk function in the sense of the 1st line of defense. It would be appreciated if EBA confirms whether this understanding is correct.

For the application of point (i) of Article 5(8) ("*the staff member has managerial responsibility for managing outsourcing arrangement of critical or important functions*") of the Draft Risk-Taker RTS it is not sufficiently clear which person is to be identified under this criterion. Does this criterion refer to the designated outsourcing coordinator who is responsible for ensuring the setup of a comprehensive outsourcing framework in line with regulatory requirements and for regular reporting to the management body? Further clarification by EBA on this criterion would be appreciated.

➤ **Question 5: Are the quantitative criteria within Article 6 appropriate and sufficiently clear?**

In analogy to our response under question 4 for the qualitative criteria, it is highly appreciated that the approach for the identification pursuant to the quantitative criteria with the possibility for exemption of staff members based on an objective assessment is similar to the approach established under Commission Delegated Regulation (EU) No 604/2014 and maintained in the CRD Risk-Taker RTS.

However, and as already outlined in our response to question 2 above, we would ask the EBA to apply the principle of proportionality also for criterion set out in point (d) of Article 6(1) of the Draft

Risk-Taker RTS and to harmonize the Draft Risk-Taker RTS in this respect as well with the CRD Risk-Taker RTS.

For the calculation of the remuneration threshold according to point (a) of Article 6(1) in conjunction with Article 7(1) of the Draft Risk-Taker RTS, investment firms should take into account the average total remuneration of all members of the management body (in its management and supervisory function) as well as of the senior management. To our understanding this requirement refers to companies with a one-tier structure. Conversely, in Germany the two-tier structure with a clear separation of responsibilities between the Executive Board (similar to the management body in its management function) and the Supervisory Board (similar to the management body in its supervisory board) is prevailing. In practice, Supervisory Board members generally do not receive performance-related remuneration, but attendance fee for the participation at committee meetings, or they do not receive any compensation at all for their Supervisory Board mandate as they are employed by another legal entity within the group. This generally also applies to staff representatives, who receive, if any, an attendance fee for their mandate, while the fixed and variable remuneration they receive from the investment firm is generally not related to their Supervisory Board mandate.

Considering this practice and the two-tier structure for investment firms located in Germany, it is our understanding that Supervisory Board members who do not receive fixed or variable remuneration for their mandate; but (if any) an attendance fee, shall not be considered in the calculation of the remuneration threshold. It would be appreciated if EBA provides clarification on this aspect.

C. General comment on the date of application of the Draft Risk-Taker RTS

The Draft Risk-Taker RTS do not mention the (expected) date of application. We assume that the RTS would first apply as of performance year 2021 for the identification of 2021 risk-takers. Vice versa we assume that the RTS do not apply for performance year 2020 firstly to avoid the application of two different sets of criteria for the identification of risk-takers in one performance year and secondly to ensure that staff members who would be identified according to the new set of criteria may be informed on their identification at the beginning of the performance year. It is highly recommended that the date of application of the new RTS is corresponding to the application date of IFR and IFD (as implemented nationally) to ensure consistency and to avoid management challenges.

* *
*

We are available to discuss any of the points raised above, if deemed useful.

Claudine Hock
Servaas De Beer