

RESPONSE TO CONSULTATION

EBA & ESMA CALL FOR ADVICE ON THE INVESTMENT FIRMS
PRUDENTIAL FRAMEWORK

Luxembourg, 3 September 2024

We thank EBA and ESMA for the opportunity to participate in this consultation.

Important considerations

ALFI considers that there is no need to impose additional capital requirements for UCITS management companies and AIFMs providing MiFID ancillary services, nor to restrict the amount of such service, as the UCITS and AIFM Directives have already been very recently reviewed and already contain a specific regime for management companies and AIFMs. Should any alignment of the capital requirements rules be opted for, duplication of requirements should be avoided and proportionality be respected.

ALFI also questions the merit of aligning the remuneration requirements for investment firms and UCITS management companies and AIFMs, as the asset management and the credit institution model are not comparable and the risks involved are different.

Section 9: Interactions of IFD and IFR with other regulations

Question 24

Do you have any views on the possible ways forward discussed above concerning the provision of MiFID ancillary services by UCITS management companies and AIFMs?

ALFI members are of the view that there is no need to impose additional capital requirements for UCITS management companies and AIFMs providing MiFID ancillary services, nor to restrict the amount of such services.

It must be underlined that management companies/AIFMs are required to segregate client assets from their own. Assets under management are thus not part of their balance sheet; moreover, they have a fiduciary duty towards investors and an obligation to invest assets in the best interest of the fund and of such investors.

Issuing new rules would also create confusion, since the UCITS and AIFM Directives have already been very recently reviewed and already contain a specific regime for management companies and AIFMs. Furthermore, local provisions, such as CSSF Circular 18/698 on the authorisation and organisation of investment fund managers incorporated under Luxembourg law, already provide for adequate rules specifically covering such ancillary activities.

Should any alignment of the capital requirements rules be opted for, particular attention should be drawn to several aspects to avoid duplications of requirements and to ensure proportionality.

First, in order to avoid duplications of requirements, any potential change should take into consideration and coordinate any new provision relating to capital requirements with what is already set out in Article 7 of Directive 2009/65/EC and Article 9 of Directive 2011/61/EC.

Second, ALFI's members believe that, when deciding which additional requirements could apply to UCITS management companies and AIFMs providing ancillary services, it is essential to ensure that any new requirement is proportionate to the ancillary activities of these entities. While some of ALFI's members deem reasonable to consider the implementation of the K-AUM for these types of entities (when UCITS Mancos/AIFMs are subsidiaries of an entity applying K-AUM for its own fund requirements), applying the complete capital requirements calculation as described in art. 15 of the IFR would result in a much more significant impact and would create a strong capital burden. Therefore, should an alignment of the capital requirement rules be opted for, ALFI would strongly recommend that it applies only in scenarios where the AuM under MiFID are higher than the AuM under UCITS Directive and/or AIFMD.

In addition, ALFI recommends to consider, in any case, the specific services provided by an entity, and not only the criteria of the presence of the MiFID licence. In fact, the activities permitted by this licence are various. For example, some Management Companies might hold a MiFID licence for other purposes than discretionary portfolio management. This is indeed the case for distribution activities (e.g. BtoB and not BtoC). Therefore, not all activities allowed by the MiFID licence should be subject to an alignment of own funds requirements, and such alignment should be based on the inherent risk of the activity itself, applying a “same risk, same rule” principle. Accordingly, any alignment should be restricted to management activities but not be applicable to the MiFID licence as a whole.

ALFI believe that the ESAs might also consider clarifying that the consequences of a potential alignment would only refer to the capital requirements. In particular, the alignment of the capital requirements would not transform UCITS management companies and AIFMs providing ancillary services in investment firms. In fact, this would result in a significant regulatory impact for these entities.

Question 25

Are differences in the regulatory regimes between MiCAR and IFR/IFD a concern to market participants regarding a level playing field between CASPs and Investment firms providing crypto-asset related services? In particular, are there concerns on the capital and liquidity requirement regimes?

No specific comment.

Question 26

Sections 5.2, 5.4 as well as this Section 9.1 all touch upon how crypto-assets (exposures and services) may influence the IFD and the IFR. Is there any other related element that should be considered in the review of the investment firms’ prudential framework?

No specific comment.

Section 10: Remuneration and its governance

Question 27

Is the different scope of application of remuneration requirements a concern for firms regarding the level playing field between different investment firms (class 1 minus and class 2), UCITS management companies and AIFMs, e.g., in terms of the application of the remuneration provisions, the ability to recruit and retain talent or with regard to the costs for the application of the requirements?

ALFI questions the merit of aligning the remuneration requirements for investment firms and UCITS management companies and AIFMs. Indeed, as explained in our response to question 9 above, the asset management and the credit institution model are not comparable and the risks involved are different, even when it comes to remuneration rules for senior management of the entities concerned. Whilst such rules aim at mitigating risks from credit institutions/investment firms dealing on their own account, on the asset management side, focus is put on ensuring an alignment between the staff’s managerial incentives with the risk-adjusted returns for investors. Therefore and as a result, the remuneration regime introduced under the UCITS Directive and AIFMD is different from the CRD/IFD remuneration rules, and in our view it should remain so.

Question 28

Are the different provisions on remuneration policies, related to governance requirements and the different approach to identify the staff to whom they apply a concern for firms regarding the level playing field between different investment firms (class 1 minus under CRD or class 2 under IFD), UCITS management companies and AIFMs, e.g. in terms of the application of the remuneration provisions, the ability to recruit and retain talent or with regard to the costs for the application of the requirements?

See response to question 27 above

Question 29

Are the different provisions, criteria and thresholds regarding the application of derogations to the provisions on variable remuneration, and that they apply to all investment firms equally without consideration of their specific business model, a concern to firms regarding the level playing field between different investment firms (class 1 minus under CRD and class 2 under IFD), UCITS management companies and AIFMs, e.g., in terms of the application of the remuneration provisions, the ability to recruit and retain talent or with regard to the costs for applying the deferral and pay out in instruments requirements? Please provide a reasoning for your position and if possible, quantify the impact on costs and numbers of identified staff to whom remuneration provisions regarding deferral and pay out in instruments need to be applied.

See response to question 27 above.

Question 30

Are the different provisions regarding the oversight on remuneration policies, disclosure and transparency a concern for firms regarding the level playing field between different investment firm, UCITS management companies and AIFMs, e.g., with regard to the costs for the application of the requirements or the need to align these underlying provisions? Please provide a reasoning for your position.

See response to question 27 above.

About ALFI

The Association of the Luxembourg Fund Industry (ALFI) represents the face and voice of the Luxembourg asset management and investment fund community. The Association is committed to the development of the Luxembourg fund industry by striving to create new business opportunities, and through the exchange of information and knowledge.

Created in 1988, the Association today represents over 1,500 Luxembourg domiciled investment funds, asset management companies and a wide range of business that serve the sector. These include depository banks, fund administrators, transfer agents, distributors, legal firms, consultants, tax advisory firms, auditors and accountants, specialised IT and communication companies. Luxembourg is the largest fund domicile in Europe and a worldwide leader in cross-border distribution of funds. Luxembourg domiciled investment funds are distributed in more than 70 countries around the world.