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BVI[1] position paper on EBA's and ESMA's discussion paper: Call for advice on the investment firms prudential framework

We would like to take this opportunity to respond to the EBA's and ESMA's discussion paper 'Call for advice on the investment firms prudential framework'. In principle, we welcome a debate on an IFD/IFR review, as the overall set of regulations indeed needs to be amended in certain areas for reasons of legal clarity. However, we are very concerned that many of the new proposals from EBA and ESMA will lead to a further tightening of the requirements and further complexity of the regulations. In this context, we also refer to our preliminary position paper on the topic. Due to the scope of the far-reaching material changes proposed, we suggest that the specific proposed amendments be discussed again with the investment firms and their associations concerned in order to better analyse their impact.

Section 1: Categorisation of investment firms

Q1: What would be the operational constraints of potentially removing the threshold?

Our members are not currently affected by the EUR 5bn threshold because they do not provide the relevant investment services dealing on own account or underwriting/placing of financial instruments on a firm commitment basis in the meaning of Annex I Section A (3) and (6) of MiFID II. We are therefore unable to assess what impact the removing of the thresholds will have on the companies affected.

However, we suggest examining what impact the removal of the thresholds may have on investment firms that provide other MiFID services or have not yet fallen within the scope of application (because their total assets are below EUR 5bn). In particular, Article 55 IFR requires certain reporting to EBA that are currently only relevant for undertakings that perform the aforementioned MiFID services (3) and (6) and have total assets above EUR 5bn. That means that there is no information provided to EBA by investment firms whose total assets are below EUR 5bn or that exclusively perform other MiFID services. Removing the EUR 5bn threshold should therefore not result in all other investment firms – not previously required to report under Article 55 IFR – having to submit these reports in future. This would increase the reporting burden, as the total assets would need to be transformed into an average number, and feed into the IFR reporting. We therefore see operational constraints that would need to be further reviewed, also considering the ongoing automation of reporting feeds into the IFR reporting. Introducing additional reporting obligations for these investment firms without further evidence would also not be in line with the EU Commission's current strategy for long-term competitiveness to reduce the burdens associated with reporting obligations by 25 per cent and to simplify the reporting obligations.

[1] BVI represents the interests of the German fund industry at national and international level. The association promotes sensible regulation of the fund business as well as fair competition vis-à-vis policy makers and regulators. Asset managers act as trustees in the sole interest of the investor and are subject to strict regulation. Funds match funding investors and the capital demands of companies and governments, thus fulfilling an important macro-economic function. BVI's 115 members manage assets of some EUR 4 trillion for retail investors, insurance companies, pension and retirement schemes, banks, churches and foundations. With a share of 27%, Germany represents the largest fund market in the EU. BVI's ID number in the EU Transparency Register is 96816064173-47. For more information, please visit www.bvi.de/en.

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Section 2: Conditions for investment firms to qualify as small and non-interconnected

Q2: Would you suggest any further element to be considered regarding the thresholds used for the categorisation of Class 3 investment firms?

First of all, Germany is the largest market in terms of the total number of investment firms affected by the IFD framework, accounting for more than 700 and around 32 per cent of all investment firms. Of these, over 600 investment firms alone are qualified as small and non-interconnected investment firms. This accounts for around half of all small and non-interconnected investment firms in the EU.

In principle, we agree with EBA and ESMA that the new IFD/IFR has led to the simplification of individual obligations (especially for small and non-interconnected investment firms) and thus to a reduction in the burden. Nevertheless, the IFD represents a very complex legal framework which sets out new capital requirements, further organisational and conduct obligations as well as reporting and disclosure obligations in addition to the conduct and organisational obligations already stipulated in MiFID. These are supplemented at EU level by the IFR which applies directly and does not need to be transposed into national law. Further Level 2 and Level 3 measures also apply. This was a significant change compared to the previous rules for investment firms. Due to its complexity, the initial implementation of the framework required a great deal of effort.

This applies in particular to investment firms with a limited licence which did not qualify as investment firms under the CRD/CRR until the IFD/IFR came into force and were therefore not treated as institutions within the meaning of the CRD/CRR (see Art. 4 (1) no. 2 letter c CRR II). As a result, all provisions of the CRD/CRR that referenced ‘institutions’ did not apply to such companies at EU level. In principle, only four articles (definition, composition and amount of own funds and rules on fixed costs) applied to them under the CRD/CRR. This covered firms which are not permitted to provide the ancillary service referred to in Annex I Section B No. 1 MiFID (the safekeeping and administration of financial instruments), which only provide one or more of the investment services and activities listed in Annex I Section A No. 1 (reception and transmission of orders in financial instruments), 2 (execution of orders on behalf of clients), 4 (portfolio management) and 5 (investment advice) of that Directive and which may not hold money or securities belonging to their clients and therefore may not be debtors of these clients at any time (hereinafter referred to as ‘limited licence firms‘).

Against this background, we suggest the following amendments:

- **Reducing complexity of the framework**: In order to simplify the complexity of the regulations, it could be useful to include a chapter in the IFD and IFR that conclusively covers all requirements for small and non-interconnected investment firms only. This would make it easier for the investment firms concerned to recognise the rules that apply to them without having to do comprehensive legal checks whether the requirements that only apply to other investment firms elsewhere do not apply to them due to exceptions.

- **Removal of the thresholds of Article 12(1)(h) and (i) IFR for ‘limited licence firms’ that were previously exempt under the Art. 4 (1) no. 2 letter c CRR II (older version)**. In particular, the new thresholds in Article 12(1)(h) and (i) IFR meant that even those investment firms that previously benefited from the aforementioned exemptions of the CRD/CRR could not be classified as small and non-interconnected and therefore had to fulfil extensive new obligations that did not previously apply to them (such as the K-factor approach for calculating own capital requirements, organisational and conduct obligations such as remuneration as well as reporting and disclosure

obligations). These two thresholds were introduced at a late stage at the suggestion of the EBA with the justification of establishing comparability of the rules from the CRD/CRR with the requirements of the IFD/IFR for companies that provide bank-like services and would therefore be comparable with smaller banks. We can certainly understand this approach. Nevertheless, these thresholds have been applied indiscriminately to all investment firms, including those that – like limited licence firms – do not carry out bank-like services.

There is a lack of valid data for these investment firms, in particular, as to why their risks should lead to such stricter requirements. As rightly stated in paragraph 37 of the discussion paper, in the period from 2013 to 2021 no significant problems were known that would have occurred as a result of the former Article 4(2)(c) CRR not having similar requirements such as Article 12(1)(h) and (i) IFR. We further are convinced that stricter rules may only justified where there is a value for a 'higher good' such as e.g. investor protection or financial markets stability. This 'higher good' does not exist here as there is no risk increase for an investor depending on whether an investment firm might have a total annual gross revenue from investment services and activities of the investment firm of more or less than EUR 30 million or whether the on- and off-balance-sheet total of an investment firm is more or less than EUR 100 million. In particular, the size of the balance-sheet total (threshold of Article 12(1)(h) IFR) says nothing about the risks of such investment firms which are not permitted to engage in dealing on own account and are not authorised to hold client's assets. Moreover, the total annual gross revenue from investment services and activities from investment firms (threshold of Article 12(2)(i) IFR) is not relevant either, as this is already taken into account – even much better and more precisely – under the own capital requirements on the basis of fixed overheads. Also, there does not seem to be an increased risk for financial markets based on smaller or higher on- and off-balance-sheet total or total annual gross revenue from investment services and activities of an investment firm.

Moreover, when an investment firm becomes a class 2 investment firm, it approx. needs one full time equivalent ('FTE') more to comply with the IFD/IFR requirements. The costs that occur for this FTE will ultimately be borne by clients in one way or another through an increase of overall fees. So, by introducing this hurdle not only client protection will not be supported but also costs for clients will increase, which goes against the clear goal of the European Commission to attract more money into Capital Markets by decreasing costs. Proportionally additional costs do not only appear for investment firms which exceed the hurdle and only for this reason become a class 2 investment firm but for all investment firms, which have to measure, audit, and report the figures on an ongoing basis. Finally, for market participants the obligation to calculate the figures for the mentioned reasons appears to be a pure bureaucratic exercise with no added value and thereby increases frustration about European law-making.

- **Application of the thresholds for AuM in Article 12(1)(a) IFR and COH in Article 12(1)(b) IFR for group consideration under Article 12(2) IFR only for investment firms in the EU without taking into account group investment firms outside the EU:** We do not follow the rationale why the notion of 'group' should also include investment firms located in a third country, as stated under paragraph 32 of the discussion paper. According to Article 4(1)(22) IFR, 'investment firm' means an investment firm as defined in point (1) of Article 4(1) of MiFID II. Article 4(1)(57) MiFID II stipulates that precondition for an undertaking to be an investment firm is that its head office and/or registered office is located within the European Union. Throughout MiFID II further similar arguments for this assessment can be found. Additionally, the notion of 'investment firm' in Article 12(2) IFR does not include a similar extension as Article 8(2)(b) IFR, which explicitly extends the meaning of

investment firm to 'undertakings established in third countries, which, were they established in the Union, would fulfil the definitions of those terms'.

Q3: Do you have any views on the possible ways forward discussed above regarding the transition of investment firms between Class 2 and Class 3 should be introduced?

Our members have not yet been affected by such a transition between Class 2 and Class 3 firms. However, we would support the simplifications proposed by the EBA and ESMA with regard to a transition period from category 3 to category 2 (e.g. three-month transition period) and the introduction of a freezing period.

Section 3: Fixed overheads requirements (FOR)

Q4: Should the minimum level of the own funds requirements be different depending on the activities performed by investment firms or on firms' business model? If yes, which elements should be considered in setting such minimum?

We reject a blanket increase in the minimum level of capital requirements on the basis of the FOR and, in any case, a differentiation according to the activities carried out by the investment firms or the business model of the firms because of the following reasons:

- In practise, we see own funds on the basis of the FOR primarily as a Pillar 1 'proxy' to absorb losses that might arise through operational risk events. The amount to at least one quarter of the fixed overheads of the preceding year provides a simple, common, minimum size-related capital requirement. Moreover, the NCAs have options to further adjust the amount of capital in cases of material changes in the activities of an investment firm (cf. Article 13(2) IFR) or Article 40 IFD). In any case, investment firms are required to have in place sound, effective and comprehensive arrangements, strategies and processes to assess and maintain on an ongoing basis the amounts, types and distribution of internal capital and liquid assets that they consider adequate to cover the nature and level of risks which they may pose to others and to which the investment firms themselves are or might be exposed, cf. Article 24(1) IFD. Such an assessment can then also led to an increase in equity at the level of the investment firm. In our view, this is an appropriate and sufficient framework for setting minimum capital requirements in a simple and effective manner which is supplemented by further capital requirements based on K-factors that in turn depend on certain risks and business activities. Any minimum level of FOR that depends on the activities performed by investment firms or their business models goes against the general objectives of the IFR/IFD as it adds complexity and reduces transparency and comparability between investment firms and prevents a level playing field.

- Only secondarily will the FOR play a role in the wind-down process. The number of cases in which investment firms (in particular, investment firms providing portfolio management or investment advice) are wound up is likely to be rather low in practice. However, we are not aware of any cases in which the previous amount of own funds on the basis of the FOR would not have been sufficient to cover the wind-down process. We would therefore first be interested in the list addressed by the EBA and ESMA to the NCAs as to whether there were any historical cases in which the wind-down period lasted longer than three months. As the EBA already stated in its report on investment firms from the year 2020, there have probably been individual cases in the past in which the wind-up phase is said to have lasted longer than three months. For such cases, however, the IFD now expressly provides for regulations via the supervisory review and evaluation process (SREP)

supplemented by the EBA guidelines on SREP to increase own funds in order to enable such wind-down processes. In particular, where investment firms need to wind down or cease their activities, competent authorities shall require that investment firms, by taking into account the viability and sustainability of their business models and strategies, give due consideration to requirements and necessary resources which are realistic, in terms of timescale and maintenance of own funds and liquid resources, throughout the process of exiting the market, cf. Article 29(2) IFD). In addition, investment firms that perform any of the investment activities listed in points (3) and (6) of Section A of Annex I to MiFID II fall under the scope of the BRRD anyway (cf. Article 63 IFD) and are therefore obliged to draw up resolution plans. In our view, these processes are appropriate for handling the (few) individual cases with a longer wind-down period without having to increase the amount of own capital to be held on the basis of the FOR for all other investment firms.

- Irrespective of the debate for investment firms, we would like to expressly point out that the amount based on fixed overheads is also directly relevant for **AIF/UCITS managers under the AIFM and UCITS Directives.** According to Article 7(1)(a)(iii) UCITS Directive and Article 9(5) AIFMD (amended by Articles 60 and 61 IFD), the own fund of the UCITS management company or the AIFM shall never be less than the amount required under Article 13 IFR. Any adjustment to the amount would therefore also have a direct impact on them. A decision on a possible adjustment of the minimum amount, which then has a direct impact on asset managers, may not be made by the EBA as part of the IFD review. Rather, we see this as a task for the EU legislator to decide within the framework of the AIFM and UCITS Directives. In this respect, the EU legislator has already expressly decided in the context of the last AIFMD review that the capital requirements – also on the basis of the FOR – continue to be appropriate for asset managers.

- At this point, we would also like to point out that we do not agree with the proposal in section 7.2, paragraph 167 of the discussion paper to increase the liquidity requirements based on the four FOR (see also our answer to question 20).

Q5: Is it necessary to differentiate the deductibles by activity or by business model for the purpose of calculating the FOR? If yes, which items should then be considered and for what reasons?

We are not in favour of deductibles that depend on the activities performed by investment firms, or business models. As with question 4, it adds complexity and reduces transparency and comparability between investment firms. Such deductibles that depend on certain activities or a deduction of non-MiFID-relevant activities (see Q7) would lead to a proven, clear procedure for determining capital requirements being replaced by a complex procedure.

Q6: Are expenses related to tied agents material for the calculation of the FOR to the extent to require a dedicated treatment for their calculation? If yes, are the considerations provided above sufficient to cover all the relevant aspects?

We do not have any comments on expenses related to tied agents because our members are not subject to this clause.

Q7: Should the FOR be calculated distinguishing the costs related to non-MiFID activities, which criteria should be considered? What kind of advantages or disadvantages would this have in practice?

We refer to our answer to question 5. A deduction of non-MiFID-relevant activities would lead to a proven, clear procedure for determining capital requirements being replaced by a complex procedure. Therefore, a practical approach should be used.

Q8: Should expenses related to fluctuation of exchange rates be included in the list of deductions for the calculation of the FOR? If yes, which criteria should be considered in addition to the ones suggested above?

We are supportive of this since the current situation is unfair for all entities subject to German GAAP. Additionally, any reversal of prior year accruals is counted against expenses in IFRS while under German GAAP it is presented as revenue. We propose to harmonise this as well and allow German firms to deduct the reversal of accruals from their expenses. However, such a proposal is explicitly not linked to obliging all investment firms to apply IFRS.

Additional point on own funds: investment firms can only use the depreciation of their intangible assets once the asset is audited (so once a year). Hence their own funds stay the same throughout the year while their book value of the intangible assets decreases. This is not fair as in other jurisdictions depreciations can be taken into account monthly.

Section 4: Review of existing K-factors

Q9: Should the concept of 'ongoing advice' be further specified for the purpose of calculating the K-AUM? If yes, which elements should be taken into account in distinguishing a recurring provision of investment advice from a one-off or non-recurring one?

We are opposed to a further clarification of the term of ongoing investment advice. Rather, ongoing investment advice should be removed completely from the calculation of the K-factor AUM or at least an exception should be included in Art. 17(2) IFR.

The inherent risks of investment advice (also on an ongoing basis) do not justify additional capital requirements based on K-factors. In particular, we do not agree with the assessment in the discussion paper that a narrow definition of ongoing investment advice could lead to an increase in risk for clients. Assets under ongoing advice are not a direct proxy to determine the potential for customer harm. The risks inherent in the financial instruments reside with their clients, meaning the firm's own risks from performing investment advice (also on an ongoing basis) are limited.

The IFD/IFR framework of prudential capital requirements shall enhance the ability of the investment firm to achieve a more 'orderly wind-down' in the event of failure. Recital 24 of the IFR explicitly states that K-AUM shall capture the risk of harm to clients from an incorrect discretionary management of client portfolios or poor execution and provides re-assurance and client benefits in terms of the continuity of service of ongoing portfolio management. Operational risks resulting from poor execution, however, do not occur in the context of investment advice of an ongoing nature. When assessing the possibility that investment advice could lead to an event of failure on an ongoing basis, the (operational) risk of investment advisory services is completely different from that of portfolio management services.

In the case of investment advice, the final decision as to whether or to what extent to invest in a financial instrument is made by the client. This also applies if the investment advice is provided on an ongoing basis. A client of an advisor can only suffer relevant losses where an investment firm provides

inadequate investment advice on which basis the client has made an investment decision. From a prudential perspective, the advisor has to ensure that the firm is well organised to avoid such inadequate recommendations and that the firm has sufficient own capital to cover legitimate claims resulting from this liability only.

However, it must be stated that neither the EBA nor the European legislators have provided evidence that such a risk of failure of advisors has materialised in the past, that the capital requirements based on the fixed overhead requirements (FOR) established in the previous set of rules under the CRD/CRR were not met by advisors, or that the risk has increased in a way that the FOR might not cover such potential failures of advisors in the future. Only such evidence could justify additional capital requirements based on K-factors. Since 1999, a total of 23 compensation cases have been identified in Germany involving investment firms that have resulted in compensation for investors (see the activity report from 2023 provided by the German Compensation Scheme for investment firms). However, these were recognisably not due to the fact that the investment firms had provided their clients with poor advice, but rather to cases of fraud in connection with the provision of certain other MiFID services.

Furthermore, we also consider the EBA's example (in the 2016 discussion paper) to be misguided, according to which a situation in which advice is not available when the client expects it should justify stricter capital requirements based on K-factors. Such cases must be specially monitored by the supervisory authority because this means that such investment advisors are not acting within the scope of their authorisation. The same applies if the investment advisor not only makes recommendations, but the investment decision of a (different) portfolio manager is no longer based on the qualified analysis of the investment for the client portfolio by the portfolio manager (i.e. the investment decision is merely ‘passed through’ without further analyses). Also in these cases it must be the task of the competent supervisory authority to check whether the adviser is still acting within the scope of his licence or whether he requires a licence for portfolio management. These cases are therefore no justification for having to maintain own funds based on K-factors.

In particular, a portfolio manager makes own decisions in selecting financial instruments on behalf of a client and implements these decisions on its own authority. In this scenario the client might suffer unnecessary losses if the investment firm manages the client’s portfolio poorly. From a prudential perspective, the portfolio manager has therefore to ensure that the firm is well organised to avoid potential liability risks and to cover claims which derive from professional negligence with respect to investment decisions taken on behalf of clients. However, the scope of the IFD/IFR does not require protecting clients from the risk of losses arising from market volatility, nor does it try to eliminate such risk. In both cases, assets under management as well as assets under advice belong to the individual clients and are thus not accounted for as a balance sheet item of the investment firm. Moreover, clients’ portfolios managed or advised by investment firms which are not authorised to hold clients’ money are fully shielded against the insolvency of portfolio managers.

In practice, a distinction must be made between the following cases:

1) **Bank-independent advisors (not providing portfolio management)**: bank-independent advisors which provide recommendations as a stand-alone service with a full MiFID licence are generally not affected by the K-factor approach because they do not reach the thresholds of Article 12(1) IFR. Irrespective of these thresholds, however, it should also be examined whether and to what extent the impending K-factor approach with higher capital requirements would represent a high barrier to

market entry and therefore would contradict the aim of MiFID II to promote the activities of bank-independent advisors.

2) **Bank-independent advisors which provide investment advice to collective investment undertakings:** Bank-independent advisors often provide investment advice to managers of collective investment undertakings (CIUs) such as UCITS or AIFs. In these cases, the manager of the CIU or the CIU itself is the professional client of the advisor (and not the investors of the CIU). These financial assets under advice pose a huge volume because they are generally identical with the total assets under management of the CIUs (which are already covered by the AIFMD or the UCITS Directive).

   In the debate at EU level to date, we have regularly been confronted with the argument that ongoing investment advice within the meaning of the IFR should be equated with a portfolio management service. However, the legislator does not do justice to this approach either, because he does not treat portfolio management in relation to third-party fund portfolios in the same way as investment advice for such portfolios. Hence, there are contradictions in judgements between ongoing investment advice and portfolio management in the calculation of assets under management (AuM) for the K-factor approach. According to Article 17(2) IFR, the AuM managed by an investment firm by way of delegation for a third party (e.g. a management company with a licence under the UCITS/AIFM Directive) do not have to be taken into account. On the other hand, an investment adviser who advises a third-party portfolio on an ongoing basis must consider the AuM of the portfolio because this circumstance is not covered by Article 17(2) IFR. This means that the investment advisor must hold considerably more own funds although the failure risk for him is considerably lower.

   Therefore, if ongoing investment advice is not removed from the K-factor AUM, we alternatively support the proposal to amend Article 17(2) IFR to include ongoing investment advice in the exemption in the second subparagraph of Article 17(2) of the IFR and to delete Article 2(2) of Delegated Regulation (EU) 2022/25 accordingly. The legal consequence that this would increase the number of 'small and unconnected' (class 3) can be justified by the extremely low risk of default of such firms, as described above.

Q10: Does the K-DTF provide a proper level of capital requirements for the provision of the services Trading on own account and execution of order on behalf of clients on account of the investment firm? If not, what elements of the calculation of the K-DTF present most challenges?

Not applicable.

Q11: Would you have any examples where the calculation of the K-DTF based on comparable activities or portfolios results in very different or counterintuitive outcomes? If yes, how could the calculation of the K-DTF be improved?

Not applicable.

Q12: What are the elements of the current methodology for the calculation of the K-ASA that raise most concerns? Taking into account the need to avoid complexifying excessively the methodology, how could the calculation of the K-ASA be improved to assess those elements?

We are not aware of any competitive disadvantages or problems in practice when calculating own funds on the basis of the K-ASA.

Q13: Clients' asset protection may be implemented differently in different Member States. Should this aspect be considered in the calculation of the K-ASA? If so, how should that be taken into account in the calculation?

We refer to our answer to question 12.

Section 5: Risks not covered by existing K-factors

Q14: Should crypto-assets be included into K-factor calculation, either as a new K-factor or as part of K-NPR?

In our view, crypto-assets could only be included into K-factor calculation as long as they qualify as financial instruments in the meaning of the MiFID II. In all other cases, however, the MiCAR already represents an independent and conclusive set of rules for the providers of such products.

Q15: In the context of addressing operational risk for investment firm trading on own account, is there any further element to be considered to ensure that the requirements are proportionate to their trading activities?

This question is not applicable to our members because they do not trade on own account.

Nevertheless, we would like to use this question to comment on the general aspects of the proposals addressed in the discussion paper on the non-trading book positions and the implications of the adoption of the Banking Package (CRR 3/CRD VI). As already mentioned in our preliminary position paper, we are very concerned that many of the new proposals from EBA and ESMA will lead to a further tightening of the requirements and further complexity of the regulations. In detail:

- The consideration of **transferring further requirements from the last banking package (CRR 3 / CRD VI) and other provisions of the current CRD/CRR** in the context of own capital requirements and risk management processes to investment firms represents another step backwards in banking regulation. In particular, the fundamental review of the trading book required under CRD VI and CRR 3 and the new boundary analysis between banking and trading book is too complex (and thus neither appropriate nor proportionate) for a prudential framework such as IFR/IFD, in particular for class 2 and 3 investment firms. The current definition of trading book in Article 4(1)(54) IFR that focuses on trading intent is sufficient and fit for purpose. Such an extension of the rules would also mean that limited licence firms (see Art. 4 (1) no. 2 letter c CRR II) in particular, which were exempt from many rules under the old CRD/CRR, would have to fulfil new requirements via the IFD/IFR and would then also have to implement additional processes derived from banking regulation in the future. The original aim of the EU legislator to create a risk-oriented and simplified framework for investment firms that is independent from the banking framework and better adapted to their business models is thus being thwarted. We also see this as very questionable because originally these CRD/CRR rules were not discussed, tested and introduced with a view to whether they are also suitable for investment firms. Further, any future changes to the banking framework that do not account for the specificities of investment firms would still have a

direct impact on them because these rules would be directly applicable to investment firms through the references from IFD/IFR to CRD/CRR.

In particular, section 5.1. of the discussion paper lists several sources of **credit risk**, e.g. loans to clients, exposures to credit institutions, illiquid financial assets, financial instruments held for purposes other than trading, or off-balance sheet commitments such as capital or performance guarantees. We strongly suggest refraining from taking over the CRR approach for products with minimum value commitments (guarantees), because risk mitigation techniques like constant proportion portfolio insurance (CPPI) are not considered. This leads to a misrepresentation of capital requirements and significant RWA under the CRR for the least risky products (if looked from the economic perspective). The current pillar 2 and SREP requirements established in the IFD can more accurately quantify capital requirements for guaranteed products. Potential arbitrage can be prevented by the SREP as well in case it might exist for funds or products with minimum value commitments. We also suggest to closely involve investment firms offering guaranteed products in case a credit risk charge for such products is further considered.

- **Expansion of trading book activities to non-trading book activities**: In our understanding of the IFD/IFR, the assessment of own funds on the basis of the K-factors does not depend on the company's authorisation (e.g. authorisation for dealing on own-account), but rather the IFR (deliberately in contrast to the CRR) is based on the actual activity, i.e. whether the company actually carries out transactions for the trading book (see also the different definition of trading book in Art. 4(1)(54) IFR). This means that all the K-factors based on the transactions ‘recorded on the trading book’ (here: RtF) or for ‘trading book positions’ (RtM) do not apply if, for example, an investment firm is authorised to trade on its own account but only conducts transactions for the non-trading book. Also, a portfolio manager that only invests its own funds in the non-trading book is also exempt from the capital requirements for trading book investment activities. The EU legislator should urgently adhere to this because any other assessment would be absurd and could no longer be justified by the simplification of the regulations for investment firms. This applies in particular to the large number of our members as portfolio managers without a licence for dealing on own account and holding client money/assets, who, as non-institutions within the meaning of the CRR (older version), have not had to comply with the capital requirements for credit/market/foreign currency or operational risks covered by the CRR to date.

  Therefore, we strongly disagree with the proposal to consider investments of own funds of investment firms that are not authorised under point (3) or (6) of Annex I, Section A MiFID in the trading book and to set a limit for the concentration risk. This approach would mean that these investment firms would also have to calculate and consider K-factors which currently only apply to trading book activities. Moreover, this would also mean that it would be necessary to define in detail which own capital or liquidity investments belong to the trading book. This would unnecessarily increase the complexity of the framework and would lead to a further increase in expenses and own funds without EBA providing any evidence of relevant risk or need for higher own funds. The proposed limitation of concentration risks would also have an adversary effect: the portfolio manager would be motivated to always keep his own funds below the threshold in order to avoid having to implement the IFR's complex processes for dealing with concentration risks. However, this would prevent the build-up of an adequate capital buffer in excess of the statutory minimum capital and liquidity requirements.

  Moreover, a limitation of concentration risks and considering equity only held in cash, investment firms would be required to invest significant portions of their own capital (such as cash) at least with

four different banks to meet the requirement, which creates complexity and is too burdensome. The current supervisory review and evaluation process (SREP) addressed in Pillar 2 better assesses the risk of own capital investments (without a licence for dealing on own account) adequately, than setting a concentration risk limit or considering such investments in a (non-existing) trading book.

The assumption that investment firms that offer individual portfolio management might be exposed to increased concentration risks via the non-trading book with their own funds in relation to their balance sheet is devious. We reject the notion of potential regulatory arbitrage in the sense that this would give them a capital advantage over investment firms which are required to consider additional K-factors based on the trading book. Here, EBA compares practices that are not comparable in the first place. Portfolio managers who are not allowed to deal on own account cannot be compared with the risks of investment firms that do. The manner and composition of a portfolio manager's own funds (and only these are considered in the non-trading book) are specified by law in the IFR. If any risks are identified here, these rules should be amended accordingly rather than setting up complex new procedures that have been developed for banks' trading business models. In any case, it should be legally clarified that the investment of own funds by investment firms that are not authorised under point (3) or (6) of Annex I Section A MiFID does not constitute a service of dealing on own account within the meaning of MiFID.

Q16: The discussion paper envisages the possibility to rely on alternative methodologies with respect to the K-DTF. If the respondents suggest an alternative approach, how would this refer to the two activities addressed under the K-DTF (trading on own account and execution on own account on behalf of the clients)?

Not applicable.

Q17: When addressing other activities an investment firm may perform, which elements, on top of the discussed ones, should be also taken in consideration?

We do not see the need to add other activities of an investment firm for the purpose of calculation own capital based on K-factors.

Section 7: Liquidity requirements

Q18: Investment firms performing MiFID activities 3 and 6 (trading on own account and underwriting on a firm commitment basis) are more exposed to unexpected liquidity needs because of market volatility. What would be the best way to measure and include liquidity needs arising from these activities as a liquidity requirement?

This question is not applicable to our members because they do not provide MiFID services 3 and 6.

Nevertheless, we would like to use this question to address the general aspects of the IFR's liquidity requirements for all other investment firms (especially portfolio managers). To have liquidity requirements which would be equal to a suggested and increased four FOR does not truly reflect the risk for an investment firm. We refer to our answer to question 4. Possible and additional wind-down costs are already covered by the SREP and should not lead to any increase of the existing liquidity requirements.

Q19: Investment firms performing the activities of providing loans and credit to clients as an ancillary service in a non-negligeable scale would be more exposed to liquidity risks. What would be the best way to measure such risk in order to take them into account for the purposes of the liquidity requirements?

In principle, we do not currently see any implications for our members here because they do not provide this ancillary investment service. However, we consider any extension of the liquidity requirements or even harmonisation with the requirements that apply to credit institutions to be too far-reaching, as this is not a main activity, but merely an ancillary investment service that does not justify the implementation effort required there. In accordance with the CRR and in connection with Regulation (EU) 2015/61, the granting of loans is taken into account in the LCR with the respective weighting factors under cash inflows/inflows (existing receivable) or under cash outflows/outflows (irrevocable loan commitment). The cash inflows and outflows then determine the net liquidity outflows, which are set in relation to the liquid assets. According to the IFR, this illustration is not comparable or transferable. The relevant figure here is the fixed overheads of the previous year for the time horizon of one month (liquidity requirement). According to the IFR concept, the investment firm should have sufficient liquidity to settle the necessary costs in the event of settlement. With regard to the ancillary investment service 'granting of loans', it can be assumed that the investment firm will no longer provide this service of its own account in the event of a wind-up phase.

Q20: Investment firms, providing any of the MiFID services, but exposed to substantial exchange foreign exchange risk may be exposed to liquidity risks. What would be the best way to measure such risk in order to take them into account for the purposes of the liquidity requirements?

We are not aware of any cases where our members have a foreign bank account (e.g. in third countries). However, if they had a foreign bank account in a country in which they also have a branch, it would be unfair if these cash funds were not recognised at 100%.

Q21: Are there scenarios where the dependency on service providers, especially in third countries, if disrupted, may lead to unexpected liquidity needs? What type of services such providers perform?

We are not aware of any specific cases in practice. However, the new DORA framework already deals comprehensively and conclusively with such cases in which service providers (especially in third countries) may fail. Supplementary rules therefore lead to even more complexity and to an unjustified disadvantage through stricter rules exclusively for non-systemically important investment firms.

Q22: Are there scenarios where the dependency on liquidity providers, especially in third countries, would lead to unexpected liquidity needs? Could you provide some examples?

We are not aware of any specific cases in practice.

Q23: What other elements should be considered in removing the possibility of the exemption in Article 43 of the IFR?

We suggest revising the 'list of high quality liquid assets'. The list of assets eligible to meet the liquidity requirements in Article 43(1)(b) IFR includes units in collective investment schemes (CIUs) up to an absolute amount of EUR 50 million, otherwise subject to the same conditions regarding eligibility criteria as in Article 15 of Delegated CRR Regulation 2015/61. The only difference is that the Delegated CRR

Regulation provides for an upper limit of EUR 500 million. We suggest either removing the limit for certain CIUs, in particular money market funds, or raising the limit for CIUs in the IFR in general, as the important qualitative criterion remains: CIUs are considered liquid assets at the same amount as the underlying liquid assets of the respective companies (Art. 15 of Delegated Regulation 2015/61).

In this context, consideration could also be given to transferring the more principle-based requirements of Article 9(8) AIFMD to the IFD, according to which own funds, including any additional own funds, shall be invested in liquid assets or assets readily convertible to cash in the short term and shall not include speculative positions.

We are also clearly in favour of retaining the existing exemptions in **Article 43(1)(2) IFR** for Class 3 firms regarding the liquidity requirements under Part 5 of the IFR (subject to supervisory approval). According to Art. 43(1)(2) IFR, the competent authorities may exempt small investment firms from holding liquid assets amounting to at least one third of fixed costs. The EBA has already published guidelines to determine which services of investment firms can lead to a liquidity risk. On this basis, the competent authorities should identify those investment firms that should not be exempted from the liquidity requirements of the IFR or should receive an exemption due to the services they provide. In current supervisory practice, however, we see problems in the implementation of the EBA guidelines, as individual examples may be misinterpreted. For example, BaFin does not allow that a small investment firm providing portfolio management or investment advice for which the management of assets has not been exclusively delegated to it by other financial institutions (cf. Art. 17(2)(2) IFR) should not qualify for an exemption.

We do not consider this absolute approach to be appropriate. This is because it would mean that portfolio managers or investment advisors, as Class 3 firms that do not perform their activities exclusively by way of delegation for other financial institutions, would be excluded from exemption forever. This would affect precisely those portfolio managers and investment advisors who provide these services directly to retail clients or other institutional clients which do not qualify as financial institutions (e.g. pension funds or pension schemes). According to paragraph 20 of the EBA guidelines, the EBA explicitly defines a case study according to which the competent authorities may exempt certain investment firms if they provide certain services. This concerns those that provide ongoing portfolio management or investment advice if this investment firm manages assets that have been transferred to it by other financial institutions. With this approach, the EBA explicitly transfers the principle already laid down in Art. 17(2)(2) IFR to the liquidity requirements. Accordingly, an investment firm does not have to take assets into account in the K-factor approach if another company in the financial sector has formally transferred the management of assets to the investment firm.

However, the reverse conclusion now developed by BaFin cannot be derived from this EBA case study, namely that portfolio management or investment advisory services that are not provided by other financial institutions by way of delegation may not be exempted per se. In our response to the consultation on the EBA guidelines, we had already criticised the fact that the EBA's wording could be misunderstood in such a way that only small investment firms could benefit from the exemption if they only provide these activities by way of delegation. However, the EBA clarified in its final report (see summary of responses to the consultation and the EBA's analysis, page 24) that the exemption should not be limited to cases where there is a transfer, as this paragraph would otherwise have been presented as a restriction. We therefore request that this assessment be explicitly clarified once again.

Section 9: Interactions of IFD and IFR with other regulations

Q24: 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?

We reject EBA's cherry-picking approach of imposing certain IFD/IFR requirements on AIF/UCITS managers who also provide MiFID services. If the EU legislator wants to analyse any competitive disadvantages for providers of MiFID activities, it will have to include the entire range of MiFID service providers including credit institutions that also provide MiFID activities in addition to banking activities. However, this is precisely what we do not see in the discussion paper.

To the contrary, the EU legislator has made its own judgements here based on its own sector-specific regulations for credit institutions on the one hand (CRD/CRR) and for asset managers on the other (AIFMD and UCITS Directive). In particular, we are very irritated that the discussion paper contains proposals to adjust the own funds requirements of the AIFM and UCITS Directives or even to limit their MiFID activities. We do not believe that such proposals are in any way covered by the mandate of the IFD/IFR. Article 66 IFD only provides for a mandate to review the level playing field between investment firms and AIFM/UCITS managers **with regard to the provisions on remuneration** in the IFD/IFR and in the AIFM and UCITS Directives. The EU Commission's call for advice is limited to assessing the interactions between investment firms and other financial activities (and their specific regulatory frameworks, such as UCITS and AIFM) and whether the IFR/IFD need to be amended to better address the risks arising from these interactions. EBA and ESMA avoid this approach by not proposing changes to IFR/IFD, but by intervening in other sector-specific frameworks. Amending capital requirements of UCITS/AIF managers requires broader consultation under the AIFM/UCITS Directives directly, which were reviewed only recently by the EU legislators as part of the AIFMD review and assessed as appropriate.

In this debate, we miss an in-depth discussion of whether the IFD/IFR requirements are at all appropriate with regard to the risks of investment firms providing services such as portfolio management and investment advice. Instead, it is proposed that these requirements should be based more strictly on the banking regulations and then transferred to UCITS/AIF managers. We would therefore like to take a step back and review the effectiveness of the current IFD/IFR requirements and then, where appropriate, transfer the requirements of the AIFM/UCITS Directives, which have been practicable and appropriate for many years, to those investment firms that provide portfolio management and investment advice. Otherwise, CRD/CRR would have to be reviewed to determine whether the requirements of IFD/IFR with regard to the K-factor approach for the provision of MIFID activities (here e.g. portfolio management, investment advice) would then not also have to be transferred.

Against this background, we also take a critical view of the data collection addressed by EBA and ESMA, which is aimed exclusively at investment firms, their supervisors, and AIF/UCITS managers that provide additional MiFID services, and completely omits credit institutions that also provide additional MiFID services.

According to the BaFin company database, there are currently 141 fully licenced AIF and/or UCITS management companies in Germany (as at mid-July 2024, 144 as at end of 2023). These are broken down as follows:

- five management companies that only manage UCITS (no AIFs)
- 29 managers that manage UCITS and AIFs

- 102 managers that only manage AIFs. The high proportion of pure AIF licences can be explained by the numerous new foundations in the real asset sector after 2013.
- For five companies, the BaFin database does not contain an entry on the type of fund they manage.

Based on our data on Germany, however, we can in any case refute the indirect accusation of management companies engaging in regulatory arbitrage by applying for an AIFM/UCITS licence for predominantly performing MiFID activities in order to avoid the IFD/IFR requirements. According to the latest EDW's activity report, a total of 52 AIF/OGAW managers provide additional MiFID services in Germany by the end of 2023. As shown in the table below, for authorised AIF and UCITS managers in Germany, the ratio of additional MiFID services to fund business has been declining for at least ten years. This data is based on the BVI's overall statistics which have been in existence for 20 years and provide figures for historical reporting dates. In the table below you will find the aggregated data for our members, 64 UCITS or AIF managers, which cover 98 per cent of the German market by assets.

	2023	2018	2013
	Amount	Amount	Amount
Activity under the UCITS and AIFM Directive authorisation:			
UCITS funds and Alternative investment funds	2.653.511,1	2.037.195,1	1.404.353,5
Assets under management / advice in relation to MiFID financial instruments only	1.474.466,9	1.266.923,6	1.075.137,7
of which: arising from individual portfolio management in relation to MiFID financial instruments only	525.309,3	491.296,0	470.982,0
of which: arising from investment advice in relation to MiFID financial instruments only	949.157,6	775.627,6	604.155,7
	ratio "MiFID instruments" [line 6] / "UCITS and AIF assets" [line 5]		
in millions of Euro			
data as of 31 December	0,56	0,62	0,77
source: BVI			

Our members often make use of the possibility to delegate the portfolio management of investment funds in particular in the area of alternative investment funds with institutional investors such as banks, insurance undertakings or pension funds. These investment funds are invested in financial instruments (securities-based investment funds) with equal investment strategies permitted by the UCITS Directive. At the middle of 2024, our members managed such securities-based investment funds with about 1,962 billion Euro assets under management. About 57 percent of this portfolio (approximately 1,124 billion Euro assets under management) is delegated to external asset managers in Germany and abroad. The other 43 percent of these assets under management are managed by the management company itself.

In this context, special consideration must be given to the fact that, under German legislation, the management of third-party fund portfolios by an AIF/UCITS management company by way of outsourcing fund portfolio management to the latter is also regarded as a MiFID financial portfolio management service. As far as we are aware, this understanding is not uniformly implemented in all EU member states, with the result that the management of outsourced fund portfolios by AIF/UCITS management companies may not be considered a MIFID service in other EU member states. While the provided data sheet is focused on MiFID investment services as a whole, there is a need to distinguish the investment service of portfolio management in two parts to reflect the management of investment funds as a special business model in a more appropriate manner: the management of investment funds by means of an outsourcing agreement (collective asset management) and the management of financial assets outside investment funds on an individual client basis.

Finally, rigorous capital requirements which reflect the risks of certain activities are already in place for the management companies under the UCITS Directive or the AIFMD. This also includes – and this is missing from the discussion paper – that AIF/UCITS managers must also hold initial capital as defined in Article 15 MiFID II to cover their additional MiFID services (cf. Article 6(6) AIFMD and Article 6(4) UCITS Directive with references to Article 12 MiFID I which is repealed and construed as reference to

Article 15 MiFID II, see Article 94 MiFID II). These capital requirements also encompass cases of delegation of portfolio management. Moreover, management companies are obliged to cover operational risks (such as professional liability risks) through additional own funds (cf. Article 14 of the Delegated Regulation (EU) No 231/2013 of 19 December 2012). Therefore, if the aim is to prevent possible regulatory arbitrage (which does not exist in Germany), it should be examined whether these additional own funds should be transferred to portfolio managers as an additional solution instead of a complicated K-factor approach, based on the AIFM Directive in accordance with MIFID/IFD. This would be in line with our proposal under question 2 to treat portfolio managers without access to client money and authorisation for dealing on own account as a class 3 investment firm in future.

Q25: 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?

We refer to our answer to question 14. MiCAR already represents an independent and conclusive set of rules for the providers of such products.

Q26: 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?

We refer to our answer to question 14. In our view, crypto-assets could only be included into the IFD/IFR framework as long as they qualify as financial instruments in the meaning of the MiFID II. In all other cases, however, the MiCAR already represents an independent and conclusive set of rules for the providers of such products.

Section 10: Remuneration and its governance

Q27: 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?

We would like to highlight that the remuneration policies and systems have already reached a very high degree of complexity due to the existing legal and supervisory requirements. This is accompanied by an equally high level of effort for implementation. We see multiple interactions especially in the remuneration rules introduced under different pieces of EU law which overall amount to a huge practical burden for the affected market participants. This is even more pronounced when consideration is given to local labour laws that conflict with the regulatory issues. Furthermore, the complexity is a competitive disadvantage to the EU on the basis that it discourages competition and provides barriers to entry for both corporates and individuals. Capital (both human and financial) is effectively restricted from flowing to the EU by the attractiveness, simplicity and certainty of the rules particularly in the USA, but also APAC and more recently the UK.

Furthermore, the requirements have not shifted the dial on absolute levels of remuneration, they have simply reclassified what was variable remuneration (and therefore scalable) into fixed thereby increasing corporate fixed costs, limiting their ability to 'pay for performance' and missing the opportunity for application of malus and clawback (which are positives).

Irrespective of this general assessment, we have the following comments on the issues raised in the discussion paper:

- In general, we share the view that the existing **MiFID remuneration rules** lay down the same standardised rules for all companies that perform MiFID activities. These therefore apply equally to credit institutions, investment firms and AIF/UCITS managers that perform MiFID activities. However, we see disadvantages due to the ESMA guidelines on certain aspects of the MiFID II remuneration requirements for class 3 investment firms which are not required to implement special IFD remuneration policies, in particular the requirements on deferral and pay-out in instruments or ex-post adjustment criteria such as malus or clawback under IFD. Neither MiFID II nor the Delegated Regulation under MiFID II contains specific requirements for the introduction of such rules. ESMA, however, requires additional rules (such as malus or clawback) which shall also apply to these small and non-interconnected investment firms (cf. 26 and 29 of the guidelines). This leads to an overly broad interpretation of the MiFID remuneration rules in disregard of the legislative concept of the principle of proportionality and the IFD remuneration requirements. In particular, recital 22 of the IFD states that small and non-interconnected investment firms should be exempt from those rules because the provisions on remuneration and corporate governance laid down in MiFID II are sufficiently comprehensive for those types of investment firms.

- With regard to the **comparison of investment firms with AIF/UCITS managers**, we have the following comments: Firstly, we disagree with the general assessment that the activities of class 3 investment firms and AIF/UCITS managers are relatively similar in terms of business models and risk profiles (cf. paragraph 230 of the discussion paper). Initially, comparability only exists if and to the extent that these companies perform the same MiFID activities. The MiFID remuneration rules then also apply to these cases. However, the sector-specific remuneration rules of the IFD on the one hand and the AIFM and UCITS Directives on the other can only be compared if comparable activities actually exist. However, this is rarely the case. An investment adviser, for example, that qualifies as a class 3 investment firm cannot be compared with an AIF/UCITS manager that provides collective portfolio management services. Similarly, a class 2 investment firm that provides MiFID services such as dealing on own account cannot be compared with the collective asset management of an AIF/UCITS manager. These are completely different business models and risks. What investment firms and AIF and UCITS managers have in common, however, is that their business models differ fundamentally from the banking business and therefore an approach based on the principle of proportionality is required in every case.

  Regardless of this, at best, portfolio management as a MiFID service provided by an investment firm could be compared with collective portfolio management, but even here there are considerable differences. It makes a significant difference whether a company provides discretionary or collective asset management. However, comparability can only be established if the individual mandate consists of managing third-party AIF or UCITS portfolios by way of delegation. In this case, the AIF/UCITS manager delegates to the investment firm the obligations applicable under the AIFMD and the UCITS Directive in relation to the management of these portfolios. Only in these cases can it therefore make sense to assess whether the different sector-specific rules lead to disadvantages for investment firms providing portfolio management services (for example, when paying out parts of the variable remuneration in certain instruments). However, the Commission's Recommendation 2009/384/EC should be considered (cf. Article 30(4) IFD) which states that fees and commissions received by external service providers in case of outsourced activities should not be addressed by

the remuneration rules, since the compensation practices relating to such fees and commissions are already partially covered by particular regimes (such as MiFID).

Conversely, asset managers offering services and products under AIFMD, UCITS Directive and MiFID (all together with an authorisation) must legally comply with three different sets of rules for the remuneration of their employees. It is common practice that all these services are provided jointly by specialised management teams within a group. Thus, it is very common for management companies to have management teams for e.g. European corporate bonds, North American or South-East Asian equities which then provide their services to all AIFs, UCITS and individual portfolios focusing on these markets. In Germany, we are not aware of any management company which differentiates employees according to the legal structures of the managed products, e.g. UCITS employees, AIF employees and MiFID employees. In most situations the affected employees need to be remunerated in line with the AIFMD, UCITS and MiFID rules at the same time. Applying all these rules simultaneously within one employment contract is barely possible. Therefore, any amendment to supervisory policies or legal requirements leads to further additional expenses. The necessity of new requirements under the AIFMD or the UCITS Directive should therefore be carefully considered.

- We also share the view that the legal **differences for class 3 investment firms compared to small AIF/UCITS managers** do not lead to any practical problems. However, a clear distinction must be made here as to which activities are being compared. As explained above, an investment advisor as a small investment firm cannot be compared with an AIF/UCITS manager that provides collective asset management, even if the latter is ‘small’. For ‘small’ UCITS/AIF managers, the AIF/UCITS remuneration rules in conjunction with the ESMA guidelines leave sufficient flexibility for the application of the proportionality principle. These rules are basically comparable to the requirements under MiFID, which class 3 investment firms must also comply with.

- **Group remuneration rules (Article 25 IFD):** There are differences between Article 109 CRD V and Article 25 IFD with regard to the group approach. According to Article 109(4)(a) CRD V, it is possible to apply other remuneration provisions to subsidiaries if they are subject to specific remuneration requirements in accordance with other EU legislation (e.g. AIFM/UCITS Directive). There is no comparable provision in Article 25 IFD. Even though CRD V was negotiated at EU level at almost the same time as the IFD, it is important to realise that the EU legislators only agreed on the group remuneration rules under CRD V at a very late stage. It was therefore no longer possible to transpose these rules into the IFD in a comparable manner. **We therefore propose to adapt Article 25 IFD to Article 109 CRD V. It should be possible to apply other remuneration provisions to subsidiaries if they are subject to sector-specific remuneration rules in accordance with other EU legislation (e.g. AIFM/UCITS Directives).**

Q28: 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?

Due to the differences in the individual business activities of investment firms on the one hand and AIF/UCITS managers on the other hand, we do not see any need for the introduction of thresholds in the remuneration rules of the AIFMD or the UCITS Directive.

Nevertheless, we see a need to adjust the requirements in the Delegated Regulation (EU) 2021/2154 on appropriate criteria to identify categories of staff (Delegated IFD Regulation) in order to fulfil the principle of proportionality in contrast to the remuneration rules applicable to credit institutions. By merely copying the CRD-RTS on identify risk takers, the EBA and the EU Commission have, in our view, failed to take due account of the mandate in Article 30(4) IFD. Accordingly, deviations from existing provisions such as the ESMA Remuneration Guidelines under the AIFMD and UCITS Directive and MiFID, in which the principle of proportionality applies in this way, should be minimised. We had already pointed this out during the consultation process (see BVI position). We would be grateful if these aspects were re-examined when the IFD's remuneration rules are reviewed.

The European legislators repeatedly argued that the governance and remuneration requirements of CRD IV already applied to investment firms and therefore nothing needs to be changed compared to the CRD approach under the IFD. Such an assumption is incorrect, as the definition of investment firms in the CRR/CRD framework is not identical to the new definition of investment firms in the IFD. Investment firms that provide certain MiFID services (such as portfolio management) without authorisation to hold client money or dealing on own account were exempt from the CRD governance/remuneration requirements (see Article 4(1)(2)(c) CRR). They were not considered institutions within the meaning of the CRD/CRR, meaning that they were not affected by the CRD requirements applicable solely to institutions. Until the IFD came into force, such investment firms were not obliged to identify risk takers or categories of staff members for the payment of variable remuneration (nor, incidentally, under the German Remuneration Ordinance for Institutions). In Germany, there are a number of such firms with limited authorisation that are now classified as class 2 investment firms and for which the IFD for the first time laid down new rules for the identification of risk takers and the payment of variable remuneration. This required a considerable new implementation effort for them. This is the reason why the principle of proportionality is so important. Otherwise, it seems strange that these investment firms were not previously covered under the CRD but are now – with an unchanged risk profile – to be subject to stricter rules under the IFD (because of the thresholds in the Delegated IFD Regulation) than managers of investment funds under the UCITS Directive or the AIFMD.

Principle of proportionality: One of the main differences between the requirements of CRD V and the IFD is that CRD V explicitly requires certain categories of staff to be identified staff (mandatory) based on their function and the specific level of their remuneration (e.g. more than EUR 500,000 total remuneration). The IFD, on the other hand, focuses on whether certain categories of staff can have a material impact on the risk of the investment firm or the assets under management. The Delegated IFD Regulation circumvents this principle by essentially copying the rules on criteria to identify categories of staff applicable under CRD V. This has the following effects:

- The new **quantitative criteria** in the Delegated IFD Regulation are now taken from the CRD V requirements and are generally not in line with the IFD approach. However, they depend on proof that the staff members with such a high remuneration does not have a material impact (see Article 4(2) of the Delegated IFD Regulation). This raises the question of whether such far-reaching quantitative criteria are still appropriate, although the IFD at Level 1 only specifies the lowest remuneration of senior managers or risk takers as a quantitative requirement. Here, it may make sense to apply the principles-based approaches for identifying staff members or categories of them without any thresholds from the ESMA guidelines under the AIFMD or the UCITS Directive to investment firms, at least to the extent that they provide portfolio management services as class 2 firms.

- In any case, the principle of proportionality is not adequately implemented in the **qualitative criteria** for identifying staff members. According to Article 3 Delegated IFD Regulation, all listed qualitative criteria should be mandatory without the investment firm being able to demonstrate that the staff members/categories do not have a material impact on the risk profile. Only Article 3(d) Delegated IFD Regulation provides for exemptions for staff members with management responsibility (e.g. for portfolio management) below a balance sheet total of EUR 100 million. All other staff members/categories listed in Article 3 Delegated IFD Regulation are deemed to be identified without exception, meaning that their variable remuneration would have to be based on the strict requirements of Article 30 IFD in any case. This would also apply, for example, to those responsible for economic analyses or outsourcing, irrespective of the size of the investment firm's balance sheet total (see Article 3(h) Delegated IFD Regulation). It is not clear to us why such managers at the second management level should be regarded as identified staff members without restriction, while their 'superiors' at the first management level should only be included if a threshold value for the balance sheet total is exceeded.

Q29: 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.

We refer to our answer to question 28. In particular, we see no need to amend the remuneration rules under the UCITS or AIFM Directives. Here, it makes more sense to apply the principles-based approaches to investment firms without any thresholds from the ESMA guidelines under the AIFMD or the UCITS Directive to investment firms, at least to the extent that they provide portfolio management services as class 2 firms. In particular, it should again be critically questioned whether the quantitative criteria in Article 32(4)(b) IFD (threshold of EUR 50,000) are appropriate for all class 2 investment firms or whether exceptions for class 2 investment firms with a limited licence would not also be appropriate. In practice, that threshold is meaningless as it captures the majority of staff within the financial industry.

However, in order to do justice to the principle of proportionality under the IFD, we suggest that the permissible instruments for the payment of remuneration be made somewhat more flexible. In particular, it should be possible for an investment firm that provides portfolio management or is part of an investment firm group including AIF/UCITS managers and other portfolio managers to also use fund-linked instruments within the group, without limiting it to non-cash instruments which reflect the instruments of the portfolios managed by their employing entity. We believe this would better result in aligning investment professionals who are identified staff under IFD with the interest of the group's clients.

Finally, we would like to point out the following in general: The requirement for 'up-front (non-deferred)' variable remuneration to be delivered part in cash and part in instruments is a pointless exercise in logistical, operational, and administrative terms. The deferral in and of itself achieves the desired outcome of aligning interests of the individual to the long-term outcomes of the firm.

Q30: 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.

Due to the different disclosure requirements in the IFD on the one hand and the AIFMD/UCITS Directives on the other, we do not see any practical implications for recruiting or retaining qualified staff. As the EBA's discussion paper can be interpreted in the sense that any IFD disclosure standards should also be applied to AIF/UCITS managers, this will in any case lead to a high cost/implementation effort, which would not be in line with the objectives of the Capital Markets Union to drastically reduce reporting obligations.

In any case, there are too many requirements on disclosure and transparency, and they should all be standardised in one comprehensive document, using similar taxonomy and requirements, and in one format that is easily accessible to all and at one deadline. Furthermore, if regulators require publication in a particular format, they should provide the tools to convert to that format.

Section 11: Other elements

Q31: What would be costs or benefits of extending existing reporting requirement to financial information? Which other elements should be considered before introducing such requirement?

In Germany, investment firms (class 2 and 3) are already required to submit on a quarterly basis additional financial information (cf. Article 66(2) of the German Investment Firm Act). We therefore have no objections to standardising these requirements at EU level. Nevertheless, we would like to point out that this should not involve any further tightening of the reporting requirements.

Compared to reporting requirements under the bank regulation (CRR/CRD), the simplified IFR reporting requirements are clearly less burdensome for our members affected, but still provide a fair view of the investment firm. Some reports in the CRR do not fit to the nature of an investment firm. While we can understand the need of regulators to get basic financial information such as basic balance sheet and P&L, as discussed in the paper, any extension of current reporting requirements should be carefully considered by the regulators under proportionality aspects.

Q32: Should there be the need to introduce prudential requirement for firms active in commodity markets and that are not currently subject to prudential requirements? How could the existing framework for investment firms be adapted for those cases? If a different prudential framework needs to be developed, what are the main elements that should be considered?

Not applicable.