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European Consultation on the review of the AIFMD
ICI Global Response

Contents

Section I. Functioning of the AIFMD regulatory framework, scope and authorisation requirements

Question 1. What is your overall experience with the functioning of the AIFMD legal framework?

☐Very satisfied | ☐Satisfied |☐Neutral |☐Unsatisfied| ☐Very unsatisfied|☒ Don't know / no opinion / not relevant

Question 2. Do you believe that the effectiveness of the AIFMD is impaired by national legislation or existing market practices?

☐Fully agree|☐Somewhat agree|☐Neutral|☐ Somewhat disagree|☐Fully disagree| ☒ Don't know / no opinion / not relevant

Question 2.1 Please explain your answer to question 2, providing concrete examples and data to substantiate it:

ICI Global [1] represents investment funds, such as UCITS, that primarily invest in securities, are substantively regulated and are eligible for public sale. In this review of the AIFMD regulatory framework, the Commission poses a number of questions related to UCITS, including whether there should be a "more coherent" approach to the UCITS and AIFMD frameworks. In particular, the Commission requests input on whether there should be greater harmonisation in the areas of delegation, leverage calculation, and reporting of the use of liquidity management tools. More broadly, the Commission asks whether the UCITS and AIFMD regulatory frameworks should be merged into a single EU rulebook.

Within that context, we are responding to a limited number of topics that have the most relevance for UCITS. As a general matter, we do not believe the UCITS and AIFMD frameworks should be merged into a single EU rulebook. The two frameworks have different purposes – the AIFMD regulatory regime provides a European fund manager a license to manage and market AIFs to professional investors across the Union while the UCITS Directive is an EU passport for regulated funds to be marketed cross border to retail investors. In addition, given the differences between UCITS and AIFs in terms of, among other things, substantive regulations, investment strategies, and types of investors, it is entirely appropriate for there to be two separate regulatory regimes.

Moreover, we believe that reviewing the effectiveness of provisions within the AIFMD and determining whether there could be areas of convergence between the AIFMD and the UCITS Directive are separate inquiries. If the Commission believes that certain provisions would be appropriate for both regulatory frameworks, it should make that determination carefully for each individual provision and clearly articulate its rationale for that determination rather than mechanically or automatically harmonising across the board.

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[1] ICI Global carries out the international work of the Investment Company Institute, the leading association representing regulated funds globally. ICI's membership includes regulated funds publicly offered to investors in jurisdictions worldwide, with total assets of US$36.0 trillion. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of regulated investment funds, their managers, and investors. ICI Global has offices in London, Brussels, Hong Kong, and Washington, DC.

Question 3. Please specify to what extent you agree with the statements below:

The AIFMD has been successful in achieving its objectives as follows:

	1 (fully disagree)	2 (somewhat disagree)	3 (neutral)	4 (somewhat agree)	5 (fully agree)	Don't know/No opinion/Not applicable
creating internal market for AIFs	☐	☐	☐	☒	☐	☐
enabling monitoring risks to the financial stability	☐	☐	☒	☐	☐	☐
providing high level investor protection	☐	☐	☒	☐	☐	☐

Other Statements:

	1 (fully disagree)	2 (somewhat disagree)	3 (neutral)	4 (somewhat agree)	5 (fully agree)	Don't know/No opinion/Not applicable
The scope of the AIFM license is clear and appropriate	☐	☒	☐	☐	☐	☐
The AIFMD costs and benefits are balanced (in particular regarding the regulatory and administrative burden)	☐	☒	☐	☐	☐	☐

The different components of the AIFMD legal framework operate well together to achieve the AIFMD objectives	☐	☒	☐	☐	☐	☐
The AIFMD objectives correspond to the needs and problems in EU asset management and financial markets	☐	☐	☒	☐	☐	☐
The AIFMD has provided EU AIFs and AIFMs added Value	☐	☐	☐	☒	☐	☐

Question 3.1 Please explain your answer to question 3, providing quantitative and qualitative reasons to substantiate it:

Our responses to those questions in this consultation that are of the greatest relevance to UCITS are summarised below:

International Relations

- In our view, the existing rules that apply to the delegation of AIFM functions are sufficiently clear and robust to prevent the creation of letter-box entities, while providing for an appropriate level of supervisory discretion and judgement.
- Before exploring making changes to the delegation rules, it is paramount that policymakers first identify with specificity their concerns regarding the existing delegation framework, whether these concerns are related to the delegation framework, and if and how any identified problems have arisen on the basis of this framework.

Macro-prudential issues

- We support the current regulatory framework and believe any changes to reporting lines or requests for additional reporting on liquidity risk management or macroprudential tools should be justified by data and relevant experience, including the recent real-life stress test in March 2020.

- We believe that AIFMD supervisory reporting would be improved if NCAs, with input from technical experts from industry and in coordination with ESMA, could work toward greater consistency in reporting requirements across jurisdictions and improved reporting infrastructure to facilitate timely and effective reporting from NCAs to ESMA.
- Leverage assessments should closely track the two-step framework recommended in IOSCO's Framework for Assessing Leverage in Investment Funds. In this regard, the first step should require NCAs to assess fund leverage exposures by broad asset categories and long and short positions.
- NCAs should prudently exercise their broad authority to impose leverage restrictions. In so doing, they should consult publicly on any possible leverage restrictions and consult confidentially with any funds before they become subject to such restrictions. In addition, any restrictions based solely on gross notional exposure, including any fund distribution restrictions, should be eliminated.

Sustainable Finance

- Given the many new sustainable finance requirements that will apply to asset managers, we urge the Commission to focus first on coherent implementation of existing requirements before considering additional significant changes that have the potential to impact negatively the investment process. This approach will provide the Commission with the opportunity to assess the market impact of SFDR, the Taxonomy, and other forthcoming requirements and avoid unintended consequences from additional requirements that may not interact effectively with existing obligations.
- We recognise the EC's interest in increasing fund managers' focus on sustainability impacts, but we strongly urge against requiring fund managers to take into account interests and preferences other than those expressed by investors. From an investor protection standpoint, it is essential that asset managers make investment decisions on behalf of their clients/investors only and invest in a manner that they assess will best achieve a client's mandate or a fund's stated investment objectives.

Investor Protection

- We have not identified the need for a separate AIF structure to be created under EU law for cross-border marketing to retail investors. The European Commission should pursue improvements to the cross-border marketing passport for retail funds and introduce a pan-European retail marketing regime.

Miscellaneous

- ESMA's existing competences and powers – which it could more fully utilise – enable it to address divergence in Member States' implementation of the EU's investment fund frameworks and support supervisory convergence across NCAs. We have recommended additional competencies and powers to support the development of the cross-border market for retail funds.

- The UCITS and AIFMD frameworks should not be merged into a single EU rulebook given their different purposes and the major legal and policy uncertainties that would result – instead the European Commission should address divergence in Member States' implementation of the UCITS and AIFMD frameworks and encourage supervisory convergence.

Question 4. Is the coverage of the AIFM licence appropriate?

☐ Yes | ☐No | ☒ Don't know / no opinion / not relevant

Question 10. Would the AIFMD benefit from further clarification or harmonisation of the requirements concerning AIFM authorisation to provide ancillary services under Article 6 of the AIFMD?

☐Fully agree|☐Somewhat agree|☐Neutral|☐ Somewhat disagree|☐Fully disagree|
☒ Don't know / no opinion / not relevant

Question 20. Can the AIFM passport be improved to enhance cross-border marketing and investor access?

☐ Yes | ☐No | ☒ Don't know / no opinion / not relevant

Section II. Investor protection

a) Investor classification and investor access

Question 23. Is there a need to structure an AIF under the EU law that could be marketed to retail investors with a passport?

☐ Yes | ☒No |☐ Don't know / no opinion / not relevant

Question 23.1 If yes, what are the requirements that should be imposed on such AIFs? Please give examples where possible and present benefits and disadvantages of your suggested approach as well as potential costs of the change:

We have not identified the need for a separate AIF structure to be created under EU law for cross-border marketing to retail investors. Instead, the European Commission should pursue the following reforms to improve cross-border distribution of funds:

- Improve the marketing passport for retail funds and introduce a pan-European retail marketing regime to remove impediments to cross-border fund distribution;
- Resolve outstanding issues concerning performance scenarios and cost disclosure in the PRIIPs KID; and
- Reform the MiFID II inducements, product governance and investor disclosure regime to simplify the fund investment process, including investor access to advice (see ICI Global's MiFID II Review Response, available from https://www.ici.org/pdf/mifidresponse.pdf)

b) Depositary regime

Question 35. Should the investor CSDs be treated as delegates of the depositary?

☒ Yes | ☐No |☐ Don't know / no opinion / not relevant

Question 35.1 Please explain your answers to question 35, providing concrete examples and suggesting improvements to the current rules and presenting benefits and disadvantages as well as costs:

Fund investors should benefit from the same level of protection (e.g., appropriate liability in the event of loss) regardless of whether a fund depositary has delegated custody of a fund's securities to a custodian (e.g., subject to MiFID II) or an investor CSD (e.g., subject to CSDR). In instances where an investor CSD is performing the same function as a custodian (i.e., holding securities for a fund in custody), it should be treated as a delegate of the depositary. The CSDR – subject to an ongoing review by the European Commission – does not provide an identical liability regime to the depositary regime under UCITS and AIFMD, but CSDs are required to hold capital against the crystallisation of various risks. Funds seek the provision of depositary services that provide the best balance between investor protection and cost (i.e., depositary fees and associated fund costs). We do not object to the treatment of investor CSDs as delegates of the depositary, but this should not result in any reduction in the level of investor protection received by an investment fund (i.e., the depositary may seek to recover costs in the event of loss from an investor CSD it has delegated custody to, but should still remain liable to the fund for that loss.)

Section III. International relations

Question 50. Are the delegation rules sufficiently clear to prevent creation of letter-box entities in the EU?

☐ Yes |☒No |☐ Don’t know / no opinion / not relevant

Question 50.1 Please explain your answer to question 50, presenting benefits and disadvantages of the current rules and where available providing concrete examples substantiating your answer:

Our response to Question 50 is “Yes.” We needed to select “No” to enable us to explain our response.

Our responses to the questions on delegation is informed by the fact that most, if not all NCAs already, by law or in practice, apply the principles set out in the AIFMD delegation rules to the delegation of functions by UCITS management companies. Moreover, ESMA’s Brexit Opinion on Investment Management provides that, “ESMA is of the view that the interpretation of Article 13 of the UCITS Directive and the relevant national laws transposing this provision should be consistent with the principles set out in Articles 75-82 of the AIFMD Level 2 Regulation.

In our view, the existing rules that apply to the delegation of AIFM functions (including those set out under the AIFMD, AIFMR and ESMA guidance, as well as relevant local implementation, rules and guidance), are sufficiently clear and robust to prevent the creation of letter-box entities. The rules permit AIFMs to use delegation arrangements to maximise operational efficiencies and best serve investors, with appropriate safeguards to ensure effective supervision. Under the current rules, AIFMs are required to appoint carefully and supervise closely delegates, and NCAs, in turn, have the tools needed to supervise effectively AIFMs. Delegation structures cannot be used to circumvent the requirements of the AIFMD, or otherwise present a regulatory arbitrage opportunity, and investors’ interests are well protected.

The AIFMD and AIFMR contain detailed provisions regarding delegation and what would be considered a letter-box entity. Article 20 of AIFMD makes it explicitly clear that an AIFM shall not delegate its functions to the extent that, in essence, it can no longer be considered to be the manager of the AIF (and therefore that it becomes a letter box entity), while Articles 75-82 of the AIFMR set out in great detail how the specific rules relating to delegation function. In particular, Article 82 sets out the definition of a letter box entity and the conditions under which an AIFM is no longer considered to be managing an AIF. Additionally, under the AIFMD and relevant legislation on authorisation and ongoing supervision, an AIFM must notify the relevant NCA of its intention to delegate certain functions, including portfolio management, risk management, fund administration and valuation activities. AIFMs must also notify the supervisor in the event there is a change in delegate. ESMA’s Q&A on the application of the AIFMD provides further guidance on the application of delegation rules and provisions relating to letter-box entities.

The current rules provide for an appropriate level of use of discretion and supervisory judgement in the application of these rules that is needed to account for asset managers' differing business models. Many NCAs have supplemented these EU-level rules with further guidance that outlines in specific detail how the delegation requirements will be applied and the specifics of any substance requirements. An assessment of whether delegation has been done to such an extent that a letter-box entity has been created must take into account the nature, scale and complexity of an AIFM's arrangements in their entirety and requires supervisory judgement. Additional and/or more detailed requirements will not obviate the need for supervisory judgement and may instead work to disadvantage AIFs by creating unnecessary hurdles to their optimal operation.

Policymakers have not articulated any particular problems or weaknesses with the existing delegation framework and practices that need to be addressed. Before exploring making changes to the delegation rules, it is paramount that policymakers first identify with specificity their concerns regarding the existing delegation framework, whether these concerns are related to the delegation framework, and if and how any identified problems , have arisen on the basis of this framework. It is only if and when this analysis is done, can policymakers effectively consider how to address any identified problems and how best to address them. For example, depending on the concerns identified, tools may already be available to ESMA to address those concerns.

Question 51. Are the delegation rules under the AIFMD/AIFMR appropriate to ensure effective risk management?

☒ Yes |☐No |☐ Don't know / no opinion / not relevant

Question 51.1: Please explain your answer to question 51, presenting benefits and disadvantages of the current rules and where available providing concrete examples substantiating your answer.

We agree with the statement in the Commission's report on the operation of the AIFMD that "the AIFMD delegation provisions have imposed effective controls on the activity of delegating AIFM functions, thereby limiting and managing key operational risks for AIFs and AIF investors, and have done so in an efficient manner."

Delegation must meet specified conditions. As stated in our response to Question 50, the AIFMD and AIFMR specify the conditions under which AIFMs can delegate functions and the criteria that must be met by delegates to be contracted for the provision of any delegated functions. Importantly, an AIFM is required to undertake due diligence to ensure that the delegate possesses sufficient resources, expertise and experience, and has adequate operational risk controls, financial resources and supervisory status. Additionally, AIFMs must ensure that appropriate contractual arrangements are in place with delegates that detail the tasks and activities that are delegated. The delegation must not prevent the delegating entity from complying with its requirements under the AIFMD.. Notably, the

AIFM's liability towards the AIF and its investors is not impacted by the fact that the AIFM has delegated certain functions; the AIFM remains primarily responsible for compliance with the AIFMD.

The AIFMD contains further protections in the case of delegation of risk management or portfolio management. In the case of delegation of risk management or portfolio management, such delegation may be conferred only on undertakings that are authorised or registered for the purpose of asset management and subject to supervision or (where that condition cannot be met) prior approval by the NCA of the AIFM's home Member State. Delegation to a third-country undertaking is possible only if there is a cooperation agreement between the NCA of the AIFM's home Member State and the third-country delegate's relevant supervisory authority. Collectively, these provisions create a robust framework that ensures that delegation does not impact the effectiveness of risk management.

Question 52. Should the AIFMD/AIFMR delegation rules, and in particular Article 82 of the Commission Delegated Regulation (EU) No 231/2013, be complemented?

☒ Yes |☐No |☐ Don't know / no opinion / not relevant

Question 52.1 Should the delegation rules be complemented with:

☒ Quantitative criteria |☐ A list of core or critical functions that would be always performed internally and may not be delegated to third parties |☐ Other requirements

Please explain why you think the AIFMD/AIFMR delegation rules should be complemented with quantitative criteria, presenting benefits and disadvantages of the potential changes as well as costs:

Our response to Question 52 is "No." We needed to select "Yes" and check "Quantitative criteria" to enable us to explain our response.

Before the Commission considers whether the delegation rules should be supplemented or amended, it needs to first identify the regulatory or supervisory deficiency that it is seeking to address. Without a clear understanding of the problems or issues that need to be addressed, and whether these problems really are related to the delegation framework, it would be impossible to evaluate or propose solutions (including quantitative criteria). We urge the Commission to articulate clearly the deficiency in the current delegation framework and then examine whether quantitative criteria would meaningfully assist an NCA in assessing supervisability (e.g., whether a letter-box entity has been created).

The AIFMD/AIFMR delegation rules should not be supplemented with quantitative criteria. The existing rules that apply to the delegation of AIFM functions are sufficiently clear and robust to prevent the creation of letter-box entities. The rules are also sufficiently flexible to allow for their effective application to asset managers with different business models based on supervisory judgment. Quantitative criteria would override the important supervisory judgement that is needed in making these determinations.

Additionally, because of the wide range of portfolio management strategies and styles, a one size fits all approach would end up penalising some strategies disproportionately.

Quantitative criteria would not assist NCAs in evaluating whether an AIFM should no longer be considered to be managing an AIF. Article 82(d) of the AIFMR appropriately recognises that an assessment of the extent of delegation requires an evaluation of the entire delegation structure taking into account not only the assets managed under delegation but also a broad range of quantitative criteria. These criteria, such as the risk profile of the AIF, the type of investment strategies pursued by the AIF, and the geographical spread of the AIF's investments, must be considered and weighed by the NCA in making its determination. An NCA needs to have the flexibility to use its supervisory judgment in making determination, taking into account for the significant differences among asset managers to come to a reasoned conclusion. Being forced to make a determination on the basis of quantitative criteria would not assist NCAs in making an appropriate, reasoned determination.

Establishing clear and meaningful quantitative criteria would be difficult. Although a quantitative requirement may appear, on its face, to provide an objective measure and limit supervisory discretion, setting quantitative criteria for delegation that are meaningful and useful to AIFMs and NCAs would be difficult (if not practically impossible) to do in practice. In establishing the criteria, various complicated threshold questions/parameters would need to be determined. Even if determinations could be made on how to proceed on these various questions, the result would lead to a blunt and unsophisticated tool that would not be useful and would not be more effective than the current requirements. Further, we are concerned that this would result in a tick-the-box approach rather than one that relies on an evaluation of all the relevant factors by the NCA.

Question 53. Should the AIFMD standards apply regardless of the location of a third party, to which AIFM has delegated the collective portfolio management functions, in order to ensure investor protection and to prevent regulatory arbitrage?

☒ Yes |☐No |☐ Don't know / no opinion / not relevant

Question 53.1 Please explain your answer to question 53:

The existing provisions within the AIFM regulatory framework ensure that, where AIFM functions are delegated to a third party, AIFMD standards are ensured regardless of the location of a third party.

The AIFM remains responsible and liable. The AIFMD and AIFMR clearly provide that AIFM remains responsible for the proper performance of any delegated funds and compliance with the AIFMD at all times, and that the AIFM's liability toward its investors is not affected if it has delegated functions to a third party, or by any further sub-delegation (e.g., AIFMD Recital 30, AIFMD Article 20(3), AIFMR Recital 32, AIFMR Recital 82, AIFMR – Article 75(a), AIFMR Article 75(c)).

Delegates must meet specified criteria. As outlined in our response to Q51, the AIFMD framework sets out in great detail the criteria that must be met by delegates to be delegated functions, including specific criteria in the case of delegation of portfolio management or risk management. These requirements are key to preventing regulatory arbitrage and ensuring investor protection.

The home NCA has appropriate access to the delegate. Under the AIFMD regulatory framework, delegation arrangements must allow for access to the delegate (i.e., access to data related to the delegated function(s) and to the business premises) by the AIFM, its auditors and the relevant NCA (AIFMR Article 79(a)). This access allows for effective ongoing monitoring and supervision of delegated functions and their compliance with the AIFMD framework.

Requiring delegates to comply with all of the provisions of the AIFMD in the same manner as the fund's AIFM could have a detrimental impact on investors. Currently, a subset of the AIFMD requirements are generally contractually imposed upon a delegate, but compliance with all of the terms of the AIFMD is not required. If the provisions AIFMD are revised to require a delegate, whether located in the EU or in a third country, to comply with all of the requirements of the AIFMD, delegates from third countries that are regulated under their own national frameworks could face significant obstacles, even if those frameworks are equally robust. This is because complying with the specific regulatory requirements of two jurisdictions could pose significant operational and compliance challenges for an entity, such as an asset manager. These challenges may be so substantial so as to deter non-EU investment managers from taking on such mandates. This may have the result of limiting the range of strategies that firms can offer to their clients.

Question 54. Do you consider that a consistent enforcement of the delegation rules throughout the EU should be improved?

☒ Yes |☐No |☐ Don't know / no opinion / not relevant

Question 54.1 Please explain your answer to question 54, presenting benefits and disadvantages of the current rules and where available providing concrete examples substantiating your answer:

Our response to Question 54 is "No." We needed to select "Yes" to enable us to explain our response.

The August 2020 ESMA letter to the Commission did not highlight or provide any evidence of enforcement issues relating to firms' compliance with, or EU NCAs' supervision of, rules relating to delegation (either under the AIFMD or UCITS Directive). There appears to be no evidence that there is a problem of enforcement of delegation rules. The European Commission should identify such problems, if any, and whether these are caused by the delegation arrangements prior to considering any mechanism to improve enforcement. Should a problem related to delegation framework be identified, ESMA may be well-placed and already have the tools necessary to foster the convergence of supervisory practices regarding delegation, whether through supervisory guidance, Q&As or peer reviews. These tools should be exhausted first.

Question 55. Which elements of the AIFMR delegation rules could be applied to UCITS?

Please explain your position, presenting benefits and disadvantages of the potential changes as well as costs:

Article 13 of the UCITS Directive lays out preconditions to delegation, including ones specific to the delegation of investment management and delegation to third parties, but does not contain detailed Level 2 measures such as those contained in the AIMFD. Recognising this difference, ESMA's Brexit Opinion on Investment Management provides that, "ESMA is of the view that the interpretation of Article 13 of the UCITS Directive and the relevant national laws transposing this provision should be consistent with the principles set out in Articles 75-82 of the AIFMD Level 2 Regulation." The principles in the AIFMD delegation rules, therefore, are already in effect for UCITS, either through direct regulation or through the application of the ESMA Brexit Opinion.

Section IV. Financial stability

a) Macroprudential tools

Question 56. Should the AIFMD framework be further enhanced for more effectively addressing macroprudential concerns?

☒ Yes |☐No |☐ Don't know / no opinion / not relevant

Question 56.1 If yes, which of the following amendments to the AIFMD legal framework would you suggest?

☒ Improving supervisory reporting requirements

☒ Harmonising availability of liquidity risk management tools for AIFMs across the EU

☒ Further detailing cooperation of the NCAs in case of activating liquidity risk management tools, in particular in situations with cross-border implications

☒ Further clarifying grounds for supervisory intervention when applying macroprudential tools

☒ Defining an inherently liquid/illiquid asset

☒ Granting ESMA strong and binding coordination powers in market stress situations

☐ Other

Please explain why you would suggest improving supervisory reporting requirements. Please present benefits and disadvantages of the potential changes as well as costs:

We do not believe that any change to the AIFMD legal framework is required at this time and support AIFMs continuing to report exclusively and directly (in the ordinary course, or on an ad hoc basis) to their respective NCAs.

However, we believe that AIFMD supervisory reporting would be improved if NCAs, with input from technical experts from industry and in coordination with ESMA, could work toward greater consistency in reporting requirements across jurisdictions. This could include developing a standardised template for periodic reporting, with standardised instructions and interpretations. Overall, AIFMD data reporting infrastructure could be improved, including by aligning reporting platforms and technology, eliminating the need for manual input, and harmonising calculation methodologies and conventions for common questions. Such an improved data infrastructure would facilitate timely and effective reporting from NCAs to ESMA, and the sharing of information with other supervisors on an as-needed basis, in normal and stressed market conditions, provide benefits to NCAs in using and understanding AIFM disclosures, and provide benefits to AIFMs in efficiently operationalising their reporting. See also our responses to Questions 58, 59, 68, 71, and 75.

Please explain why you would suggest harmonising availability of liquidity risk management tools for AIMs across the EU. Please present benefits and disadvantages for the potential changes as well as costs:

We generally favour harmonising the availability of liquidity risk management tools across the EU. AIFMs should continue to have discretion to adopt and use such tools as appropriate for each AIF based on factors such as the fund's structure and redemption provisions, the asset classes in which it invests, its liabilities, or market conditions. Policymakers should be aware, however, that complete harmonisation in a top-down matter may be difficult to achieve due to legal and operational differences across jurisdictions. To the extent possible, we recommend that each NCA should endeavour to make the broadest liquidity management toolkit available in its jurisdiction.

Please explain why you would suggest further detailing cooperation of the NCAs in case of activating liquidity risk management tools, in particular in situations with cross-border implications. Please present benefits and disadvantages of the potential changes as well as costs:

We support providing more transparency on how NCAs would coordinate and monitor cases in which AIFMs have exercised their discretion and activated liquidity tools in exceptional circumstances. Primary responsibility for activating liquidity risk management tools must remain with the AIFM, with oversight by the appropriate NCA. In periods of market stress, however, activation of a liquidity tool with respect to a cross-border AIF may be of interest to more than one NCA. It would be helpful to have greater clarity as to how NCAs will coordinate and share information in such circumstances. This could be achieved through ESMA guidance prepared in consultation with industry and the NCAs.

Please explain why you would suggest further clarifying grounds for supervisory intervention when applying macroprudential tools. Please present benefits and disadvantages of the potential changes as well as costs:

We believe that NCAs must narrowly limit the circumstances in which they would consider applying a macroprudential tool to any AIF. The use of macroprudential tools by NCAs would impact investors and operational processes and conflict potentially with an AIF's investment mandate. To the extent that NCAs are authorised to utilise macroprudential tools, they should exercise prudently this authority to avoid market disruption and harm to investors. It would be helpful for NCAs to consult with industry and potentially affected parties regarding the scope of their authority, their decision-making process before using a tool, any mitigation efforts before activating a tool, any market notice processes, and the operational effects of activating a tool. Given these concerns, we suggest that the appropriate role for NCAs and ESMA is oversight and coordination, with the overall goal to ensure AIFM readiness to activate their own liquidity risk management tools as necessitated by market conditions and investor activity.

Please explain why you would suggest defining an inherently liquid-illiquid asset. Please present benefits and disadvantages of the potential changes as well as costs:

We do not favour adoption of such a definition.

It would be unnecessary and unhelpful for AIFMD to provide a definition of a liquid or illiquid asset, which is best assessed holistically at the fund level. IOSCO's 2018 Recommendations for Liquidity Risk Management for Collective Investment Schemes calls for responsible entities to undertake regular assessments of the liquidity of portfolio assets (Recommendation 10) but did not provide a prescriptive definition of liquid (or illiquid) assets. A bright line definition would go beyond IOSCO's recommendations without providing any compelling benefit.

Please explain why you would suggest granting ESMA strong and binding coordination powers in market stress situations. Please present benefits and disadvantages of the potential changes as well as costs:

We support the current regulatory framework and the current roles for ESMA and NCAs in responding to stress in the securities markets as their primary regulators. ESMA's current role in gathering data from NCAs and coordinating with them in times of stress or instability is valuable. We believe that NCAs should remain the primary regulators of AIFs, with primary responsibility for overseeing AIFs, even in times of market stress. This overall regulatory framework proved to be effective during the market turmoil of March 2020. For example, as noted by ICI Global in its recent report on the experiences of European Markets, UCITS, and European ETFs during the COVID-19 crisis, the overwhelming majority of UCITS continued to operate normally and redeem shares upon demand even during the market turmoil. Although the term "strong and binding coordination" is not clear, given the success of the current framework during this real-life stress test, the European Commission should carefully consider any change that could potentially impact flexibility among primary regulatory actors or cause confusion for AIFMs regarding their reporting obligations.

Question 56.1.1 Please explain your answer to question 56:

We support the current regulatory framework and believe any changes to liquidity risk management or macroprudential tools, including those listed above, should be driven by data and relevant experience, including the recent real-life stress test in March 2020. As ESMA has recognised, data shows AIFs and UCITS generally performed well in response to the market-wide stresses caused by the pandemic. Only 25% of UCITS with large exposures to corporate debt experienced net outflows above 10%.[1] However, not all funds faced outflows, and almost 40% of all funds in ESMA's sample experienced net inflows during this period. AIFs in ESMA's sample overall recorded small inflows, thus the overall decline in NAV of 7% was related to declines in values rather than net outflows. Only 4% of AIFs reported outflows higher than 10%.

The number of UCITS and AIFs that used extraordinary liquidity management tools (e.g., redemption suspensions, redemption in kind, side pocketing, and activation of gates/deferred redemptions) during this time was small. In ESMA's sample, only six UCITS by four management companies suspended redemptions due to the combination of

[1] ESMA Liquidity Report

valuation uncertainties and significant outflows (with managers identifying valuation uncertainty as their primary motivation). The use of swing pricing (generally thought of as an "ordinary" tool that funds often employ for reasons other than liquidity risk management, and which may be used when neither the fund nor the relevant market is experiencing stress) was more widespread (134 UCITS and four AIFs), but the use of other liquidity management tools was overall limited. ESMA concluded that this may indicate that during February and March 2020 most managers were able to meet redemption requests without suspending redemptions.

We recommend that the European Commission consider the scope and timing of any policy recommendations in light of concurrent workstreams by the Financial Stability Board, and IOSCO to collect, analyse, and understand data about the March turmoil. Further, while we do not believe there is any basis to extend the macroprudential regulatory framework for AIFMs, we recommend that any such considerations be undertaken by the NCAs and ESMA as the primary capital market's regulators.

Question 57. Is there a need to clarify in the AIFMD that the NCAs' right to require the suspension of the issue, repurchase or redemption of units in the public interest includes financial stability reasons?

☐ Yes |☒No |☐ Don't know / no opinion / not relevant

Question 57.1 Please explain your answer to question 57, presenting benefits and disadvantages of the potential changes to existing rules and processes as well as costs:

We do not believe it is necessary to revise the AIFMD in order to clarify that NCAs have authority to require fund suspensions for financial stability reasons. AIFMD Article 46 already provides NCAs with the authority to require the suspension of an issue, repurchase, or redemption of units in the interest of the investors or of the public. We believe this authority sufficiently allows NCAs to evaluate whether a redemption suspension would be in the public interest and to intervene as necessary. Any redemption suspensions by an NCA should be limited to extraordinary circumstances and used only as a last resort.

If this revision is made, the AIFMD must require any redemption suspensions by an NCA to be limited to specified extraordinary circumstances and used with the highest circumspection and only as a last resort, given the risk that such a suspension itself would have knock-on effects on the financial system at large.

Question 58. Which data fields should be included in a template for NCAs to report relevant and timely data to ESMA during the period of the stressed market conditions? Please provide your suggestions, presenting benefits and disadvantages of the potential changes as well as costs:

We believe that AIFMs **should continue to report to their respective NCAs**. However, we believe **that data reporting infrastructure could be improved substantially** (*i.e.*, submitting data in ways that facilitate its collection, aggregation, comparability, and analysis and where possible, simplifying reporting across jurisdictions). Improved data infrastructure would facilitate timely and effective reporting from NCAs to ESMA, and the sharing of information with other institutions on an as-needed basis, in both normal and stressed conditions. As discussed further in our response to Question 75, we believe that reporting from NCAs to ESMA should be consistent with any information that the NCAs already have collected from AIFMs.

When a specific market event arises that warrants an ad hoc data collection, NCAs should provide ESMA with consistent, comparable information. We believe, however, that it may be difficult to create a standard template for NCA-to-ESMA reporting because no two market events will be the same. We recommend instead that, before commencing any ad hoc data collection, ESMA and the NCAs should work together to identify the specific fund data that they expect would be beneficial, informed by their past experiences in monitoring stressed market conditions. This approach also would give ESMA and the NCAs the ability to adjust for any past difficulties that AIFMs had in gathering and reporting certain information and to avoid requesting information that proved not to be particularly useful in evaluating past market events. In any event, coordination between ESMA and the NCAs should precede any requests to AIFMs, to ensure consistent and efficient data collection and transmission along the chain while avoiding making multiple (and potentially inconsistent) requests of AIFMs. See also our response to Question 75.

Question 59. Should AIFMs be required to report to the relevant supervisory authorities when they activate liquidity risk management tools?

☒ Yes |☐No |☐ Don’t know / no opinion / not relevant

Question 59.1 Please explain your answer to question 59, providing costs, benefits and disadvantages of the advocated approach:

We note that AIFMs already report information on the percentage of an AIF’s NAV that is subject to side pockets, gates, and suspensions of dealing (Item 23 of Annex IV). We would not object to AIFs reporting to their NCAs when they activate certain identified extraordinary liquidity management tools. The tools that would be subject to such reporting must be narrowly defined to ensure that AIFMs only report information that would be indicative of fund-specific stress and beneficial to regulators given the burdens of reporting. For example, funds may not view swing pricing purely, or even primarily, as a liquidity risk management tool, and it is generally not considered an extraordinary tool. Swing pricing may be activated multiple times in a given year based on daily fund flows, in circumstances where neither the fund itself nor the relevant market is under stress. Thus, overinclusive reporting of this activity would detract from, rather than contribute to an NCAs’ ability to detect and monitor liquidity-related stress. NCAs must analyse whether receiving information when funds activate that or any other tools would be beneficial to their monitoring or oversight objectives, given the costs to AIFMs to report every use of every tool.

We would support adding a narrowly-tailored field to the AIFMR supervisory reporting template for AIFMs to identify which liquidity management tools their AIFs are currently authorised to use under fund governing documents. Such data may be useful for regulators to evaluate in understanding responses to market events.

Question 60. Should the AIFMD rules on remuneration be adjusted to provide for the de minimis thresholds?

☒ Yes | ☐No | ☐ Don't know / no opinion / not relevant

Question 60.1 Please explain your answer to question 60, suggesting thresholds and justification thereof, if applicable:

Our response to Question 60 is "No." We needed to select "Yes" to enable us to explain our response.

We believe that there is no need to introduce de minimis thresholds, either for individuals or for firms, into the AIFMD rules on remuneration.

All AIFMs are required to have remuneration policies and practices for those categories of staff, including senior management, risk takers, control functions, and any employees receiving total remuneration that takes them into the same remuneration bracket as senior management and risk takers, whose professional activities have a material impact on the risk profiles of the AIFMs or of the AIFs they manage (identified staff). These remuneration policies and practices need to be consistent with and promote sound and effective risk management and not encourage risk-taking which is inconsistent with the risk profiles, rules or instruments of incorporation of the AIFs they manage, as specified in Article 13 of the AIFMD. When establishing the remuneration policies applicable to those identified staff, AIFMs are permitted to comply with the remuneration principles specified in Annex II of the AIFMD in a way and to the extent that is appropriate to their size, internal organisation and the nature, scope and complexity of their activities.

The current requirements are sufficiently clear to allow an AIFM to make a determination regarding the application of the requirements to staff and sufficiently proportionate to allow firms to comply with the requirements in a manner that is appropriate to their size, internal organisation and the nature, scope and complexity of their activities.

b) Supervisory Reporting Requirements

Question 61. Are the supervisory reporting requirements as provided in the AIFMD and AIFMR's Annex IV appropriate?

☐Fully agree | ☐Somewhat agree | ☐Neutral | ☒ Somewhat disagree | ☐Fully disagree | ☐ Don't know / no opinion / not relevant

Question 61.1 Please explain your answer to question 61:

Our response to Question 61 is “Neutral.” We needed to select “Somewhat disagree” to enable us to explain our response.

We do not recommend substantive changes to the type of information reported to supervisors under the AIFMD, but we believe that the reporting framework can be improved by achieving greater consistency in reporting requirements across Member States and removing duplicative information submitted by regulated funds to different recipients (e.g., NCAs, Trade Repositories).

Question 61.1 If you disagree that the supervisory reporting requirements as provided in the AIFMD and AIFMR’s Annex IV appropriate, it is because of:

☒ Overlaps with other EU laws|☐ The reporting coverage is insufficient |☐ The reporting coverage is superfluous |☐other

Please detail as much as possible your answer providing examples of the overlaps. Where possible, please provide concrete examples and where relevant information on costs and benefits in changing the currently applicable reporting requirements:

EU level reporting frameworks often require regulated funds to submit duplicative information in the supervisory reports they make to different recipients (e.g., NCAs, Trade Repositories). For example, an AIF concluding a securities financing transaction is required to report information on the transaction to the relevant NCA under the AIFMD, and to a trade repository (TR) under SFTR. The Commission should eliminate/reduce duplicative reporting.

Question 67. Should the supervisory reporting by AIFMs be submitted to a single central authority?

☐ Yes | ☒No | ☐ Don’t know / no opinion / not relevant

Question 67.1 Please explain your answer to question 67:

AIFMs should continue to report to their home NCAs. The European Commission should focus on achieving greater consistency in reporting requirements across Member States, including further harmonisation in definitions, calculation methodologies and conventions for common questions. Furthermore, we are supportive of the efforts of supervisors to explore the use of technology to address reporting challenges and to facilitate greater automation (e.g., machine executable regulatory reporting).

ESMA has an important role to play to facilitate the exchange of good practices amongst NCAs in using technology to support supervisory reporting. Greater use of technology, including the development of common protocols, has the potential to enhance the efficiency of reporting for all parties concerned and improve timeline and effective information sharing among regulators in normal and stressed market conditions.

Question 68. Should access to the AIFMD supervisory reporting data be granted to other relevant national and/or EU institutions with responsibilities in the area of financial stability?

☐ Yes |☒No |☐ Don't know / no opinion / not relevant

Question 68.1 Please explain your answer to question 68:

We do not recommend providing additional national or EU institutions with direct access to AIFMD supervisory reporting data. The current reporting system, in which an AIFM files reports directly with its NCA supervisor, works well. Article 25(2) of the AIFMD provides: "The competent authorities of the home Member State of the AIFM shall ensure that all information gathered under Article 24 in respect of all AIFMs that they supervise and the information gathered under Article 7 is made available to competent authorities of other relevant Member States, ESMA and the ESRB by means of the procedures set out in Article 50 on supervisory cooperation. They shall, without delay, also provide information by means of those procedures, and bilaterally to the competent authorities of other Member States directly concerned, if an AIFM under their responsibility, or AIF managed by that AIFM could potentially constitute an important source of counterparty risk to a credit institution or other systemically relevant institutions in other Member States." Therefore, the principle that AIFMD reporting data submitted to NCAs by AIFMs could be shared with other national and EU institutions for the purpose of monitoring systemic risk is already well established in the AIFMD. We support the current regulatory framework as sufficient in responding to stress in the securities markets. As we explain in response to Questions 56 and 58, the adoption of a template for regular reporting that is standardised across all NCAs and other improvements in data infrastructure would facilitate efficient sharing of comparable data with ESMA and with other institutions as needed.

Question 71. What additional data fields should be added to the AIFMR supervisory reporting template to improve capturing risks to financial stability:

☐ Value at Risk (VaR)
☐ Additional details used for calculating leverage
☐ Additional details on the liquidity profile of the fund's portfolio
☐ Details on initial margin and variation margin
☐ The geographical focus expressed in monetary values
☐ The extent of hedging through long/short positions by an AIFM/AIF expressed as a percentage
☐ Liquidity risk management tools that are available to AIFMs

☐ Data on non-EU master AIFs that are not marketed into the EU, but which have an EU feeder AIF or a non-EU feeder marketed into the EU if managed by the same AIFM

☒ The role of external credit ratings in investment mandates

☒ LEIs of all counterparties to provide detail on exposures

☐ Sustainability-related data, in particular on exposure to climate and environmental risks, including physical and transition risks (e.g. shares of assets for which sustainability risks are assessed; types and magnitudes of risks; forward-looking, scenario-based data)

☐ Other

Please explain why the role of external credit ratings in investment mandates should be added to the AIFMR supervisory reporting template, providing as much detail as possible and relevant examples as well as the costs, benefits and disadvantages of this option:

We do not support adding a data field about the role of external credit ratings in investment mandates to the AIFMR supervisory reporting template. The role of credit ratings in investment mandates or policies would not be easily or accurately reduced to a data field. Managers may have discretion on how they use credit ratings and may not apply them in a mechanical fashion.

Please explain why LEIs of all counterparties to provide detail on exposures should be added to the AIFMR supervisory reporting template, providing as much detail as possible and relevant examples as well as the costs, benefits and disadvantages of this option:

To the extent that funds currently obtain LEIs of counterparties in the ordinary course of business, we would not object to adding that optional reporting to the AIFMR supervisory reporting template. We note, however, that not all counterparties are required to have an LEI and not all funds currently collect this information. We do not believe that adding reporting to the supervisory reporting template should become a requirement for AIFMs to collect counterparty LEIs beyond their current practice.

Question 73. Should any data fields be deleted from the AIFMR supervisory reporting template?

☒ Yes | ☐No |☐ Don’t know / no opinion / not relevant

Question 73.1 Please explain your answer to question 73, presenting the costs, benefits and disadvantages of each data field suggested for deletion:

The European Commission should eliminate/reduce those data fields that are already reported by AIF to other recipients (e.g., the reporting of securities financing transactions to NCAs under the AIFMD and to TRs under the SFTR).

Question 74. Is the reporting frequency of the data required under Annex IV of the AIFMR appropriate?

☐ Yes | ☐No |☒ Don’t know / no opinion / not relevant

Question 75. Which data fields should be included in a template requiring AIFMs to provide ad hoc information in accordance with Article 24(5) of the AIFMD during the period of the stressed market in a harmonised and proportionate way? Please explain your answer presenting the costs, benefits and disadvantages of implementing the suggestions:

AIFMs should report exclusively and directly to their respective NCAs, including in periods of stressed conditions. Doing so eliminates the need for AIFMs to satisfy multiple (and potentially confusing or duplicative) reporting requests.

We support a template for ad hoc reporting during stressed conditions that collects basic information (e.g., large redemptions, fund flows), but recognise that ad hoc information requests may not be reduced to a single template as the stressed markets may vary in a number of ways. An event-specific template, created in response to an event, could be useful in facilitating NCA conversations with individual AIFMs on managing market conditions, enable consistency in information flow from NCAs to other policymakers, as permitted, and reduce reporting burdens on AIFMs.

Any template developed for ad hoc reporting during stressed market conditions should be separate from the regular reporting template. We caution against the possibility of ad hoc reporting items "creeping" into the AIF periodic reporting template. We believe that each type of reporting serves important, albeit very different, purposes. See also our response to Question 58.

Question 76. Should supervisory reporting for UCITS funds be introduced?

☐ Yes | ☐No |☒ Don't know / no opinion / not relevant

Question 76.1 Please explain your answer to question 78, also in terms of costs, benefits and disadvantages:

We support supervisors having access to the information they need to monitor effectively risks to financial stability and investor protection. UCITS, their managers and any delegated portfolio managers are already subject to considerable regulatory reporting obligations including in EMIR, MiFID II/R, UCITS, SFTR, MMR, BMR and other delegated frameworks such as the ECB's regulation requiring the reporting of certain data by Eurozone domiciled investment funds. We believe the European Commission should address the question of UCITS reporting separately from the AIFMD review. If the Commission deems it necessary to introduce additional supervisory reporting for UCITS, then before doing so it should consider the extent to which existing reporting requirements (e.g., to TRs through SFTR and EMIR etc.) and the many other aspects of funds' transparency already provide supervisors with the information necessary to monitor, manage and mitigate risks.

The Commission should consider the following aspects of any changes to supervisory reporting, including the introduction of additional reporting for UCITS:

- Limiting the additional compliance burden imposed on UCITS and their managers by removing existing duplicative reporting, which does not compromise the ability of supervisors to monitor risks to financial stability and investor protection.
- Providing ESMA with a role to facilitate the exchange and adoption of good practices amongst NCAs to using technology to support supervisory reporting, including developing cybersecurity policies and procedures tailored to counteract the risks associated with NCAs collecting and storing capital market data; and
- Determining the appropriate coordination role for ESMA to play in supporting cross-border surveillance by NCAs, including facilitating the exchange of information amongst NCAs and other authorities.

The Commission should also identify anonymised aggregate data that can be published from supervisory reports on a periodic basis by NCAs and/or ESMA. Such data can contribute to the body of public market data with benefits to investors and to fund managers (e.g., allowing benchmarking against their peers, supporting compliance obligations and the identification of areas of focus for a fund manager to improve products or the service they provide to investors).

Question 77. Should the supervisory reporting requirements for UCITS and AIFs be harmonised?

☐ Yes |☒No |☐ Don't know / no opinion / not relevant

Question 77.1 Please explain your answer to question 79, also in terms of costs, benefits and disadvantages:

The European Commission should first determine whether UCITS reporting obligations are sufficient to enable supervisors to monitor effectively risks to financial stability and investor protection before addressing the question of the harmonisation of reporting requirements for UCITS and AIF. If the Commission believes that harmonising elements of reporting across both regulatory frameworks is appropriate, it should make that determination carefully for each individual data field and clearly articulate its rationale for that determination rather than mechanically or automatically harmonising across the board.

Question 78. Should the formats and definitions be harmonised with other reporting regimes (e.g. for derivates and repos, that the AIF could report using a straightforward transformation of the data that they already have to report under EMIR or SFTR)?

☒ Yes | ☐No |☐ Don't know / no opinion / not relevant

Question 78.1 If yes, please explain your response indicating the benefits and disadvantages of a harmonisation of the format and definitions with other reporting regimes:

Rather than harmonising the formats and definitions between AIFMD and other reporting regimes, we urge the Commission to eliminate/reduce duplicative reporting of data by AIF to multiple recipients (e.g., the reporting of securities financing transactions to NCAs under the AIFMD and to TRs under the SFTR). The Commission should identify ways in which information can be reported once and then shared with relevant regulatory authorities as appropriate.

c) Leverage

Question 79. Are the leverage calculation methods – gross and commitment – as provided in AIFMR appropriate?

☐Fully agree | ☐Somewhat agree| ☐Neutral |☐ Somewhat disagree |☒Fully disagree |
☐ Don't know / no opinion / not relevant

Question 79.1 Please explain your answer to question 79 in terms of the costs, benefits and disadvantages:

We fully disagree with using either the AIFMR's gross or commitment approaches to assess or impose caps on fund leverage, as the results of these tests could be misleading without further information or adjustments.

There are significant limitations with both the gross and commitment approaches, which each attempt to distil a fund's leverage use into a single notional amount. IOSCO and other regulatory bodies have concluded that gross measures of leverage are inexact and have a number of significant limitations (*e.g.*, they do not reflect netting and hedging and could overstate the effects of leverage). Likewise, although the commitment approach reflects netting and hedging arrangements and generally provides a better view of a fund's leverage use, it also has known limitations as it does not differentiate between exposures to different asset classes, which may pose different risks. We believe that the limitations of these approaches outweigh any benefits, and any assessments to evaluate a fund's use of leverage—and especially any caps on a fund's use of leverage—that are based solely on these measures is inappropriate.

We strongly recommend that the European Commission instead eliminate the gross approach and adjust the commitment approach to closely align with IOSCO's leverage framework. In particular, as recommended under IOSCO's framework, national competent authorities ("NCAs") should permit a fund to adjust the notional amounts of interest-rate derivatives to the duration of a ten-year bond equivalent and to delta adjust options exposures. In addition, as under the framework, NCAs should assess fund leverage exposures classified by broad asset categories and long and short positions.

Making these changes would assist NCAs in better identifying funds of interest, by using more risk sensitive information to exclude those funds that are not likely to pose risks to the financial system from further analysis. Eliminating the gross approach would eliminate a measure that is incomplete, potentially misleading, and that is not a good indicator of a fund's overall economic risk or degree of leverage. Permitting funds to use duration adjustments would better reflect economic risk and leverage by adjusting exposures of different interest rate derivatives for risk using a common reference point. The use of delta adjustments would adjust options exposures for risk, basing them on the degree to which an option's value shifts in relation to changes in the price of its underlying asset. Although not perfect, these adjustments would better reflect true derivatives risk without the pronounced overstatement associated with unadjusted notional amounts. Evaluating fund leverage classified by broad asset categories and long and short positions provides more meaningful insight than simply evaluating one combined figure, such as under the current gross or commitment approach. It would enable NCAs to see a fund's basic asset allocations and exposures to higher risk assets along with the directionality of those positions. This is crucial, as different asset classes have differing levels of risk.

Question 80. Should the leverage calculation methods for UCITS and AIFs be harmonised?

☐ Yes | ☒No |☐ Don't know / no opinion / not relevant

Question 80.1 Please explain your answer to question 80:

Although both UCITS and AIF leverage calculation methods should adhere closely to the recommendations under the IOSCO leverage framework (*e.g.*, permit adjustments of interest-rate derivatives to a ten-year bond equivalent, permit delta adjustments of options, and evaluate fund leverage exposures by broad asset categories and long and short positions), those methods need not be completely harmonised to be effective.

Making the changes we recommended in response to Question 79, NCAs substantially should improve their ability to identify AIFs that are more likely to pose substantial risk to the financial system.

Likewise, the UCITS leverage calculation methods, which enable UCITS to choose either a commitment approach similar to that under the AIFMR or a value-at-risk ("VaR") approach, already are quite established and robust. The option to use a VaR-based approach that measures a fund's portfolio risk in a reasonably comparable manner provides NCAs with a good understanding of how a fund's use of leverage could affect its portfolio (*e.g.*, whether a fund is using derivatives to leverage its portfolio or for other purposes, like hedging).

Perhaps more importantly, the AIFMD framework purposefully has developed to cover different types of funds than UCITS. The separate regulatory regime recognises that not all investment vehicles are UCITS and that non-UCITS should be treated differently. Given the differences between UCITS and AIFs in terms of, among other things, substantive regulations, investment strategies, and types of investors, it is entirely appropriate for leverage calculation methods to vary. With multiple methods of computing fund leverage, NCAs should not feel compelled to align the approaches. Doing so could impose additional costs on AIFs that could offset benefits that they may have over UCITS under certain scenarios and discourage the use of such vehicles. It also could lead to a regulatory convergence that may erode the distinctions between UCITS and AIFs.

Question 81. What is your assessment of the two-step approach as suggested by International Organisation of Securities Commissions ('IOSCO') in the Framework Assessing Leverage in Investment Funds published in December 2019 to collect data on the asset by asset class to assess leverage in AIFs? Please provide it, presenting costs, benefits and disadvantages of implementing the IOSCO approach:

We strongly support IOSCO's two-step approach, including its recommendation to collect fund data on an asset class-by-asset class basis and by long and short positions.

As we have noted on numerous occasions, there is no single measure that can capture the leverage exposures of all types of funds in a manner appropriate for regulatory monitoring. A two-step approach enables NCAs to rely on multiple measures and indicators to assess whether a fund could pose systemic risk. The bifurcated approach allows NCAs to use a simple Step 1 measure as a screening tool to easily eliminate from any further consideration numbers of funds that are unlikely to pose risk to the financial system. Those Step 1 measures, even with adjustments, have known shortcomings and should not be used in isolation. With Step 2, NCAs could use more accurate, precise and granular information to more fully evaluate a much narrower universe of funds.

In addition, collecting fund leverage holdings on asset class-by-asset class basis and by long and short positions provides NCAs with better, more detailed information about a fund's holdings and degree of leverage that can be used as part of the Step 1 process. The more detailed information would enable NCAs to effectively and more efficiently exclude funds for further analysis that otherwise may be identified inappropriately under blunter approaches that simply yield one aggregated amount representing leverage. Grouping assets with similar risk characteristics provides a better picture of a fund's overall risk. Similarly, further separating asset class exposures by long and short positions reflects the fund's true position in an asset class, allowing regulators to better understand a fund's leverage exposure and how it might react when different market stresses occur. Thus, the asset class-by-asset class approach would enable NCAs to assess risk in a straightforward and meaningful way.

IOSCO proffered its leverage framework after a significant consultation process in which it held several meetings internally with the global regulatory community and externally with affected parties. Those entities spent significant time, resources, and intellectual capital to develop the framework. Given the global involvement and effort, we would urge the European Commission not to ignore IOSCO's general recommendations, which were the subject of considerable discussion and compromise.

Question 82. Should the leverage calculation metrics be harmonised at EU level?

☐ Yes | ☒No |☐ Don't know / no opinion / not relevant

Question 82.1 Please explain your answer to question 82, presenting the costs, benefits and disadvantages of your chosen approach:

The current regulatory approach to leverage calculation metrics has worked well. Under this approach, the AIFMD Level 2 Delegated Regulation sets forth general methods for determining leverage metrics (*i.e.*, either the AIFMR gross or commitment approach). NCAs then have the regulatory flexibility to determine how to apply the general methods. For example, although the regulation defines netting and hedging arrangements that apply under the AIFMR commitment approach, NCAs have the flexibility to determine whether a fund has appropriately applied the netting or hedging arrangements when determining its exposure.

The European Commission should take a similar approach with respect to any future AIF leverage regulation. Such regulation should set forth general principles describing the methods for determining the Step 1 leverage metrics. NCAs, however, should retain the flexibility to interpret the application of those methods, as NCAs are in the best position to implement their regulatory frameworks to appropriately capture any potential financial stability risks in their jurisdictions. Similarly, consistent with the IOSCO leverage framework, the regulation should require NCAs to have a two-step approach to assess leverage but leave NCAs the discretion to determine other leverage measures and indicators that could be used as supplementary data points for any Step 2 analysis. NCAs are in the best position to assess fund leverage within their jurisdiction to determine what, if any, additional analyses should be performed to identify potential risks to financial stability.

Of course, as recommended above, any future AIF leverage regulation should eliminate the gross approach and adjust the commitment approach to reflect adjustments for interest-rate derivatives and options. In addition, it should require NCAs to assess fund leverage on an asset class-by-asset class basis and by long and short positions.

Question 83. What additional measures may be required given the reported increase in CLO and leveraged loans in the financial system and the risks those may present to macro-prudential stability? Please provide your suggestion(s) including information, where available, on the costs and benefits, advantages and disadvantages of the proposed measures:

None.

Question 84. Are the current AIFMD rules permitting NCAs to cap the use of leverage appropriate?

☐ Yes | ☒No |☐ Don’t know / no opinion / not relevant

Question 84.1 Please explain your answer to question 86, in terms of the costs, benefits and disadvantages:

We agree that NCAs should have the authority and discretion to impose leverage caps on an AIF to limit the extent to which its leverage may contribute to systemic risk. As we noted in our recent comment letter on ESMA’s guidelines on Article 25 of Directive 2011/61/EU (“Article 25”), however, NCAs should prudently exercise this broad authority to avoid market disruption and harm to investors. Imposing broad leverage caps can eliminate or substantially restrict managers from using important portfolio management tools (*e.g.*, structural and synthetic leverage) to more efficiently hedge risk, manage duration, enhance liquidity and gain and reduce exposures for the benefit of a fund and its investors. Therefore, we recommend that the AIFMD rules require NCAs to consult on any possible limitations that they may impose. In addition, the AIFMD rules should ensure that NCAs narrowly tailor any limitations and eliminate any caps or enhanced restrictions based on the gross approach.

The AIFMD rules should require NCAs to consult publicly on any possible leverage caps and to consult confidentially with any funds before they become subject to such caps. NCAs are in the best position to evaluate fund leverage in their jurisdiction and have access to information that could determine where a leverage cap should be set to appropriately reduce systemic risk. Consulting on any potential caps would ensure that funds are informed and understand the NCA's analysis and rationale, and that the process is conducted with transparency. It also ensures that funds understand the potential restrictions that could be implemented and that NCAs receive appropriate feedback. Consulting confidentially with any funds before they become subject to such limitations would provide funds the opportunity to better understand and respond to the NCA's more detailed and granular Step 2 leverage analysis prior to becoming subject to any leverage caps.

The AIFMD rules also should ensure that NCAs impose any leverage limitations narrowly to address only the specific risks identified during the assessment phase. Given the impact that such limitations may have on a fund and its investors, NCAs should avoid applying these restrictions prophylactically without any clear, detailed evidence that they are necessary and appropriate.

Finally, consistent with our response to Question 79, NCAs should avoid imposing any regulatory limitations or requirements based solely on the gross approach. In this regard, we understand that some NCAs have imposed distribution restrictions on funds based on a fund's gross notional exposure. Under a gross notional exposure-based test, some funds will be mischaracterised and treated as being riskier than they truly are, exposing them to additional restrictions and severe practical repercussions. Simply adding up the notional exposures of derivatives gives an inaccurate picture of the amount of leverage and economic risk within a fund portfolio. In fact, gross notional exposure has little relationship to the return volatility of a fund (often used in finance as an indicator of risk). Consequently, these tests would restrict a fund's use of derivatives beyond the extent necessary to accomplish an NCA's goals and to the detriment of fund investors. If the purpose of any leverage restriction is to limit the extent to which leverage contributes to the build-up of systemic risk, risks of disorderly markets, or risks to the long-term growth of the economy (as stated in Article 25), then the tests used to limit such fund should focus on a fund's true economic exposure or risk and not on an imprecise measurement, such as gross notional exposure.

Further, these restrictions have forced many funds to count certain risk-reducing derivatives toward the limits. To avoid breaching the limits, funds have avoided or limited their use of these instruments, including duration-adjusting derivatives that otherwise could alleviate portfolio risk. Bond funds, which often use derivatives to adjust their portfolio duration and exposures, have suffered disproportionately from the impact of these regulations. Overall, these restrictions have reduced the use of an invaluable portfolio management tool that has served investors across the globe so successfully. For these reasons, we urge the AIFMD rules to eliminate these gross notional exposure-based restrictions.

Section VI. Sustainability/ESG

Question 90. The disclosure regulation 2019/2088 defines sustainability risks and allows their disclosures either in quantitative or qualitative terms. Should AIFMs only quantify such risks?

☐ Yes | ☒No | ☐ Don't know / no opinion / not relevant

Question 90.1 Please substantiate your answer to question 90, also in terms of benefits, disadvantages and costs as well as in terms of available data:

No, as agreed in the SFDR text, asset managers should have the option to provide qualitative disclosures.

We strongly urge against using the AIFMD review to further modify the SFDR, when the level 2 rules are not final, and the legislation has not been implemented. Instead of mandating disclosure in quantitative terms, we urge the Commission to focus on implementation of SFDR to ensure market participants are able to integrate effectively the various new requirements. This will provide the Commission with the opportunity to observe the market reaction, ensure that market participants have a consistent and clear understanding of the new regulatory obligations, and then base any further steps on this foundation, as opposed to changing the foundation before these new requirements are fully in place.

As an added complication, common definitions and taxonomies in the area of sustainability risk are still under development.

We note that regulation in this area will need to be flexible to maintain relevance and enable policymakers to react quickly to market developments. Additional prescriptive regulation may have a counterproductive effect as opposed to a more flexible supervisory approach—for example, calling out best practices to facilitate industry adoption.

We have additional concerns that requiring only quantitative disclosure of the impact of sustainability risks on investment returns would be meaningless and even misleading to investors for the following reasons:

1. **Qualitative disclosure provides necessary context.** Metrics or numbers without qualitative explanation will not provide investors with meaningful information. For example, qualitative disclosure of sustainability risk is necessary to account for the extraordinarily heterogenous world of asset classes and industries in which funds are invested. Although the Commission has focused to date on listed equities, funds invest in a much broader scope of asset classes. This type of complexity is not well-suited for quantification without qualitative information.
2. **Without reliable data inputs, quantitative metrics are meaningless.** Requiring disclosure of data that is not yet well-developed will result in meaningless disclosure at high cost with no benefit to investors. We note that companies are not yet required to

disclose this information in a consistent, comparable manner. Data availability and reliability vary widely depending on many factors including size and geographical location of a company and also across asset classes. For example, data gaps in private assets are still significant. These data gaps are filled by service providers that estimate or model information with significant variations in inputs and assumptions. We believe bridging these data gaps would be a more effective approach for the Commission to take rather than simply mandating quantitative disclosure. This is why we support the creation of a global standard for company disclosure of sustainability risk information. *See* ICI's letter in response to the IFRS Foundation's Consultation Paper on Sustainability Reporting, *available at* http://eifrs.ifrs.org/eifrs/comment_letters//570/570_27789_LindaFrenchInvestmentCompanyInstituteICI_0_20201231ICIresponsetoIFRSconsultationFINAL.pdf.

3. **No one number will be comparable and meaningful to investors.** There is no consistent methodology or data system infrastructure for determining the impact of sustainability risks on investment returns or for deriving one specific 'risk' number. Fund managers consider sustainability risks alongside many other factors and are not able to disaggregate the impact on investment returns of sustainability risks alone, especially if the strategy fully embeds ESG information without explicit use of ESG ratings/scores in constructing a universe.

4. **Other risks are not quantified.** Quantifying only sustainability risk may be confusing to investors as other risks are not required to be quantified.

5. **Quantitative disclosure of the impact of sustainability risks on investment returns would require a backward-looking, short-term perspective, while sustainability risks are often forward-looking and may impact returns over a longer time horizon.** Requiring only backward-looking quantitative disclosure would run counter to the Commission's objective of fostering a more long-term approach to investing and consideration of sustainability risk.

Even as this area further develops, we urge the Commission to preserve the option to provide qualitative disclosure on how the integration of sustainability risks impacts the performance of the portfolio, as a qualitative approach may remain more informative, more accurate, and better understood by investors.

Question 91. Should investment decision processes of any AIFM integrate the assessment of non-financial materiality, i.e. potential principal adverse sustainability impacts?

☐ Yes | ☒No |☐ Don't know / no opinion / not relevant

Question 91.1 Please substantiate your answer to question 91, also in terms of benefits, disadvantages and costs. Please make a distinction between adverse impacts and principal adverse impacts and consider those types of adverse impacts for which data and methodologies are available as well as those where the competence is nascent or evolving:

Fund managers' investment decision processes broadly integrate consideration of sustainability risk and will integrate any sustainability impact that rises to the level of a sustainability risk. Given that they invest on behalf of fund investors, a fund manager must focus on sustainability risks that could impact the performance of the fund's investments rather than the much broader set of sustainability impact information that is not yet material to enterprise value creation (i.e., does not pose a sustainability risk to the performance of the fund's investments). We note that the manager of an ESG fund with ESG-related objectives may integrate a broader spectrum of sustainability factors in line with the fund's objective.

It is essential to clarify the difference between sustainability risks and sustainability impacts that are not deemed to be sustainability risks. The Commission states in the introduction that there is a financial dimension to 'non-financial materiality' (i.e., sustainability impact). By definition, however, if a sustainability impact has a financial dimension, then it would be deemed a sustainability risk. As an example, we disagree with the characterisation in the introduction to this section of climate transition risk as a sustainability impact. We view climate transition risk—e.g., due to potential policy changes for mitigating climate change, shifts of supply chains and end-demand, as well as stakeholder actions for mitigating climate change—as a sustainability risk that could have a negative material impact on the value of the investment.

Although not all sustainability impacts are sustainability risks, the leading sustainability disclosure standard setters have recognised that sustainability impacts considered immaterial to enterprise value creation today may become material over time (referred to as 'dynamic materiality'). Movement of information along this continuum—from sustainability impact to material sustainability information to information that is reflected in a company's financial accounts—could happen either gradually or rapidly due to catalyst events, stakeholder reaction, and regulatory reaction as well as innovation. *See* Statement of Intent to Work Together Towards Comprehensive Corporate Reporting (September 2020), *available at* https://29kjwb3armds2g3gi4lq2sx1-wpengine.netdna-ssl.com/wp-content/uploads/Statement-of-Intent-to-Work-Together-Towards-Comprehensive-Corporate-Reporting.pdf.

Fund managers will integrate sustainability impacts into the investment process as they move along this continuum and become sustainability risks. The concept of dynamic materiality recognises that this will shift and change over time, and fund managers are poised to take these impacts into account as they pose sustainability risks to a fund's investments.

As we explain in our response to Question 93, requiring fund managers to integrate the assessment of sustainability impact into investment decision is significant because it has the potential to conflict with an asset manager's duty to act in a client's best interest. A fund manager must invest a fund's assets according to the fund's stated investment objectives (as set forth in the fund documentation). Mandated inclusion of adverse sustainability impact, where this is not part of the fund's investment objective, would raise significant concerns around how these new obligations would interact with an asset manager's duty to act in a client's best interest. For example, if an asset manager must consider adverse impact on sustainability, regardless of a fund's investment objective, how should an asset manager balance these obligations or weigh them against each other, especially in relation to an investor's economic/financial interests or other preferences?

We urge the EU to continue its current approach of incorporating adverse impact in targeted sustainable finance legislation to achieve the EU's objectives. SFDR Article 4, for example, requires financial market participants, including fund managers when they consider principal adverse impacts of investment decisions on sustainability factors, to disclose a statement on due diligence policies on those impacts, taking due account of their size, the nature and scale of their activities, and the types of financial products they make available. This proportionate approach accounts for investor mandates and investment objectives and would apply the obligation when appropriate to the investment strategy of the portfolio.

Question 92. Should the adverse impacts on sustainability factors be integrated in the quantification of sustainability risks (see the example in the introduction)?

☐Fully agree |☐Somewhat agree | ☐Neutral |☐ Somewhat disagree |☒Fully disagree |
☐ Don't know / no opinion / not relevant

Question 92.1 If you agree, please explain how and at which level the adverse impacts on sustainability factors should be integrated in the quantification of sustainability risks (AIFM or financial product level etc.).

Please explain your answer including concrete proposals, if any, and costs, advantages and disadvantages associated therewith. Please make a distinction between adverse impacts and principal adverse impacts and consider those types of adverse impacts for which data and methodologies are available as well as those where the competence is nascent or evolving.

We are concerned that there appears to be confusion about the relationship between adverse sustainability impact and sustainability risk. As we explain in our response to Question 91.1, by definition, if a sustainability impact has a financial dimension, then it would be deemed a sustainability risk. Sustainability impacts that have not yet become a sustainability risk to a company's business are therefore not yet relevant to the returns of an investment in that company.

As we explain in our response to Question 91, fund managers will integrate sustainability impacts into the investment process as they become sustainability risks. The concept of dynamic materiality recognises that this will shift and change over time, and fund managers are poised to take these impacts into account as they pose sustainability risks to a fund's investments. A sustainability impact that becomes a sustainability risk would then be captured by the SFDR Art. 6 disclosure of sustainability risks.

Separately, given the lack of data and continued development of this area, we strongly urge caution around any new requirements to quantify the impact of financial products

on sustainability factors. The concept of sustainability impact is still developing. For example, there are significant concerns around how to define or measure different sustainability impacts, how to weigh or balance one sustainability impact in relation to another, and the potential for conflict when considering various sustainability impacts in relation to an investor's economic interests or other preferences (see our response to Question 93).

The data that would be used to measure sustainability impact is still being developed, with the NFRD review beginning to contemplate how companies can measure and report sustainability impact. We note that the NFRD does not currently require companies to disclose the sustainability impact related information that fund managers will need to meet the new disclosure requirements under the Disclosure and Taxonomy Regulations. This lack of data is extremely problematic in the context of the proposed Sustainable Finance Disclosure Regulation (SFDR) RTS, which would require asset managers to disclose over 30 different impact-related indicators for all of their investments.

As a final point, the SFDR RTS are expected to require asset managers to disclose quantitative, manager-level indicators on adverse impact. We strongly urge against using the AIFMD review to further modify the SFDR, when the level 2 rules are not final, and the legislation has not been implemented. Instead of mandating disclosure in quantitative terms, we urge the Commission to focus on implementation of SFDR to ensure market participants are able to effectively integrate the various new requirements. This will provide the Commission with the opportunity to observe the market reaction, ensure that market participants have a consistent and clear understanding of the new regulatory obligations, and then base any further steps on this foundation, as opposed to changing the foundation before these new requirements have been fully understood.

Question 93. Should AIFMs, when considering investment decisions, be required to take account of sustainability-related impacts beyond what is currently required by the EU law (such as environmental pollution and degradation, climate change, social impacts, human rights violations) alongside the interests and preferences of investors?

☐Yes | ☒No |☐No, ESMA's current competences and powers are sufficient |
☐Don't know / no opinion / not relevant

Question 93.1 If so, how should AIFMs be required to take account of the long-term sustainability and social impacts of their investment decisions? Please explain.

We recognise the EC's interest in increasing fund managers' focus on sustainability impacts, but we strongly urge against requiring fund managers to take into account interests and preferences other than those expressed by investors. Asset managers invest within the guidelines specified by their clients for a given mandate as set out in the investment management agreement. For regulated funds, a fund's manager invests in accordance with investment objectives and policies that are established by the fund's offering or constituent documents.

We emphasise that the client or fund investor assumes the risk of investing rather than the asset manager. Asset management is based on an agency relationship: asset owners hire asset managers to invest assets on their behalf. Asset managers act as fiduciaries, which means acting in the best interests of the client and faithfully executing the investment mandate provided by the client.

From an investor protection standpoint, it is therefore essential that asset managers make investment decisions on behalf of their clients/investors only and invest in a manner that they assess will best achieve a client's mandate or a fund's stated investment objectives. For example, if an asset manager must consider adverse impact on sustainability, regardless of a fund's investment objective, how should an asset manager balance these obligations or weigh them against each other, especially in relation to an investor's economic/financial interests or other preferences?

In addition to investor protection concerns, a change to the investment process of this magnitude would risk damaging European fund managers' competitiveness. Mandatory integration of sustainability impact would eliminate the ability for an investor to choose whether and how an asset manager considers adverse sustainability impact in the client's investments. Non-EU clients may choose non-EU asset managers and markets that permit an asset manager to act in a client's best interest and invest according to the client's preferences. Directly requiring asset managers to take into account sustainability impacts in investment decisions also could create legal conflicts for EU asset managers advising clients in other jurisdictions. A European asset manager advising a non-EU client could be forced to reconcile two different concepts of fiduciary duty—one that focuses solely on the investor's best interest, and the other that more broadly includes environmental and social sustainability impact (separate from investment returns or investor preferences).

Given the many workstreams that are currently focusing on sustainability impact, we urge the Commission to focus on implementation and ensure that market participants have a consistent and clear understanding of the new regulatory obligations and are able to integrate effectively the various new requirements. We note the Commission's ongoing work on sustainability impact includes the following:

- Implementation of the Sustainable Finance Disclosure Regulation (SFDR) and the - Taxonomy Regulation;
- Amendments to delegated acts under AIFMD and the UCITS Directive to integrate consideration of sustainability risk, as well as the delegated acts under MiFID II that concern identifying clients' sustainability preferences;
- Upcoming review of the Non-Financial Reporting Directive (NFRD); and
- Consultation on sustainable corporate governance legislation.

Achieving coherent implementation of these various workstreams and others presents a significant challenge. Focusing on common interpretation and coherent implementation will provide the Commission with the opportunity to observe the market reaction, and then base any further steps on this foundation, as opposed to making fundamental changes to the relationship between investors and fund managers before the ramifications of the raft of new requirements have been fully understood.

Question 94. The EU Taxonomy Regulation 2020/852 provides a framework for identifying economic activities that are in fact sustainable in order to establish a common understanding for market participants and prevent green-washing. To qualify as sustainable, an activity needs to make a substantial contribution to one of six environmental objectives, do no significant harm to any of the other five, and meet certain social minimum standards. In your view, should the EU Taxonomy play a role when AIFMs are making investment decisions, in particular regarding sustainability factors?

☐ Yes | ☒ No |☐ Don't know / no opinion / not relevant

Question 94.1 Please explain your answer to question 94:

No, mandating that the EU Taxonomy play a role when fund managers are making investment decisions (regardless of the investment management mandate) would pose a substantial negative disruption to the investment process and add a significant layer of operational complexity and cost with a corresponding benefit for investors.

Integrating the Taxonomy into the investment process would be an extremely significant, novel use of the Taxonomy for which it was not intended. This approach would contravene the agreed-on approach under the Taxonomy Regulation, where fund managers have a disclosure obligation to inform investors of the percentage of a product's Taxonomy alignment for SFDR Article 8 and 9 funds. This is solely a disclosure obligation.

We also note the Taxonomy's technical screening criteria are not yet settled, and the first set of criteria for climate change adaptation and mitigation will not be in application until January 2022. We urge the Commission to wait to see how the Taxonomy operates in practice before deploying it for uses for which it was not intended.

Funds invest globally, and Taxonomy alignment data will not be available for many non-EU securities as well as many asset classes. The Taxonomy Regulation only requires corporate issuers subject to the Non-Financial Reporting Directive (NFRD) to disclose their Taxonomy alignment. This means that EU SMEs and non-EU companies not subject to the NFRD will not be required to disclose Taxonomy alignment.

There also are significant concerns about the size of the universe of Taxonomy-aligned investments. We understand the current universe of Taxonomy-aligned investments is expected to be quite small. It is important for managers to be able to incorporate a broader understanding of sustainability considerations across a larger segment of the market, rather than focusing solely on a few small green companies. Crowding investors into the small universe of already sustainable investments runs counter to the Commission's objective of mainstreaming sustainable finance and supporting the transition to a lower-carbon economy.

Question 95. Should other sustainability-related requirements or international principles beyond those laid down in Regulation (EU) 2020/852 be considered by AIFMs when making investment decisions?

☐ Yes |☒ No |☐ Don't know / no opinion / not relevant

Question 95.1 Please explain your answer to question 95, describing sustainability-related requirements or international principles that you would propose to consider. Please indicate, where possible, costs, advantages and disadvantages associated therewith:

As discussed in our response to Question 93.1, we strongly urge against requiring fund managers to take into account interests and preferences other than those expressed by investors. From an investor protection standpoint, it is essential that asset managers make investment decisions on behalf of their clients/investors only and invest in a manner that they assess will best achieve a client's mandate or a fund's stated investment objectives. We also emphasise that fund managers' investment decision processes integrate consideration of sustainability risk and will integrate any sustainability impact that becomes a sustainability risk.

Given the many new sustainable finance requirements that will apply to asset managers, we urge the Commission to focus on implementation and how market participants are integrating the various new requirements. Achieving coherent implementation of these various workstreams presents a significant challenge. Focusing on coherent implementation will provide the Commission with the opportunity to observe the market reaction, and then base any further steps on this foundation, as opposed to making significant changes to the investment process before the ramifications of the raft of new requirements have been fully understood.

Section VII. Miscellaneous

Question 96. Should ESMA be granted additional competences and powers beyond those already granted to them under the AIFMD? Please select as many answers as you like

☐ Entrusting ESMA with authorisation and supervision of all AIFMs
☐ Entrusting ESMA with authorisation and supervision of non-EU AIFMs and AIFs
☐ Enhancing ESMA's powers in taking action against individual AIFMs and AIFs where their activities threaten integrity of the EU financial market or stability the financial system
☒ Enhance ESMA's powers in getting information about national supervisory practices, including in relation to individual AIFMs and AIFs
☐ No, there is no need to change competences and powers of ESMA
☒ Other

Please explain why you think ESMA's powers should be enhanced in getting information about national supervisory practices, including in relation to individual AIFMs and AIFs. Please present costs, advantages and disadvantages associated with the chosen option. Concrete examples substantiating your answer are welcome:

ESMA has an important role to play in strengthening consistency in supervisory outcomes across NCAs, potentially reducing complexity and cost for cross-border funds and their managers. Enabling ESMA to obtain information on national supervisory practices supports the use of these convergence tools and mechanisms.

Please explain with what other additional competences and powers ESMA should be granted. Please present costs, advantages and disadvantages associated with the chosen option. Concrete examples substantiating your answer are welcome:

ESMAs existing competences and powers enable it to address divergence in Member States' implementation of the EU's investment fund frameworks and support supervisory convergence across NCAs. However, we are concerned that ESMA has not fully utilised the tools at its disposal. For instance, ESMA should support greater harmonisation of NCAs' authorisation process for funds by identifying and adopting NCA good practice and experience. Converging and simplifying the authorisation process for funds will reduce complexity and save cost.

We recommend additional competences and powers for ESMA to support:

- the development of a pan-European marketing regime for cross-border retail funds to address divergence in host Member State approaches and complete the single market in retail investment funds;
- the creation of an EU-wide database of investment products which would: (i) allow investors to easily access comprehensive information and tools with which to make informed investment decisions, including comparing investment products; and (ii)

enable fund managers to submit a single filing to obtain the marketing passport – akin to the MiFID services passport and approach for EuVECA and EuSEF – and file updates to documentation (e.g., UCITS KIID, PRIIPS KID), greatly reducing complexity and improving efficiency for cross-border funds;

- the facilitation of information exchange and the adoption of good practices amongst NCAs to using technology to support supervisory reporting, including developing cybersecurity policies and procedures tailored to counteract the risks associated with NCAs collecting and storing capital market data; and
- the cross-border surveillance by NCAs, including facilitating the exchange of information amongst NCAs and other authorities.

Question 97. Should NCAs be granted additional powers and competences beyond those already granted to them under the AIFMD?

☒ Yes |☐ No |☐ Don't know / no opinion / not relevant

Question 97.1 Please explain your answer to question 97, providing information, where available, on the costs and benefits, advantages and disadvantages of implementing your suggestion:

Our response to Question 97 is "No." We needed to select "Yes" to enable us to explain our response.

NCAs do not need additional powers and competencies for the authorisation and supervision of funds. Under ESMA's coordination, NCAs have an important role to play in supporting ongoing harmonisation of Member States' implementation of the EU's investment fund framework (e.g., investment terms and restrictions imposed on funds) and convergence of supervisory practices across NCAs. Harmonising NCAs' approaches to fund authorisation s and promoting supervisory convergence among NCAs offers the potential to: (i) identify and adopt good or best practice and experience; (ii) ensure consistency; (iii) reduce complexity; and (iv) improve efficiency to strengthen the single market for investment funds.

Question 98. Are the AIFMD provisions for the supervision of intra-EU cross-border entities effective?

☐Fully agree | ☐Somewhat agree |☐Neutral |☒ Somewhat disagree |☐Fully disagree | ☐ Don't know / no opinion / not relevant

Question 98.1 Please explain your answer to question 98, providing concrete examples:

The EU's investment fund framework outlines the responsibilities of home and host NCAs and contains mechanisms (e.g., binding mediation) to address home/host matters. Failure by home and host NCAs to effectively address cross-border supervisory issues in an efficient and timely manner can result in unnecessary administrative burdens and restrictions being imposed on cross-border funds and their managers.

Question 99. What improvements to intra-EU cross-border supervisory cooperation would you suggest? Please provide your answer presenting costs, advantages and disadvantages associated with the suggestions:

The European Commission should pursue the following four sets of reforms to support the effective supervision of cross-border funds:

- Addressing divergence in host Member State approaches to the "supervision" of funds and their managers using the cross-border management passport and marketing passport (e.g., definition of marketing communications, pre-approval processes etc.);
- Incentivising NCAs to address home/host matters in a timely and efficient manner (e.g., under ESMA's coordination through the use of supervisory coordination networks, common supervisory actions and other convergence tools);
- Engendering commonalities in the NCAs' supervisory culture and approaches and trust among NCAs;
- Supporting supervisory convergence through mechanisms such as peer reviews and incentivising efficient and timely resolution of home/host matters, while maintaining tools such as binding mediation to resolve outstanding matters.

Question 101. Should the UCITS and AIFM regulatory frameworks be merged into a single EU rulebook?

☐ Yes | ☒No |☐ Don't know / no opinion / not relevant

Question 101.1 Please explain your answer to question 101, in terms of costs, benefits and disadvantages:

We do not believe that the UCITS and AIFMD frameworks should be merged into a single EU rulebook. The two frameworks are intended for different purposes, and the major legal disruptions and policy uncertainties that would result from such a fundamental overhaul of the EU's investment fund framework would not provide commensurate benefits to investors or fund managers. Instead, Commission should direct its resources towards: (i) addressing divergence in Member States' implementation of the existing UCITS and AIFM frameworks (e.g., terms and restrictions applied at fund authorisation); and (ii) encouraging supervisory convergence across NCAs (e.g., approaches to marketing).