

EBA/CP/2020/08

4 June 2020

Consultation Paper

Draft Regulatory Technical Standards

on classes of instruments that adequately reflect the credit quality of the investment firm as a going concern and possible alternative arrangements that are appropriate to be used for the purposes of variable remuneration

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1. Responding to this consultation

The EBA invites comments on all proposals put forward in this paper and in particular on the specific questions summarised in 4.2.

Comments are most helpful if they:

- respond to the question stated;
- indicate the specific point to which a comment relates;
- contain a clear rationale;
- provide evidence to support the views expressed/ rationale proposed; and
- describe any alternative regulatory choices the EBA should consider.

Submission of responses

To submit your comments, click on the 'send your comments' button on the consultation page by 4 September 2020. Please note that comments submitted after this deadline, or submitted via other means may not be processed.

Publication of responses

Please clearly indicate in the consultation form if you wish your comments to be disclosed or to be treated as confidential. A confidential response may be requested from us in accordance with the EBA's rules on public access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by the EBA's Board of Appeal and the European Ombudsman.

Data protection

The protection of individuals with regard to the processing of personal data by the EBA is based on Regulation (EC) N° 45/2001 of the European Parliament and of the Council of 18 December 2000 as implemented by the EBA in its implementing rules adopted by its Management Board. Further information on data protection can be found under the Legal notice section of the EBA website.

2. Executive Summary

Directive (EU) 2019/2034¹ (IFD) sets out requirements for the remuneration of staff whose professional activities have a material impact on the risk profile of the investment firm or of the assets that it manages (identified staff) that apply from the 26 January 2021. Currently such staff is subject to similar provisions under Directive 2013/36/EU²(CRD).

Article 32(1)(j) of the IFD provides that at least 50% of the variable remuneration consists of certain instruments, including (iii) Additional Tier 1 instruments or Tier 2 instruments or Other Instruments which can be fully converted to Common Equity Tier 1 instruments or written down and that adequately reflect the credit quality of the investment firm as a going concern.

Article 32(1)(k) of the IFD provides that by way of derogation from point (j), where an investment firm does not issue any of the instruments referred to in that point, competent authorities may approve the use of alternative arrangements fulfilling the same objectives.

Article 32 (8) of Directive (EU) 2019/2034 mandates the EBA, in consultation with ESMA, to develop draft regulatory technical standards to specify the instruments under point (j)(iii) of paragraph (1) of this Article and possible alternative arrangements for the pay out of variable remuneration.

The IFD refers to the requirements included in Regulation (EU) No 575/2013³ (CRR) regarding AT 1 and Tier 2 instruments. The draft RTS introduce requirements for investment firms for AT 1, Tier 2 and Other Instruments used for the purposes of variable remuneration, to ensure that they appropriately reflect the credit quality of the institution, and define for Tier 2 and Other Instruments the write-down, write-up and conversion mechanisms. For AT 1 instruments, these mechanisms are defined by the CRR. The provisions within the RTS are aligned with the Commissions Delegated Regulation 527/2014⁴ (Regulatory Technical Standards (RTS) on classes of instruments that are appropriate to be used for the purposes of variable remuneration under CRD) to ensure that in particular groups of credit institutions and investment firms are able to use a common set of instruments for remuneration purposes.

The draft RTS set out requirements to ensure that the credit quality of the institutions is reflected in the instruments and that these instruments are appropriate for the purposes of variable

¹ 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

² Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC

³ Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012

⁴ COMMISSION DELEGATED REGULATION (EU) No 527/2014 of 12 March 2014 supplementing Directive (EU) No 2013/36/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the classes of instruments that adequately reflect the credit quality of an institution as a going concern and are appropriate to be used for the purposes of variable remuneration.

remuneration. The link to credit quality as a going concern is established by introducing uniform minimum trigger events for write-down and conversion of AT 1, Tier 2 and Other Instruments. To ensure that different classes of instruments are appropriate for the purposes of variable remuneration, these instruments should provide appropriate incentives for staff to be prudent and long term oriented in their risk-taking.

Next steps

The EBA will finalise the draft RTS after a three month period of public consultation and aims at submitting the draft RTS to the European Commission in November 2020. It is assumed that institutions will have to comply with the RTS with regard to the remuneration awarded for the performance year 2021.

3. Background and rationale

3.1 The nature of RTS under EU law

1. These draft RTS are produced in accordance with Article 10 of Regulation (EU) No 1093/2010 of 24 November 2010 (the EBA Regulation) as amended. Paragraph 4 of that same Article provides that the RTS shall be adopted by means of an EU Regulation or Decision.
2. In accordance with EU law, EU regulations are binding in their entirety and directly applicable in all Member States. This means that, on the date of their entry into force, EU Regulations become part of the national law of the Member States and that their implementation into national law is not only unnecessary but also prohibited by EU law, except insofar as this is expressly required by the regulations.

3.2 Legal basis and background

3. After the financial crisis, the EU co-legislator has put in place a legal framework under Directives 2010/76/EU and 2013/36/EU for identified staff, i.e. staff that has a material impact on the institutions risk profile. This framework aimed at ensuring that the variable remuneration of identified staff is aligned with the institutions risk profile in the longer-term and applied to credit institutions and investment firms.
4. Considering the differences between credit institutions and investment firms a specific remuneration framework for investment firms has been established for those firms that are subject to Directive (EU) 2019/2034⁵ (IFD). Small and non-interconnected investment firms that meet all the conditions of Article 12(1) Regulation (EU) 2019/2033 (IFR)⁶ are not subject to the specific remuneration framework under IFD, but have still to comply with the remuneration requirements within Directive 2014/65/EU⁷ that sets out requirements on the remuneration of sales staff.

⁵ 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

⁶ 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

⁷ DIRECTIVE 2014/65/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU

5. The IFD sets out a framework for remuneration policies for investment firms that has been construed as referring to the corresponding provisions in Directive 2013/36/EU⁸. The provisions should ensure that the remuneration of staff members who have a material impact on the investment firm's risk profile or on the assets that it manages is aligned with its risk profile.
6. While ensuring a level playing field, the IFD takes into account the differences between credit institutions and investment firms and offers some flexibility to investment firms in the way they use non-cash instruments when paying variable remuneration, as long as such instruments are effective in achieving the objective of aligning the interest of staff with the interest of various stakeholders, such as shareholders, creditors and clients and contribute to the alignment of variable remuneration with the risk profile of the investment firm. These conditions and the present Commission's delegated regulation ensure that non-cash instruments are appropriate to be used for the purposes of variable remuneration.
7. Article 32(1)(j) of the IFD requires that "at least 50% of the variable remuneration" of staff members who have a material impact on the investment firm's risk profile or on the assets that it manages "consists of any of the following instruments: (i) shares, or subject to the legal structure of the investment firm concerned, equivalent ownership interests; (ii) share-linked instruments, or subject to the legal structure of the investment firm concerned, equivalent non-cash instruments; (iii) additional Tier 1 instruments or Tier 2 instruments or Other Instruments which can be fully converted to Common Equity Tier 1 instruments or written down and that adequately reflect the credit quality of the investment firm as a going concern; (iv) non-cash instruments which reflect the instruments of the portfolios managed.
8. Article 32(1)(k) determines that by way of derogation from point (j), where an investment firm does not issue any of the instruments referred to in that point, national competent authorities may approve the use of alternative arrangements fulfilling the same objectives."
9. Article 32 (3) of IFD determines that "Member States or their competent authorities may place restrictions on the types and designs of those instruments or prohibit the use of certain instruments for variable remuneration."
10. Article 32(8) of IFD sets out "that EBA, in consultation with ESMA, shall develop draft regulatory technical standards to specify the classes of instruments that satisfy the conditions set out in paragraph 1(j)(iii) as well as to specify possible alternative arrangements set out in paragraph 1(k)."
11. The IFD allows institutions to use a wide set of instruments for the pay out of variable remuneration. The purpose of the draft RTS is to specify a subset of those instruments,

⁸ Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 as amended on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC Text with EEA relevance

namely classes of additional Tier 1, Tier 2 and Other Instruments that are appropriate to be used for variable remuneration as well as to specify possible alternative arrangements for the pay out of variable remuneration where investment firms do not issue any of the instruments referred to within Article 32(1)(j) of the IFD.

12. The EBA has conducted an impact assessment of costs and benefits caused by the provisions contained in these draft RTS. The EBA came to the conclusion that the additional costs caused by these draft RTS are very limited, as the draft RTS is closely aligned with the existing framework. The possibility for certain investment firms to use alternative arrangements is aimed at reducing the regulatory burden for those institutions, which do not issue any of the instruments included in Article 32(1)(j) of IFD. However, also the setting up of alternative arrangements will trigger one of costs that are very limited as they do not require the issuance of any financial instruments.

3.3 Regulatory approach within the RTS

13. The EBA has taken the existing remuneration framework established under Directive 2013/36/EU and the Commissions Delegated Regulation 527/2014⁹ into account when developing the draft RTS. The existing framework takes into account market practices for own funds instruments and aims to ensure that already existing types of instruments can be used when they meet certain additional conditions that ensure that such issuances are appropriate for the purpose of variable remuneration.
14. Regarding the classes of additional Tier 1 (AT 1), Tier 2 and Other Instruments that are appropriate to be used for variable remuneration the Commission has already adopted the aforementioned Delegated Regulation specifying the classes of such instruments that meet the conditions of Article 94 (1) point (l)(ii) of Directive 2013/36/EU.
15. The conditions for such instruments under IFD are equal to the conditions set out in Directive 2013/36/EU and therefore the classes of instruments that satisfy the conditions under Article 32 (1)(j)(iii) of the IFD should be equivalent to the classes of instruments specified in Commissions Delegated Regulation 527/2014, but should also take into account the need for increased flexibility of investment firms. This additional flexibility has to a large extent already been provided for within paragraphs 4 and 5 of the same Article that allows to limit the application of the requirement to pay out variable remuneration to certain investment firms and staff. Moreover, investment firms that do not issue instruments are allowed to use alternative arrangements for the pay out of variable remuneration.
16. Variable remuneration awarded in instruments is intended to promote sound and effective risk management and should not encourage risk-taking that exceeds the level of tolerated risk within the investment firm. Receiving a part of the variable remuneration in

⁹ COMMISSION DELEGATED REGULATION (EU) No 527/2014 of 12 March 2014 supplementing Directive (EU) No 2013/36/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the classes of instruments that adequately reflect the credit quality of an institution as a going concern and are appropriate to be used for the purposes of variable remuneration.

instruments or via alternative arrangements should provide incentives for staff to act in the long-term interest of the investment firm.

17. The price or value of instruments awarded as variable remuneration should reflect changes in the credit quality of the firm, in particular if it deteriorates, to ensure that instruments awarded to staff participate in potential losses that have an adverse effect on credit quality as a going concern. This link provides incentives for prudent and long term oriented risk-taking. Credit quality may be measured by different means, e.g. using a rating, spreads or capital ratios.
18. The qualification that the instrument shall reflect the credit quality of the institution as a going concern makes it necessary to introduce measures that ensure that the value of instruments is not reduced only at the time where an institution is resolved or at the point of non-viability. Therefore, the trigger level for investment firms at which write-off or conversion takes place is set above the regulatory minimum requirements at 7% CET 1 to ensure that the instruments are suitable for the purposes of variable remuneration.
19. To ensure that a reliable measure exists for all investment firms without creating costs for additional rating processes and to ensure a close alignment with the framework applicable to credit institutions, including on a consolidated basis, the CET 1 capital ratio was chosen as an indicator for the credit quality as a going concern.
20. The IFD provisions for variable remuneration require deferral and retention periods and state, among other requirements, that variable remuneration is not paid through vehicles or methods that facilitate non-compliance with the requirements. Consequently, the conditions of instruments need to ensure a sufficiently long maturity to account for deferral and retention periods and to be at market rates to avoid situations in which overly high distributions jeopardise the ability of investment firms to strengthen their capital bases or that would circumvent limits set for the variable components of remuneration. This is achieved by a cap on the distributions or through the requirement to issue significant parts of any issuance to other investors. To ensure a level playing field the requirements of the draft RTS have been aligned with the framework applicable to institutions.
21. Where an investment firm does not issue any of the instruments referred to in Article 32(1)(j), national competent authorities may approve the use of alternative arrangements fulfilling the same objectives. The draft RTS specify possible alternative arrangements that should ensure that the variable remuneration received by staff members who have a material impact on the investment firms risk profile or on the assets that it manages is aligned with its risk profile.
22. To achieve this objective it is necessary to create conditions that ensure that the value of the variable remuneration received under alternative arrangements is reduced when risks cause an adverse effect on the institutions or the managed assets performance or that such arrangements could be converted into CET1 capital. Such arrangements should allow

deferral and retention of variable remuneration received, so that the compliance with other requirements for variable remuneration is ensured.

4. Draft regulatory technical standards

COMMISSION DELEGATED REGULATION (EU) No .../..

of [date]

on classes of instruments that adequately reflect the credit quality of the investment firm as a going concern and possible alternative arrangements that are appropriate to be used for the purposes of variable remuneration

THE EUROPEAN COMMISSION,

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

Having regard to Directive 2019/2034/EU 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 32 (8) thereof,

Whereas:

- (1) Directive 2019/2034/EU regarding the governance and remuneration provisions applicable to investment firms has been construed as referring to the corresponding provisions in Directive 2013/36/EU to ensure that governance and remuneration provisions applicable to investment firms benefit from the well established meaning of these concepts under Directive 2013/36/EU. Against this background and also with a view to ensure a level playing field between credit institutions and investment firms this Regulation should be inspired by and as far as possible aligned with the Commission's Delegated Regulation 527/2014 that specifies the classes of instruments that are appropriate to be used under Directive 2013/36/EU. This Regulation should also, provide appropriate flexibility to investment firms regarding the use of different types of non-cash instruments or of alternative arrangements when paying variable remuneration as long as such instruments are effective in achieving the objective of aligning the interest of staff with the interest of various stakeholders, such as shareholders, creditors and clients, and contribute to the alignment of variable remuneration with the risk profile of the investment firm.
- (2) Investment firms have been subject to Commission's Delegated Regulation 527/2014 that specifies the additional Tier 1, Tier 2 and Other Instruments, of which the substantial portion of variable remuneration to be paid out in instruments under Article 94(1)(1) of Directive 2013/36/EU should consist. Investment firms should be able to

continue to use those instruments that comply with the Commissions Delegated Regulation 527/2014.

- (3) Variable remuneration awarded in instruments should promote sound and effective risk management and should not encourage risk-taking that exceeds the level of risk appetite of the investment firm.. Therefore classes of instruments which can be used for the purposes of variable remuneration should align the interests of staff with the longer-term interests of the investment firm, its shareholders, creditors, clients and other stakeholders by providing incentives for staff to act in the longer-term interest of the investment firm.
- (4) Directive 2019/2034/EU allows investment firms to use a wide set of instruments for the pay out of variable remuneration. In order to ensure that there is a strong link to the credit quality of an investment firm as a going concern, additional Tier 1, Tier 2 and Other Instruments used for the purposes of variable remuneration should contain appropriate trigger events for write down or conversion which reduce the value of the instruments in situations where the credit quality of the investment firm as a going concern has deteriorated. The trigger events used for remuneration purposes should not change the level of subordination of the instruments and therefore should not lead to a disqualification of Additional Tier 1 or Tier 2 instruments as own funds instruments.
- (5) While the conditions which apply to Additional Tier 1 and Tier 2 instruments are specified in Article 9 of Regulation (EU) 2019/2033¹⁰ in conjunction with Chapter 3 and 4 of Title 1 of Part Two of Regulation (EU) No 575/2013, the Other Instruments referred to in point (j)(iii) of Article 32(1) of Directive 2019/2034/EU which can be fully converted to Common Equity Tier 1 instruments or written down are not subject to specific conditions pursuant to that Regulation as they are not classified as own funds instruments for prudential purposes. Specific requirements should therefore be set for different classes of instruments to ensure that they are appropriate to be used for the purposes of variable remuneration, taking account of the different nature of the instruments. The use of instruments for the purposes of variable remuneration should not in itself prevent instruments from qualifying as own funds of an investment firm as long as the conditions laid down in Regulation (EU) 2019/2033 are met. Nor should such use in itself be understood as providing an incentive to redeem the instrument, as after deferral and retention periods staff members are, in general, able to receive liquid funds by other means than redemption.
- (6) Other Instruments should not be limited to financial instruments as defined in point 15 of Article 4(1) of Regulation (EU) No 2019/2033 and allow for the use of other contractual arrangements between staff members and investment firm to reduce the administrative burden for the creation of such instruments. To ensure that Other Instruments reflect the credit quality of an institution as a going concern, appropriate requirements should ensure that such instruments are written down or converted before an investment firm fails to meet its own funds requirements.
- (7) When instruments used for the purposes of variable remuneration are called, redeemed, repurchased or converted, in general such transactions should not increase the value of

¹⁰ 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

the remuneration awarded by paying out amounts that are higher than the value of the instrument or by converting into instruments which have a higher value than the instrument initially awarded. The replacement of instruments at the same value should ensure that remuneration is not paid through vehicles or methods that facilitate non-compliance with Article 32 of Directive 2019/2034/EU.

- (8) When awarding variable remuneration and when instruments used for variable remuneration are redeemed, called, repurchased or converted, those transactions should be based on values that have been established in accordance with the applicable accounting standard at the point of time of the transaction to ensure that the correct amount of variable remuneration is awarded and not unduly altered when the instrument is redeemed, called, repurchased or converted.
- (9) Article 54 of Regulation (EU) No 575/2013 sets out the write-down and conversion mechanisms for Additional Tier 1 instruments. Additionally, point (j)(iii) of Article 32(1) of Directive 2019/2034/EU requires that Other Instruments can be fully converted into Common Equity Tier 1 instruments or written down. As the economic outcome of a conversion or write-down of Other Instruments is the same as for Additional Tier 1 instruments, write-down or conversion mechanisms for Other Instruments should take into account the mechanisms that apply to Additional Tier 1 instruments, with adaptations to take account of the fact that Other Instruments do not qualify as own fund instruments from a prudential perspective. Tier 2 instruments are not subject to regulatory requirements regarding write-down and conversion under Regulation (EU) No 575/2013. To ensure that the value of all such instruments, when used for variable remuneration, is reduced when the credit quality of the institution deteriorates, the situations in which a write-down or conversion of the instrument is necessary should be specified. The write down, write up and conversion mechanisms for Tier 2 and Other Instruments should be specified to ensure consistent application.
- (10) Distributions arising from instruments can take various forms. They can be variable or fixed and can be paid periodically or at the final maturity of an instrument. In order to promote sound and effective risk management no distributions should be paid to staff during deferral periods. Staff members should only receive the distributions in respect of periods which follow the vesting of the instrument, after which staff becomes the legal owner of the instrument. Therefore only instruments with distributions which are paid periodically to the owner of the instrument are appropriate for use as variable remuneration; zero coupon bonds or instruments which retain earnings should not count towards the portion of remuneration which must consist of any of the instruments referred to in point (j) of Article 32(1) of Directive 2019/2034/EU. This is because staff would benefit during the deferral period from increasing values, which can be understood as equivalent to receiving distributions.
- (11) Very high distributions can reduce the long-term incentive for prudent risk-taking as they effectively increase the variable part of the remuneration. In particular distributions should not be paid out at intervals of longer than one year, as this would lead to distributions effectively accumulating during deferral periods and being paid out once the variable remuneration vests. Accumulation of distributions would circumvent the principle in paragraph 3 of Article 32 that remuneration payable under deferral arrangements vests no faster than on a pro rata basis. Point (b) of Article 32(2) of

Directive 2019/2034/EU requires that variable remuneration shall not be paid through financial vehicles or methods that facilitate the non-compliance with this Directive or Regulation (EU) 2019/2033. Therefore distributions made after the instrument has vested should not exceed market rates for such instruments issued by other investment firms or institutions of comparable credit quality. This should be ensured by requiring instruments used for variable remuneration, or the instruments to which they are linked, to be issued mainly to other investors, or by requiring such instruments to be subject to a cap on distributions.

- (12) Deferral and retention requirements which apply to awards of variable remuneration pursuant to point (l) of Article 32(1) and Article 32(3) of Directive 2019/2034/EU have to be met at all relevant times, including when instruments used for variable remuneration are called, redeemed, repurchased or converted. In such situations instruments should therefore be replaced with Additional Tier 1, Tier 2 and Other Instruments which reflect the credit quality of the institution as a going concern, have features equivalent to those of the instrument initially awarded, and are of the same value, taking into account any amounts which have been written down. Where instruments other than Additional Tier 1 instruments have a fixed maturity date minimum requirements should be set for the remaining maturity of such instruments when they are awarded in order to ensure that they are consistent with requirements regarding the deferral and retention periods for variable remuneration.
- (13) Directive 2019/2034/EU does not limit the classes of instruments that can be used for variable remuneration to a specific class of financial instruments. It should be possible to use synthetic instruments or contracts between staff members and institutions which are linked to Additional Tier 1 and Tier 2 instruments which can be fully converted or written down. This allows for the introduction of specific conditions in the terms of such instruments which apply only to instruments awarded to staff, without the need to impose such conditions on other investors.
- (14) In a group context issuances may be managed centrally within a parent undertaking; this should include situations where the parent undertaking is subject to Directive 2013/36/EU or Directive 2019/2034. Investment firms within a group may not always issue instruments which are appropriate to be used for the purpose of variable remuneration themselves. Regulation (EU) 2019/2034 in conjunction with Regulation (EU) No 575/2013 enables Additional Tier 1 and Tier 2 instruments issued through an entity within the scope of consolidation to form part of an investment firm's own funds subject to certain conditions. Therefore it should also be possible to use such instruments for the purpose of variable remuneration, provided that there is a clear link between the credit quality of the investment firm using these instruments for the purpose of variable remuneration and the credit quality of the issuer of the instrument. Such a link can usually be assumed to be the case between a parent undertaking and a subsidiary. Instruments other than Additional Tier 1 and Tier 2 instruments which are not issued directly by an investment firm should also be capable of being used for variable remuneration, subject to equivalent conditions. Instruments which are linked to reference instruments issued by parent undertakings in third countries and which are otherwise equivalent to Additional Tier 1 or Tier 2 instruments should be eligible to be used for the purposes of variable remuneration if the trigger event refers to the investment firm using such a synthetic instrument.

- (15) Investment firms that do not issue any of the instruments listed under point (j) Article 32(1) of Directive 2019/2034/EU, should be able to use alternative arrangements, subject to the approval of the competent authority. Such alternative arrangements should meet the same objectives than the award of eligible instruments. The alternative arrangement should ensure that the variable remuneration awarded is subject to implicit risk adjustments, i.e. changes of its value in cases there is an adverse effect on the investment firms or managed assets performance. Alternative arrangements should also be consistent with the requirement to defer variable remuneration, the application of malus or claw back and the application of retention periods to variable remuneration paid in instruments.
- (16) This Regulation is based on the draft regulatory technical standards submitted by the European Banking Authority (EBA) to the European Commission.
- (17) [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 1093/2010¹¹.]

HAS ADOPTED THIS REGULATION:

Article 1

Classes of instruments that adequately reflect the credit quality of an institution as a going concern and are appropriate to be used for the purposes of variable remuneration

1. The following shall be the classes of instruments that satisfy the conditions laid down in point (j)(iii) of Article 32(1) of Directive 2019/2034/EU:

- (a) classes of Additional Tier 1 instruments where those classes fulfil the conditions referred to in paragraph 2 and Article 2, and comply with Article 5(9) and point (c) of Article 5(13);
- (b) classes of Tier 2 instruments where those classes fulfil the conditions referred to in paragraph 2 and Article 3, and comply with Article 5;
- (c) classes of instruments which can be fully converted to Common Equity Tier 1 instruments or written down and which are neither Additional Tier 1 instruments nor Tier 2 instruments ('Other Instruments') in the cases referred to in Article 4 where those classes fulfil the conditions referred to in paragraph 2 and comply with Article 5.

2. The classes of instruments referred to in paragraph 1 shall fulfil the following conditions:

¹¹ 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).

- (a) instruments shall not be secured or subject to a guarantee that enhances the seniority of the claims of the holder;
- (b) where the provisions governing an instrument allow its conversion, that instrument shall only be used for the purposes of awarding variable remuneration where the rate or range of conversion is set at a level that ensures that the value of the instrument into which the instrument initially awarded is converted is not higher than the value of the instrument initially awarded at the time it was awarded as variable remuneration;
- (c) the provisions governing convertible instruments which are used for the sole purpose of variable remuneration shall ensure that the value of the instrument into which the instrument initially awarded is converted is not higher than the value, at the time of that conversion, of the instrument initially awarded;
- (d) the provisions governing the instrument shall provide that any distributions are paid on at least an annual basis and are paid to the holder of the instrument;
- (e) instruments shall be priced at their value at the time the instrument is awarded, in accordance with the applicable accounting standard. The valuation shall be subject to independent review;
- (f) the provisions governing the instruments issued for the sole purpose of variable remuneration shall require a valuation to be carried out in accordance with the applicable accounting standard in the event that the instrument is redeemed, called, repurchased or converted.

Article 2

Conditions for classes of Additional Tier 1 instruments

Classes of Additional Tier 1 instruments shall comply with the following conditions:

- (a) the provisions governing the instrument shall specify a trigger event for the purpose of point (e)(iii) of Article 9(2) of Regulation (EU) No 2019/2033;
- (b) the trigger event referred to in point (a) occurs when the Common Equity Tier 1 capital ratio of the institution issuing the instrument falls below either of the following:
 - (i) 7 % of the product of 12.5 multiplied by the own funds requirements calculated under Article 11 (1) of Regulation (EU) 2019/2033;
 - (ii) a level higher than specified in (i), where determined by the institution and specified in the provisions governing the instrument;
- (c) one of the following requirements is met:

- (i) the instruments are issued for the sole purpose of being awarded as variable remuneration and the provisions governing the instrument ensure that any distributions are paid at a rate which is consistent with market rates for similar instruments issued by the investment firm or by investment firms or institutions of comparable credit quality and which in any case is, at the time the remuneration is awarded, no higher than 8 percentage points above the annual average rate of change for the Union published by the Commission (Eurostat) in its Harmonised Indices of Consumer Prices published pursuant to Article 11 of Council Regulation (EC) No 2494/95 (1). Where the instruments are awarded to staff members who perform the predominant part of their professional activities outside the Union and the instruments are denominated in a currency issued by a third country, investment firms may use a similar independently-calculated index of consumer prices produced in respect of that third country;
- (ii) at the time of the award of the instruments as variable remuneration, at least 60 % of the instruments in issuance were issued other than as an award of variable remuneration and are not held by one of the following or by any undertaking that has close links with one of the following: the institution or its subsidiaries, the parent undertaking of the investment firm or its subsidiaries, the parent financial holding company or its subsidiaries, the mixed activity holding company or its subsidiaries or the mixed financial holding company and its subsidiaries.

Article 3

Conditions for classes of Tier 2 instruments

Classes of Tier 2 instruments shall comply with the following conditions:

- (a) at the time of the award of the instruments as variable remuneration, the remaining period before maturity of the instruments shall be equal to or exceed the sum of the deferral periods and retention periods that apply to variable remuneration in respect of the award of those instruments;
- (b) the provisions governing the instrument provide that, upon the occurrence of a trigger event the principal amount of the instruments shall be written down on a permanent or temporary basis or the instrument shall be converted to Common Equity Tier 1 instruments;
- (c) the trigger event referred to in point (b) occurs where the Common Equity Tier 1 capital ratio of the investment firm issuing the instrument falls below either of the following:
 - (i) 7 % of the product of 12.5 multiplied by the own funds requirements calculated under Article 11(1) of Regulation 2019/2034/EU;

- (ii) a level higher than specified under (i), where determined by the investment firm and specified in the provisions governing the instrument;
- (d) one of the requirements in point (c) of Article 2 is met.

Article 4

Conditions for classes of Other Instruments

1. Under the conditions laid down in point (c) of Article 1(1), Other Instruments satisfy the conditions laid down in point (j)(iii) of Article 32(1) of Directive 2019/2034/EU in each of the following cases:

- (a) the Other Instruments fulfil the conditions referred to in paragraph 2;
- (b) the Other Instruments are linked to an Additional Tier 1 instrument or Tier 2 instrument and fulfil the conditions referred to in paragraph 3;
- (c) the Other Instruments are linked to an instrument which would be an Additional Tier 1 instrument or Tier 2 instrument but for the fact that it is issued by a parent undertaking of the institution which is outside the scope of consolidation pursuant to Chapter 2 of Title II of Part One of Regulation (EU) No 575/2013 and the Other Instruments fulfil the conditions in paragraph 4.

2. The conditions referred to in point (a) of paragraph 1 are the following:

- (a) the Other Instruments shall be issued directly or through an institution or financial institution included within the consolidation pursuant to Chapter 2 of Title II of Part One of Regulation (EU) No 575/2013 or Article 7 of Regulation (EU) 2019/2034, provided that a change to the credit quality of the issuer of the instrument can reasonably be expected to lead to a similar change to the credit quality of the investment firm using the Other Instruments for the purpose of variable remuneration;
- (b) the provisions governing the Other Instruments do not give the holder the right to accelerate the scheduled payment of distributions or principal other than in the case of the insolvency or liquidation of the institution or investment firm issuing the instrument;
- (c) at the time of the award of the Other Instruments as variable remuneration the remaining period before maturity of the Other Instruments is equal to or exceeds the sum of the deferral periods and retention periods that apply in respect of the award of those instruments;
- (d) the provisions governing the instrument provide that, upon the occurrence of a trigger event the principal amount of the instruments shall be written down on a

permanent or temporary basis or the instrument shall be converted to Common Equity Tier 1 instruments;

- (e) the trigger event referred to in point (d) occurs when the Common Equity Tier 1 capital ratio of the institution or investment firm issuing the instrument falls below either of the following:
 - (i) in the case of an investment firm issuing the instrument, 7 % of the product of 12.5 multiplied by the own funds requirements calculated under Article 11(1) of Regulation 2019/2034/EU;
 - (ii) in the case of an institution issuing the instrument, 7% of the Common Equity Tier 1 capital ratio of the institution issuing the instrument;
 - (iii) a level higher than specified under (i) or (ii), where determined by the investment firm or institution issuing the instrument and specified in the provisions governing the instrument;
- (f) one of the requirements in point (c) of Article 2 is met.

3. The conditions referred to in point (b) of paragraph 1 are the following:

- (a) the Other Instruments fulfil the conditions in points (a) to (e) of paragraph 2;
- (b) the Other Instruments are linked to an Additional Tier 1 or Tier 2 instrument issued through an entity included within the group consolidation pursuant to Chapter 2 of Title II of Part One of Regulation (EU) No 575/2013 or Article 7 of Regulation (EU) 2019/2034 (the 'reference instrument');
- (c) the reference instrument fulfils the conditions of points (c) and (f) of paragraph 2 at the time that the instrument is awarded as variable remuneration;
- (d) the value of an Other Instrument is linked to the reference instrument such that it is at no time more than the value of the reference instrument;
- (e) the value of any distributions paid after the Other Instrument has vested is linked to the reference instrument such that distributions paid are at no time more than the value of any distributions paid under the reference instrument;
- (f) the provisions governing the Other Instruments provide that if the reference instrument is called, converted, repurchased or redeemed within the deferral or retention period the Other Instruments shall be linked to an equivalent reference instrument which fulfils the conditions in this Article such that the total value of the Other Instruments does not increase.

4. The conditions referred to in point (c) of paragraph 1 are the following:

- (a) the competent authorities have determined for the purpose of Article 55 of Directive (EU) 2019/2034 or Article 127 of Directive 2013/36/EU that the investment firm or

institution that issues the instrument to which the *Other Instruments* are linked is subject to consolidated supervision by a third-country supervisory authority which is equivalent to that governed by the principles set out in that Directive and the requirements of Chapter 2 of Title II of Part One of Regulation (EU) No 575/2013;

- (b) the *Other Instruments* fulfil the conditions referred to in points (a) and points (c) to (f) of paragraph 3.

Article 5

Write down, write up and conversion procedures

1. For the purpose of point (b) of Article 3 and point (d) of Article 4(2) the provisions governing Tier 2 instruments and *Other Instruments* shall comply with the procedures and timing laid down in paragraphs 2 to 14 for calculating the Common Equity Tier 1 capital ratio and the amounts to be written down, written up or converted. The provisions governing Additional Tier 1 instruments shall comply with the procedures laid down in paragraph 9 and point (c) of paragraph 13 in respect of amounts to be written down, written up or converted.

2. Where the provisions governing Tier 2 and *Other Instruments* require the instruments to be converted into Common Equity Tier 1 instruments upon the occurrence of a trigger event, those provisions shall specify either of the following:

- (a) the rate of that conversion and a limit on the permitted amount of conversion;
- (b) a range within which the instruments will convert into Common Equity Tier 1 instruments.

3. Where the provisions governing the instruments provide that their principal amount shall be written down upon the occurrence of a trigger event, the write-down shall permanently or temporarily reduce all the following:

- (a) the claim of the holder of the instrument in the insolvency or liquidation of the institution;
- (b) the amount to be paid in the event of the call or redemption of the instrument;
- (c) the distributions made on the instrument.

4. Any distributions payable after a write-down shall be based on the reduced amount of the principal.

5. Write-down or conversion of the instruments shall, under the applicable accounting framework, generate items that qualify as Common Equity Tier 1 items.

6. Where the investment firm or institution issuing the instrument has established that the Common Equity Tier 1 ratio has fallen below the level that activates conversion or write-

down of the instrument the management body or any other relevant body of the investment firm or institution shall be required to determine without delay that a trigger event has occurred and there shall be an irrevocable obligation to write-down or convert the instrument.

7. The aggregate amount of instruments that is required to be written down or converted upon the occurrence of a trigger event shall be no less than the lower of the following:

- (a) the amount required to fully restore the Common Equity Tier 1 ratio of the investment firm or institution to the percentage set as the trigger event in the provisions governing the instrument;
- (b) the full principal amount of the instrument.

8. Where a trigger event occurs:

- (a) the investment firm shall inform the staff members who have been awarded the instruments as variable remuneration and the persons who continue to hold such instruments;
- (b) the investment firm or institution issuing the instrument shall write down the principal amount of the instruments, or convert the instruments into Common Equity Tier 1 instruments as soon as possible and within a maximum period of one month in accordance with the requirements laid down in this Article.

9. Where Additional Tier 1 instruments, Tier 2 instruments and Other Instruments include an identical trigger level, the principal amount shall be written down or converted on a pro rata basis to all holders of such instruments which are used for the purposes of variable remuneration.

10. The amount of the instrument to be written down or converted shall be subject to independent review. That review shall be completed as soon as possible and shall not create impediments to write-down or convert the instrument.

11. An investment firm or institution issuing instruments that convert to Common Equity Tier 1 on the occurrence of a trigger event shall be required to ensure that its authorised share capital is at all times sufficient to convert all such convertible instruments into shares if a trigger event occurs. The investment firm or institution shall be required to maintain at all times the necessary prior authorisation to issue the Common Equity Tier 1 instruments into which such instruments would convert upon the occurrence of a trigger event.

12. An investment firm or institution issuing instruments that convert to Common Equity Tier 1 on the occurrence of a trigger event shall be required to ensure that there are no procedural impediments to that conversion by virtue of its incorporation or statutes or contractual arrangements.

13. In order for the write-down of an instrument to be considered temporary, all of the following conditions shall be met:

- (a) write-ups shall be based on profits after the issuer of the instrument has taken a formal decision confirming the final profits;
- (b) any write-up of the instrument or payment of coupons on the reduced amount of the principal shall be operated at the full discretion of the investment firm or institution subject to the constraints arising from points (c), (d) and (e) and the investment firm or institution shall not be obliged to operate or accelerate a write-up under specific circumstances;
- (c) a write-up shall be operated on a pro rata basis among Additional Tier 1 instruments, Tier 2 instruments and Other Instruments used for the purpose of variable remuneration that have been subject to a write-down;
- (d) the maximum amount to be attributed to the sum of the write-up of Tier 2 and Other Instruments together with the payment of coupons on the reduced amount of the principal shall be equal to the profit of the institution multiplied by the amount obtained by dividing the amount determined in point (i) by the amount determined in point (ii):
 - (i) the sum of the nominal amount of all Tier 2 instruments and *Other Instruments* of the investment firm before write-down that have been subject to a write-down;
 - (ii) the sum of own funds and of the nominal amount of *Other Instruments* used for the purpose of variable remuneration of the investment firm;
- (e) the sum of any write-up amounts and payments of coupons on the reduced amount of the principal shall be treated as a payment that results in a reduction of Common Equity Tier 1 and shall
 - (i) be consistent with the maintenance of a sound capital base of an investment firm and, if applicable,
 - (ii) its timely exit from extraordinary public financial support and shall be limited to a portion of net revenue when the investment firm benefits from extraordinary public financial support.

14. For the purposes of point (d) of paragraph 13, the calculation shall be made at the moment when the write-up is operated.

Question 1: Are the provisions within Article 1-5 sufficiently clear?

Question 2: Is it appropriate to continue to require the same conditions for the use of AT1, Tier 2 and Other Instruments as under the current legislative framework?

Article 6

Alternative arrangements

Alternative arrangements that may be used by investment firms for the pay out of variable remuneration under point (k) of Article 32(1) of Directive (EU) 2019/2034 subject to the approval of the competent authority shall comply with all of the following conditions:

- (a) the alternative arrangement contributes to the alignment of the variable remuneration with the risk profile of the investment firm;
- (b) the alternative arrangement allows the application of deferral and retention of the amounts of variable remuneration received;
- (c) the amount received under an alternative arrangement and the applicable conditions, including the application of deferral and retention, are well documented and transparent to the staff member receiving variable remuneration under such an arrangements;
- (d) for amounts received under deferral and retention arrangements the alternative arrangement ensures that staff cannot access, transfer or redeem the deferred part of variable remuneration;
- (e) the alternative arrangement is subject to an appropriate retention policy designed to align the incentives of the individual with the longer-term interests of the investment firm, its creditors and clients. The retention period shall be at least six month;
- (f) the alternative arrangement does not foresee the increase of the variable remuneration received during deferral periods by interest payments or other similar arrangements other than by arrangements that fulfil the conditions under point (i);
- (g) where the alternative arrangement allows for predetermined changes of the value received as variable remuneration during deferral and retention periods, based on the performance of the investment firm or the managed assets; the following conditions shall be met:
 - (i) the change of the value is based on predefined performance indicators that are based on the credit quality of the institution or the performance of the managed assets;
 - (ii) value changes should at least be calculated annually and at the end of the retention period;
 - (iii) the rate of possible positive and negative value changes should equally be based on the level of positive or negative credit quality changes or performance measured;

- (iv) where the value change is based on the performance of assets managed, the percentage of value change should be limited to the percentage of value change of the managed assets;
 - (v) where the value change is based on the credit quality of the investment firm, the percentage of value change should be limited to the percentage of net revenue in relation to the investment firms total own funds;
- (h) the alternative arrangement does not hinder the application of point (m) of Article 32(1) of Directive 2019/2034/EU.

Question 3: Are the provisions in Article 6 appropriate and sufficiently clear?

Where respondents are of the view that the draft RTS should define a set of specific arrangements rather than providing conditions that such arrangements should meet, comments are most helpful, when they clearly describe the alternative arrangements that investment firms desire to use to ensure that variable remuneration is aligned with the long-term interest of the investment firm and its risk profile.

Article 7

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. It shall apply from [...]. 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]

Accompanying documents

4.1 Draft cost-benefit analysis / impact assessment

1. Article 10(1) of the EBA Regulation provides that before any draft regulatory technical standards developed by the EBA are submitted to the Commission for adoption the EBA should analyse 'the potential related costs and benefits'. This analysis is to provide an overview of the findings regarding the problem to be dealt with, the solutions proposed and the potential impact of these options.

A. Problem identification

1. Commission Delegated Regulation (EU) No 527/2014 of 12 March 2014 supplementing Directive (EU) No 2013/36/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the classes of instruments that adequately reflect the credit quality of an institution as a going concern and are appropriate to be used for the purposes of variable remuneration has been applicable to investment firms and credit institutions.
2. A specific framework on remuneration requirements has been created for certain investment firms within the IFD. Investment firms to whom those provisions apply must use the instruments specified in point (j) of Article 32(1) IFD or alternative arrangements in point (k) of Article 32(1) IFD for the pay out of a part of the variable remuneration to staff whose professional activities have a material impact on the risk profile of the investment firm or of the assets that it manages.
3. The draft RTS have been mandated under the requirement laid down in Article 32(8) of the IFD that requires that "EBA, in consultation with ESMA, shall develop draft regulatory technical standards to specify the classes of instruments that satisfy the conditions set out in point (j)(iii) of paragraph 1 and to specify possible alternative arrangements set out in point (k) of paragraph 1."

B. Policy objectives

4. The present draft RTS should in line with the mandate within Article 32(8) IFD specify the additional Tier 1 instruments or Tier 2 instruments or Other Instruments which can be fully converted to Common Equity Tier 1 instruments or written down and that adequately reflect the credit quality of the investment firm as a going concern and where an investment firm does not issue any of the instruments referred to in point (j)(iii) of Article (32(1) IFD the alternative arrangements fulfilling the same objectives that may be approved



by competent authorities in derogation of point (j) of Article (32)(1) IFD where an investment firm does not issue any of the instruments referred to in that point.

5. The specified instruments and alternative arrangements should ensure, together with other remuneration requirements, that the variable remuneration of staff whose professional activities have a material impact on the risk profile of the investment firm or of the assets that it manages is aligned with the risk profile of the investment firm or the assets its manages.
6. The RTS should not lead, within the restrictions set by the IFD, to instruments or alternative arrangements that are overly burdensome to create and use for the purpose of variable remuneration and respect the principle of proportionality.

C. Baseline scenario

7. The baseline scenario for the present impact assessment is set by points (j) and (k) of Article 31 (1) IFD and the Commission Delegated Regulation (EU) No 527/2014 of 12 March 2014 supplementing Directive (EU) No 2013/36/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the classes of instruments that adequately reflect the credit quality of an institution as a going concern and are appropriate to be used for the purposes of variable remuneration that is currently applicable to investment firms.

D. Options considered

Option 1 - Conditions for instruments under point j(iii) of Article 31 (i) IFD

Option A: Maintaining the provisions within the current RTS No 527/2014 of 12 March 2014.

8. No material change to the current framework would ensure that investment firms that currently use such instruments will be able to do so also in the future and therefore no additional implementation costs would be created. In particular the possibility to use instruments under certain conditions that are issued by parent undertakings limits the costs for the application of the costs.

Option B: Setting a different framework for such instruments.

9. Given that the framework in existence has been applied since 2014, any material deviation from existing provisions would create additional burden for investment firms in creating instruments. Setting softer conditions, e.g. with regard to the level of the trigger event, would lead to an un-level playing field between investment firms and credit institutions and would lead to challenges if instruments issued by the parent undertaking would be used for the pay out of variable remuneration. With regard of other conditions, e.g. for the definition of write down or conversion the IFD refers to the CRD provisions and therefore



no material differentiation of instruments compared to the instruments defined under Commission Delegated Regulation (EU) No 527/2014 of 12 March 2014 was possible.

Option A has been retained

Option 2 – Conditions for alternative arrangements

10. Alternative arrangements require the approval of the competent authorities and the approval is subject to the condition that an investment firm does not issue any of the instruments referred to in point (j) of Article 31(1) IFD.

Option A: Setting conditions for alternative arrangements that ensure that they meet the same objectives as the pay out of variable remuneration in instruments without specifying in detail the form such an arrangement should take (e.g. financial instruments or deferred cash on frozen accounts).

11. Given the limitation that alternative arrangements can only be approved for investment firms that do not issue any of the instruments under point (j) of Article 31 IFD, any requirement to create another specific financial instrument would lead to additional implementation burden. Considering the nature, size and complexity of investment firms that are subject to the specific remuneration framework under IFD this could create material costs. Also requiring specific forms of deferred cash to be held on frozen accounts might be more burdensome than other possible alternative arrangements. Given that so far no alternative arrangements can be observed, a high level of flexibility would ensure that the implementation costs and burdens are kept low. Still the regulatory objectives will be achieved by defining the conditions that have to be met in order to ensure that the alternative arrangement is appropriate for the use of paying out variable remuneration of identified staff. The conditions set should ensure that other requirements like deferral or malus can be applied.

Option B: Specifying other financial instruments that ensure that the alternative arrangement would meet the same objectives as the pay out of variable remuneration in instruments.

12. As explained above requiring specific financial instruments would increase the implementation burden without necessarily improving the alignment of variable remuneration with risks.

Option A has been retained

E. Overall impact of the draft RST

13. Considering that investment firms that are subject to IFD have several instruments available for the pay out of variable remuneration to identified staff and the available waivers that may be implemented by Member States and given that the currently existing framework for the use of Additional Tier 1 instruments or Tier 2 instruments or Other



Instruments which can be fully converted to Common Equity Tier 1 instruments or written down and that adequately reflect the credit quality of the investment firm as a going concern has been retained and that the requirements for alternative arrangements have been kept as flexible as possible to ensure the objectives set within IFD, the draft RTS would create only a minor cost impact for investment firms that use such instruments or arrangements for the pay out of variable remuneration for identified staff.

Question 4: Do respondents agree with the findings of the impact assessment?

Where respondents have identified additional costs or burdens created by the draft RTS, it would be most helpful if respondents could specify and, where possible, quantify separately the costs for the implementation of the provision and the costs for the ongoing application of the provisions.



4.2 Overview of questions for consultation

Question 1: Are the provisions within Article 1-5 sufficiently clear?

Question 2: Is it appropriate to continue to require the same conditions for the use of AT1, Tier 2 and Other Instruments as under the current legislative framework?

Question 3: Are the provisions in Article 6 appropriate and sufficiently clear?

Where respondents are of the view that the draft RTS should define a set of specific arrangements rather than providing conditions that such arrangements should meet, comments are most helpful, when they clearly describe the alternative arrangements that investment firms desire to use to ensure that variable remuneration is aligned with the long-term interest of the investment firm and its risk profile.

Question 4: Do respondents agree with the findings of the impact assessment?

Where respondents have identified additional costs or burdens created by the draft RTS, it would be most helpful if respondents could specify and, where possible, quantify separately the costs for the implementation of the provision and the costs for the ongoing application of the provisions.