

**EFAMA submission to the European Commission  
Call for evidence: EU regulatory framework for financial services**

[EU Transparency Register Number: 3373670692-24]

**General remarks**

EFAMA welcomes the opportunity to provide the views of the asset management industry to this challenging exercise of assessing the impacts of recent regulatory reforms in the area of financial services.

There are a number of general remarks that we would like to make by way of introduction.

**Need for consistency and coordination**

EFAMA encourages further coordination among the three European Supervisory Authorities (ESAs), ESMA, EIOPA and EBA as an important number of regulatory issues concern two or at times the three of them. Ensuring consistency and avoiding unnecessary overlaps is important, as is that each Authority ensures that the specificities of their respective financial sector are well taken into consideration.

Equally, we believe further cooperation among the various units within the Commission would help enhance efficient work on cross-consistency and in particular cross-impact assessments when proposing new pieces of legislation. Asset management companies are often impacted by horizontal pieces of legislation which are not centrally targeting them but which might have unintended consequences if our sector is not appropriately considered (e.g. EMIR, Benchmarks).

**Need for realistic implementation timelines**

In general, too restrictive implementation deadlines of EU legislation which cannot be met due to delays or unforeseen difficulties in the implementation of Level 2, lead to increased costs for both the industry and, indirectly, the investors. Clear, predictable implementation timetables should become state of the art.

Too short or unrealistic implementation deadlines lead to legal uncertainty and cause serious challenges for EU asset managers in the implementing phase of EU financial legislation.

Further consideration needs to be given to ensuring realistic timeframes for developing and implementing level 2 measures. Given the complexity of financial services legislation, the European Commission and the ESAs should have enough time to provide secondary EC legislation. Alternatively, providing for greater flexibility built in at level 1 to take account of the time which, in practice, may be required to implement and apply a given piece of legislation would be equally helpful. There are many examples of directives (AIFMD, Solvency II, EMIR, MiFID II, UCITS V, PRIIPs)

where it has been or it is very difficult for the industry to be prepared within the timetables laid down. Possibly the general rule could be a minimum 18 months period starting from the date industry has all the necessary information to start applying new rules.

Finally, appropriate time periods are also relevant to assess in practice the actual consequences of an implemented legislation, before envisaging a review of the legislation.

### **Need for better regulation**

EFAMA fully supports the better regulation objectives.

Better regulation relies on efficient dialogue with stakeholders, to obtain the expertise and views of those concerned, and on the EU legislators (the European Parliament and the Council) and the Commission to properly assess, also during negotiations, all possible consequences of a given piece of legislation.

EFAMA supports longer consultation periods, and encourages the EU legislators to take the time to consider changes that in many cases have profound consequences that should be carefully assessed before the final decision is taken.

Better regulation also needs to rely on clear and common definitions of terminology and legal concepts ahead of preliminary works during the pre-legislative stage. We would suggest the ESAs aim to reach consistency in the understanding and definitions of such legal concepts.

### **Need for regulatory stability**

In order to avoid procyclicality, we acknowledge how crucial it is for the European Commission to work closer with the ESAs on the implementation and enforcement of the existing EU rules before launching new regulatory initiatives, in particular when these may not be evidence-based.

One significant issue regards the review clauses included in EU legislation. The obligation to review the rules can cause instability in market participants' way of working, as they have to constantly adapt to new rules which in many cases stem solely from these review clauses, when instead there may not be a case to justify such review.

In addition, these review clauses are usually required too soon after the start of implementation of the existing new rules by market participants, so it is usually too early to judge in a reasonable manner what should be changed – and therefore the regulatory changes may ultimately lead to situations not needed, generating useless costs.

### **Need for targeted improvements**

EFAMA would not see particular regulatory gaps, but rather believes there is a need for targeted improvements in existing or forthcoming proposed EU legislation to allow EU-based players and products both to facilitate the financing of the EU economy (in particular SMEs) and be more competitive vis-à-vis non-EU based players and products both within the EU Single Market and in third country markets.

EFAMA thinks that there needs to be an ability to rescind existing legislation without a lengthy public delay, such as suspending the clearing obligation<sup>1</sup> for a given instrument if there are no longer any clearinghouses offering the service. In the US, for instance, the regulatory authorities can issue a no-action letter, which provides legal certainty to market participants around their ability to not respect a rule in this type of case. In the EU, the legal obligation to clear would still stand in this case until the legislative process to repeal it would be completed, and all firms trading such instruments without clearing them would be in breach of the law.

### **Need to ensure EU competitiveness**

It is crucial to ensure that the EU financial services regulatory framework remains competitive vis-à-vis the rest of the world. A number of our members are concerned that the competitiveness of EU-based players and products within the EU Single Market itself needs to be ensured: an increasing number of pieces of EU legislation offers an access for 3<sup>rd</sup> country players and products to the EU market, while the whole set of regulations to be applied to them is not always required to be the same as for EU-based players and products.

As EU-based players and products export increasingly more outside the EU to keep or increase their growth, global reach and economies of scale through a stronger client base, they must be able to compete in terms of regulatory costs in third country markets.

On the other hand, the recognition of regulatory regimes and the equivalence decisions also prove to be problematic in the cases where new EU legislation goes beyond the international principles or standards with no similar regulatory initiatives being taken in other jurisdictions. Such inconsistencies could lead to significant disruptions in the market by reducing the existing scope of services provided to asset managers and inevitably leading to higher costs for end investors. In order to find the right balance between safeguarding the level playing field amongst EU and non-EU players and allowing the access of EU players to a wide range of options, it should be ensured that the EU legislative initiatives fully take into account and are coordinated with the corresponding regulatory developments at the international level.

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<sup>1</sup> Please refer to Section 2.3 in [https://www.esma.europa.eu/sites/default/files/library/2015/11/esma-2014-799\\_irs\\_-\\_consultation\\_paper\\_on\\_the\\_clearing\\_obligation\\_no\\_u\\_1\\_uu.pdf](https://www.esma.europa.eu/sites/default/files/library/2015/11/esma-2014-799_irs_-_consultation_paper_on_the_clearing_obligation_no_u_1_uu.pdf)  
As well as Section 2.3 in [https://www.esma.europa.eu/sites/default/files/library/2015/11/esma-2014-1184\\_final\\_report\\_clearing\\_obligation\\_irs.pdf](https://www.esma.europa.eu/sites/default/files/library/2015/11/esma-2014-1184_final_report_clearing_obligation_irs.pdf)

## Issue 1 – Unnecessary regulatory constraints on financing

### Example 1 of Issue 1 – Unnecessary regulatory constraints on financing

Narrow definition of professional investors under AIFMD/MiFID and the impact on the attractiveness of products such as ELTIFs.

**To which Directive(s) and/or Regulation(s) do you refer in your example?**

AIFMD Definition of professional investors in Article 4(1)(ag), ELTIFs Regulation definition of eligible investors of article 2.

**Please provide us with an executive/succinct summary of your example:**

The definition of professional investors under AIFMD which is derived from the MiFID framework does not sufficiently consider certain categories of institutions. In particular, entities such as foundations, charities, national providers of pension schemes, church organisations or family offices which generally favour long-term engagements are in most cases deprived of the possibility to obtain the professional investor status and thus not able to exploit investment opportunities available to professional investors. In some Member States, these investors have been granted access to professional AIFs at national level on the basis of them being classified as “semi-professional”. However, under the current rules, they are not able to benefit from the AIFMD passport (which only allows to engage with professional clients cross-border) and to choose from EU-wide suitable investment opportunities e.g. with focus on infrastructure or SME financing which are mainly set up for professional investors. On the other hand, professional AIFs admitting “semi-professional” investors under national law have to struggle with additional burdens such as i.e. the application of the PRIIPs regime and the requirement to produce a PRIIP KID.

In the case of ELTIFs such investors looking for more long-term investment opportunities have the potential to become key players and contributors for the success of this new vehicle. The possibility of those investors to be treated as professional based on the requirements of MiFID II (minimum portfolio of more than € 500,000 and especially the requirement of trades with an average frequency of 10 per quarter over the previous four quarters) will usually not be met by them.

**If you have suggestions to remedy the issue(s) raised in your example, please make them here:**

EFAMA believes that the introduction of a new EU category of “semi-professional” investors in the AIFMD or ultimately in the MiFID framework could broaden the professional investor base and further diversify the supply of funding to long-term projects in the EU. In our view, such new investor category should be modelled along the lines of EuSEF/EuVECA Regulations which inter alia impose a minimum investment amount for investments by other than professional investors<sup>2</sup>.

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<sup>2</sup> Cf. Art. 6(1) of Regulation (EU) 345/2013 and Regulation (EU) 346/2013 respectively.

## **Example 2 of Issue 1 – Unnecessary regulatory constraints on financing**

EBA Guidelines on shadow banking (EBA/GL/2015/20)

### **To which Directive(s) and/or Regulation(s) do you refer in your example?**

The UCITS Directive (2009/65/EC), the AIFM Directive (2011/61/EU) and the Money Market Fund Regulation proposal [COM (2013) 615 final].

### **Please provide us with an executive/succinct summary of your example:**

Despite the initial orientation of its draft Guidelines on banks' limits on exposures to shadow banking entities in March 2015, we appreciate the EBA has partially revised its policy position, expressed in the final Guidelines as published in December 2015. We appreciate, in particular, that the inclusion of MMFs into the shadow banking remit may become subject to a review once the details of the current MMFR proposal are finalized and published.

We regret, however, that the EBA has extended the scope of the final Guidelines to AIFs which are allowed to originate loans or purchase third party lending exposures onto their balance-sheet pursuant to the relevant fund rules or instruments of incorporation.

We are concerned that the EBA's approach towards loan-originating activities in the non-bank remit lies at odds with the intents of the CMU, intended to re-start loan origination for the benefit of the real economy. In our opinion, there is on the part of the EBA (as with a variety of other central bank supervisors) a tendency to consider non-bank financing to the economy as a "second-tier" mean to bank financing, all while tarnishing an important part of the Commission's CMU initiative with a "shadow banking" label.

To better appreciate this last contradiction, the Commission's CMU Action Plan states that large institutional investors or investment funds can further diversify credit intermediation and increase financing opportunities for mid-sized firms by originating loans (sometimes in partnership with banks). According to the figures and estimates available to the Commission, as of the end of 2014, over 350 transactions were completed by 36 alternative lenders in just over two years which underlines that there are opportunities in the development of private credit.

EFAMA would therefore encourage further considering the notion of "EU loan funds", by addressing the existing barriers such as the lack of information to non-bank lenders (which can be a key barrier for their further growth).

### **Please provide us with supporting relevant and verifiable empirical evidence for your example:**

Please refer to the EBA's final Guidelines on *Limits on exposures to shadow banking entities which carry out banking activities outside a regulated framework* (EBA/GL/2015/20), as published on 14 December 2015, in particular, paragraphs 14 to 16 thereof.

**If you have suggestions to remedy the issue(s) raised in your example, please make them here:**

In some countries, a non-bank lender is required to have a banking license, which prevents institutional investors or funds from making loans. There are also different tax regimes for different types of investors/lenders and banks often receive preference in insolvency proceedings. These barriers need to be dealt with in order to encourage the take up of alternative future source of non-bank credit.

With regard to loan-originating AIFs, we would welcome that the competent Services of the Commission and/or ESMA reconsider their inclusion into the scope of the EBA's Guidelines on the basis of the results of the 2016 consultation. The same we would require for MMFs, although we do acknowledge that a final political agreement on the MMFR proposal is still looming. In this regard, we are satisfied that the EBA Guidelines provide an appropriate review clause for MMFs, whose inclusion in the shadow banking definition would deserve to be reassessed once the MMFR text is finalised.

We would therefore call on the competent Services of the Commission and/or ESMA to ensure that the applicable body of EU rules and their relative purposes are better explained to and well understood by the EBA. On various occasions, banking supervisors (as in this case the EBA) have attempted to discipline non-bank financial market actors and activities from a bank-centric perspective, at times ignoring existing market legislation – with therefore the risk of unjustified potential detrimental consequences on EU fund managers - and undermining the authority of ESMA by over-reaching their own mandate.

### **Example 3 of Issue 1 – Unnecessary regulatory constraints on financing**

#### **To which Directive(s) and/or Regulation(s) do you refer in your example?**

Draft Directive on Financial Transaction Tax.

#### **Please provide us with an executive/succinct summary of your example:**

The draft Directive on Financial Transaction Tax proposed by the European Commission in 2013 is not consistent with the CMU objectives to “maximise the benefits of capital markets for the economy, jobs and growth”:

- A tax on EU citizens lowering returns on investments and savings: FTT would be an indiscriminate tax on savings, investment and pensions borne by EU citizens as it would increase the cost of capital for businesses and lower returns on investments and savings.
- A discontinuation of the principle of equal treatment between indirect and direct investments triggering an increase on cost of capital for the public: FTT would increase the costs borne by investment funds and will render EU investment funds more expensive compared to direct investment if, as contemplated, the FTT applies additionally on investment funds' units redemptions and/or subscriptions. As a consequence, investments would be channeled to products not subject to FTT, such as insurance contracts or savings deposits instead of e.g. ELTIFs, or to non EU investment funds. This would diminish the benefits of investment in funds

on providing cost effective access to capital market investments to the mass public.

**If you have suggestions to remedy the issue(s) raised in your example, please make them here:**

EFAMA would urge the participating Member States to agree that the European Commission should withdraw this proposal which is contradictory with the CMU and the Juncker Plan, or at the very least not to levy the tax on the redemption and/or subscription of funds units, so that a double and discriminatory taxation is avoided.

**Example 4 of Issue 1 – Unnecessary regulatory constraints on financing**

BEPS

**To which Directive(s) and/or Regulation(s) do you refer in your example?**

The OECD's BEPS initiative seeks to address double non-taxation by multinational corporations.

**Please provide us with an executive/succinct summary of your example:**

We support the overall aim of this initiative. However, if implemented as proposed, BEPS will lead to significant unintended consequences for investment funds, in particular, those investing on a cross-border basis in real assets such as infrastructure, real estate, and renewable energy. Cross-border flows and investment in these assets classes will fall as a result.

**To which Directive(s) and/or Regulation(s) do you refer in your example?**

The OECD's BEPS initiative seeks to address double non-taxation by multinational corporations.

**Please provide us with supporting relevant and verifiable empirical evidence for your example:**

As it stands, BEPS will make investing in these assets via pooled funds unattractive and will consequently reduce their level of funding contrary to the aims of the initiatives undertaken by the EU in particular (such as the EFSI and the ELTIF). Action 6 of BEPS will be particularly detrimental to non-collective investment funds (commonly referred to as alternative funds), as they are likely to be deprived from treaty relief.

Potential solutions that would allow the aims of BEPS to be met and promote infrastructure investment by investors exist. We suggest that the OECD and member governments work with industry to provide guidance as to how funds and their investors, especially alternative funds, can appropriately be treated in a post-BEPS world without impairing cross-border investment. Towards this end, we propose three approaches:

- A full look-through to the fund's beneficial owners such that direct treaty relief is respected.
- Provide that a "Qualified Fund" be respected as tax resident when most of its investors would otherwise be entitled to treaty benefits directly.
- Consider the substance that a fund or its service providers have in the jurisdiction where it is claiming tax residence.

**If you have suggestions to remedy the issue(s) raised in your example, please make them here:**

EFAMA would strongly recommend that the short time remaining before BEPS is finalised next year be taken to explore these solutions.

Encouraging capital markets investment in infrastructure has the potential to bridge the world's infrastructure funding gap. A holistic and consistent policy framework is necessary to incentivize greater private capital investment in infrastructure. This framework should provide certainty, transparency, an alignment of public and private interests, and a stable and consistent tax and regulatory environment. Striking the appropriate balance between public policy and investor needs will facilitate greater private infrastructure investment.

### Example 5 of Issue 1 – Unnecessary regulatory constraints on financing

Risks of investments are over-emphasised

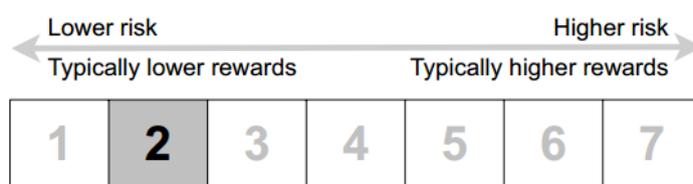
**To which Directive(s) and/or Regulation(s) do you refer in your example?**

UCITS, PRIIPs, MiFID II

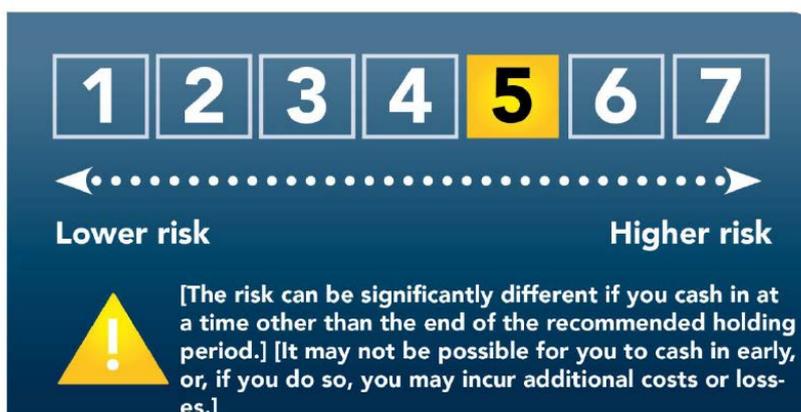
**Please provide us with supporting relevant and verifiable empirical evidence for your example:**

EFAMA is supportive of the PRIIP Regulation stipulates a Key Information Document for all packaged investment product in order to provide essential pre-sales disclosures to retail investor. Unfortunately, it has to be observed that the new PRIIP KID is overemphasizing risks compared to its UCITS KIID predecessor. The UCITS KIID measures risk and reward in its “synthetic risk and reward indicator”, whereas the current PRIIP KID only focuses on the investment risk, forgetting to disclose its potential returns.

UCITS KIID



PRIIP KID (to be finalised)



This new presentation will have an essential effect on the choices of retail investors, especially if the calibration of between lower and higher risk PRIIPs is not done correctly. We are, in particular, concerned about this in the currently ongoing discussion on the PRIIPs Level-2 measures. The ESAs are suggesting that products where the investor may lose more than the money invested (i.e. creating additional payment liabilities) should be categorized on the same maximum risk level as risky products where the investor may lose his money up to the invested amount. This is of importance for the Commission, as we are currently even seeing a number of equity funds being categorized in this highest risk category which will eventually refrain (retail) investor investing into plain-vanilla capital markets products, such as UCITS equity funds, which are also offering their own risk reduction tools such as compulsory investment spreading for instance.

**If you have suggestions to remedy the issue(s) raised in your example, please make them here:** Disclosure of costs and risks is essential to any type of investor. Legally required pre-disclosure information should not, however, overemphasize on the potential risks without also highlighting its potential returns to present the investor a true representation of the potential investment.

## Issue 2 – Market liquidity

### Example 1 of Issue 2 – Market Liquidity

**Please provide us with an executive/succinct summary of your example:**

The Capital Requirements legislation, derived from Basel III, penalises hedging activity & liquidity management.

**To which Directive(s) and/or Regulation(s) do you refer in your example?**

CRD/CRR derived from Basel 3, in particular Basel 3 leverage ratio framework and disclosure requirements (January 2014):

**Please provide us with supporting relevant and verifiable empirical evidence for your example:**

- Higher cost for hedging & lower liquidity
  - Derivatives & REPO bid-offers will increase by taking into account bank capital consumption
  - REPO capital charge will create distortion in the bond and collateralized loan market
  - Cleared positions are counted in the LR of the BS of the clearer
  - Decreases remuneration for investors
  - Regulated funds and asset managers only have access to minimum and limited in time borrowing capabilities. This has direct impact on the liquidity and access to liquidity.
- More collateral requirement essentially in cash
  - Incentivize clearing vs. bilateral
  - More cash collateral requirement
    - Clearing requires more cash as collateral (Variation Margins)
    - Margining for non-cleared OTC will increase the need for collateral
  - ...while real investors hold assets & fund regulation limits the use of REPO
- Products are evolving for banks capital need, less for client hedging & accounting objective

Please also see the below reports:

- Risk magazine's recent survey (September 2014) revealed the impact of new regulatory ratios on a 5-year, non-collateralised interest rate swap (with huge differences between banks):
  - *For an A-rated counterparty, the impact of new regulations could reach up to 10 basis points (bp) of notional*
  - *For a BB-rated counterparty the impact could reach up to 40 bp of notional*
- According to Credit Suisse, Bank regulation changes could add up to 60bp to the cost of a repo transaction (Risk magazine November 2014)

**If you have suggestions to remedy the issue(s) raised in your example, please make them here:**

We would suggest to adapt Basel III regulation to allow diversified asset collateral.

## Example 2 of Issue 2 – Market Liquidity

### **To which Directive(s) and/or Regulation(s) do you refer in your example?**

The “CRD IV” Directive (2013/36/EU)

The Capital Requirements Regulation - “CRR” (Regulation No. 575/2013)

The “Solvency II” Directive (2009/138/EC)

### **Please provide us with an executive/succinct summary of your example:**

The accommodative stance of the ECB’s quantitative easing programme has inevitably facilitated the issuance of corporate bonds (investment grade and high yield), making it cheaper for companies to access credit away from the more traditional bank-funding channels. As a result, corporate issuance and size of outstanding corporate debt has actually increased.

However, the punitive capital requirements of CRD / CRR / Solvency II are acting in the opposite direction, making investment and holding of their bonds prohibitive. There is a growing consensus around a marked decline in bank dealer ownership of corporate bonds as a result higher regulatory capital charges, accompanied by a gradual shift from a “principal” to an “agency” trading model, whereby dealers simply match opposing orders without taking them onto their balance sheet. Order matching is also complicated given the heterogeneity of issues. As a result, in general and on average bid-ask spreads have widened (also due to the higher regulatory costs for dealers to maintain tradeable debt on their inventories).

### **Please provide us with supporting relevant and verifiable empirical evidence for your example:**

Please refer to the work of ICMA (2014), PWC (2015), Federal Reserve Bank of New York (2015), UK FCA – Fair & Efficient Markets Report (2015), French AMF - Study of Liquidity in French Bond Markets (2015), etc.

### **If you have suggestions to remedy the issue(s) raised in your example, please make them here:**

Liquidity conditions will gradually normalize over the medium-term, as market solutions to facilitate the trading of fixed-income instruments are being sought and tested by both buy-side and sell-side in cooperation with exchange platforms (e.g. the “electronification” of fixed income trading via dedicated venues, the standardization of corporate bond issues, to name a few). Bouts of market illiquidity regularly occur and the global financial system emerging from the 2008 crisis has proved resilient in all recent episodes. Such episodes, including the announced tightening of monetary conditions by the world’s main central banks in the near future and consequent re-pricing of securities, should not be equated with “systemic” events.

From the perspective of the European asset management industry, recourse to liquidity management tools and stress-testing in the well regulated environment of UCITS/AIFs has served managers well in meeting investors’ redemption demands, including during all the significant market events which have occurred over the last few years. From this perspective, it is interesting to see that the EU regulatory model of managing fund liquidity risk is taken as a reference in other

parts of the world<sup>3</sup>. In addition, if needed, we would emphasise the importance of investor education in helping investors understand that liquidity – as we have known it in pre-crisis times – may not be a given at every moment.

### Example 3 of Issue 2 – Market Liquidity

Lack of short term investments

#### **To which Directive(s) and/or Regulation(s) do you refer in your example?**

Liquidity Coverage Ratio / Basel 3 regulations

#### **Please provide us with an executive/succinct summary of your example:**

New Liquidity ratio requirements have a negative impact on issues of short term investments by banks.

To adjust their treasury, funds and in particular MMFs are investors on a daily basis for huge amounts on short term CDs (certificates of deposits) and CPs (commercial papers). Banks have no interest anymore (regarding the Basel 3 regulations) in issuing CDs below 2 month maturity, when MMF managers are precisely looking for CDs with short and very short maturities (even especially less than a week). This creates a negative incentive for fund managers to invest on longer maturities and impacts the risk and liquidity profiles of the fund.

On the other side banks are penalised when they invest in MMFs, as these funds are often not considered as liquid enough to be equivalent to cash.

Today, the LCR is not yet implemented, but banks are already somewhat anticipating the rules for reasons of financial ratios communication. MMF portfolio managers are already thus very concerned that they might be forced to further concentrate their investments on such other instruments as deposits and reverse repos.

### Example 4 of Issue 2 – Market Liquidity

Excessive investment limitations for MMFs

#### **Please provide us with an executive/succinct summary of your example:**

Stricter concentration limits create a risk to invest in issues of lesser quality when the interest of the investors would suggest to concentrate more on high quality investments.

#### **To which Directive(s) and/or Regulation(s) do you refer in your example?**

UCITS/MMF

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<sup>3</sup> In this regard, please refer to IOSCO's *Final Report on Liquidity Management Tools in Collective Investment Schemes: Results from an IOSCO Committee 5 survey to members (FR28/2015)*, published in December 2015; available at: <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD517.pdf>

**Please provide us with supporting relevant and verifiable empirical evidence for your example:**

MMFs have to invest large amounts (in hundreds of million € daily per fund) on short term instruments. There are a few issuers that are ready to take such amounts any day. They are financial institutions and many of them belong to large groups. The 5/10/40% rule in UCITS has been supplemented with a possible 20% limit for issuers of a same group. The MMF Regulation would suggest a limitation of the group limit to 10% (Commission) or less (Parliament). There are less than 20 issuers present daily for large volumes in €. The incentive to subscribe CDs from non-European banks or banks of lesser quality is counterproductive in terms of financing the economy and not efficient in terms of investors' protection.

**If you have suggestions to remedy the issue(s) raised in your example, please make them here:**

We would suggest to use concentration limits which are proportionate to the reality of the European market and recalibrate by using the UCITS concentration limits rather than the too restrictive ones currently proposed by the draft MMF Regulation.

**Example 5 of Issue 2 – Market Liquidity**

Prospectus Directive: risk of reducing market liquidity from SME markets due to a forthcoming lack of confidence in the Prospectuses to be issued by SMEs.

**To which Directive(s) and/or Regulation(s) do you refer in your example?**

Prospectus Directive

**Please provide us with supporting relevant and verifiable empirical evidence for your example:**

The professional investors (e.g. asset managers) carry out their own assessments before investing in securities, e.g. SMEs. Among the sources of information, they make use – both for SME equities and for SME fixed income securities – of the official prospectuses issued by them.

All the parts of the current Prospectuses are scrutinised by asset managers. These prospectus bring several advantages:

- They are part of “regulated information”: although this information is not certified as such by national regulators, the fact that information is put into a document officially issued through a process involving a regulator gives a minimum level of confidence in the quality of such information. If for the future the elements of these prospectuses are lightened, it will give less confidence for professional investors making use of them
- It is even more so for SMEs: SMEs usually communicate less on an ongoing basis than blue chips. Therefore the relative importance of Prospectuses for professional investors is more crucial for SMEs than for blue chips.

Ultimately, far from bringing investors back to SME markets, it will push them away from them.

**If you have suggestions to remedy the issue(s) raised in your example, please make them here:**

Any simplification of Prospectus needs to ensure the right balance with the capacity of the investor to have appropriate access to information on SMEs. If it increases the difficulties in getting the right information, it will only lead to less confidence from the investors' and the asset managers' side, leading to less investment choices linked to the SMEs markets. This would of course impede the SMEs' growth and increased financing, which is the main priority of the Commission.

### Issue 3 – Investor and consumer protection

#### Example 1 of Issue 3 – Investor and Consumer Protection

Inducements - alignment of distribution rules under MiFID II and IDD

**Please provide us with an executive/succinct summary of your example:**

Investors buying securities investment products today are already protected by requirements for cost disclosure and quality standards for distributors remunerated by commissions received from product providers. This regime of investor protection will be significantly strengthened under MiFID II by requiring comprehensive disclosure of all costs and charges and by further tightening the conditions for allowing commission payments to distributors. In the context of the PRIIPs initiative, it has been generally acknowledged by the EU institutions that distribution of all investment products in the retail market, regardless of whether they are sold in a securities or an insurance wrapper, should be subject to equal conduct of business rules in order to effectively protect European investors. Notwithstanding this commitment which has been explicitly enshrined also in the MiFID II legislation<sup>4</sup>, the risk that the IDD framework recently agreed by the EU institutions will substantially fall behind the MiFID II standards

**To which Directive(s) and/or Regulation(s) do you refer in your example?**

MiFID II and IDD

**Please provide us with supporting relevant and verifiable empirical evidence for your example:**

Specifically, there is still uncertainty in relation to the following provisions:

- It is unclear whether legitimacy of inducements will be assessed against the same criteria by financial and insurance distribution channels. The conditions for payment or reception of inducements have been phrased in a different manner under IDD requiring that a fee, commission or a non-monetary benefit “does not have a detrimental impact on the quality of the relevant service to the customer”<sup>5</sup>. In contrast, MiFID II provides that inducements must be designed to enhance the quality of the relevant service to the client.
- While cost information standards under IDD and MiFID II should be similar and apply to all costs and charges at both product and service level<sup>6</sup>, it is unclear whether distributors of insurance-based investment products shall disclose third-party payments and other inducements on separate terms as required under MiFID II.

**If you have suggestions to remedy the issue(s) raised in your example, please make them here:**

Against the backdrop of the CMU initiative, we would like to call upon the EU institutions to work

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<sup>4</sup> Cf. recital 87 of the MiFID II Directive (Directive 2014/65/EU).

<sup>5</sup> Cf. Art. 29 para. 2(a) of the IDD text (European Parliament’s provisional version as voted on 24 November 2015).

<sup>6</sup> Cf. Art. 24 para. 4 (c) and last subparagraph of MiFID II, Art. 24 (7) (c) and last subparagraph of IDD (Parliament’s version from 16 July 2015).

towards equal standards of investor protection at the point of sale and in particular, to further align these essential standards of good conduct of business in the upcoming work on Level 2 measures under IDD.

### **Example 2 of Issue 3 – Investor and Consumer Protection**

Complex products vs risky products / Hurdles for the distribution of retail AIFs through MiFID II

**To which Directive(s) and/or Regulation(s) do you refer in your example?**

MIFID II

**Please provide us with an executive/succinct summary of your example:**

AIFs are an important investment pillar for European citizens. Yet, they are being seriously threatened by EU legislation. They suffer from the stigma of being perceived as hedge funds but in fact the vast majority of AIFs are not. It is key for EU legislation to appropriately acknowledge the different types of funds which qualify as AIFs, some hedge funds, but the vast majority of them AIFs with a conservative risk-return-profile comparable to UCITS.

**Please provide us with supporting relevant and verifiable empirical evidence for your example:**

The MiFID regime classifies certain products as complex in order to prohibit their sales by way of execution-only. However, the notion of complexity has also been subject of many debates (more recently at Level 2) which requires that the sale of complex products shall be require additional requirements by assessing their suitability to investors.

We believe that the interpretation in MiFID II's Level-1 Directive of all AIFs (i.e. non-UCITS) as complex (see above) is not correct. In the same vein, ESMA's stance to treat all AIFs as complex products as manifested in its technical advice on MiFID II from December 2014 is disappointing.

The term "AIF" is very broad and also includes highly regulated retail funds. Hence, a consequence of ESMA's position would be that investment funds which are comparable to UCITS in that they observe rules on eligible assets and investment limits, provide for risk diversification and redemption rights for investors, where the issuer is regulated and the product is approved for marketing to retail investors would be considered complex and subjected to stricter appropriateness testing whereas other products such as listed shares or bonds would be considered non-complex even though they tend to be less suitable for retail investors due to the higher concentration and liquidity risk.

As many of these retail funds are regulated on the national law, they have been sold to retail investors for years without problems<sup>7</sup>. We therefore believe that MiFID II requiring even these

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<sup>7</sup> The following are (non-exhaustive) examples of nationally regulated non-UCITS retail schemes: Belgium (fonds d'épargne-pension/pensioenspaarfondsen); France ("Fonds d'investissement à vocation générale"); Germany (Gemischte Investmentvermögen, sonstige Investmentvermögen and offene Immobilien-Sondervermögen); Netherlands (non-UCITS BMVK's and the non UCITS fondsen voor gemene rekening for

retail AIFs to be subject to an “appropriateness” test will add to barriers and costs even though there has been no detriment arising from the existing regime.

Unfortunately, there are other instances where AIFs are being inaccurately considered as hedge funds and treated accordingly. The proposal on Banking Structural Reform will also severely impact asset management companies that are EU bank subsidiaries as well as many alternative investment funds. In this proposal, all AIFs are inappropriately and inaccurately being considered as hedge funds and therefore barred access to those nationally regulated AIFs.

**If you have suggestions to remedy the issue(s) raised in your example, please make them here:**

AIFs should not be treated as complex products. Instead, they should be allowed to assess themselves against the complexity criteria to be endorsed by Level 2 measures under MiFID II. Their treatment should be based on grounds of the nature of the fund’s specificities (e.g. liquidity, leverage). This will avoid an unjustifiable bias in the existing distribution of retail AIFs.

### **Example 3 of Issue 3 – Investor and Consumer Protection**

Access to professional investment advice

**To which Directive(s) and/or Regulation(s) do you refer in your example?**

MiFID II

**Please provide us with an executive/succinct summary of your example:**

In order to encourage more retail investments in capital markets, we deem it crucial to ensure that European investors retain meaningful access to professional investment advice.

**Please provide us with supporting relevant and verifiable empirical evidence for your example:**

Given the complexity and the great variety of product available as investment options in the retail market, we fear that the EU citizens’ willingness to invest could further decrease should their ability to obtain professional advice at reasonable cost be curtailed. Shrinking coverage by advice could have negative repercussions for both the level of retirement savings by EU citizens and their engagement in financing the EU economy. Thus, where commission-based advice models are established channels of providing investment advice services to the mass retail market they should be upheld under the MiFID II regime in line with the EU legislator’s decision for a competition of systems at Level 1. In addition, the regulatory requirements applying to investment advice must remain feasible in the day-to-day retail business<sup>8</sup>. This pertains in particular to the

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the retail market); Spain (Non UCITS fixed income funds, Non UCITS Fixed income defined return funds and Non UCITS global investment policy SICAVs); Sweden (Specialfond) & UK (Non-UCITS Retail Schemes), Portugal “PPR – Plano de Poupança Reforma”.

<sup>8</sup> In particular, German experience with the recording of advice (“Beratungsprotokoll”) which is a national equivalent to the suitability statement (and which preceded the discussions in MiFID II), saw that such onerous requirements resulted in a number of banks withdrawing from the advice business in case of overly burdensome (national) regulation and thus left an advice gap for certain parts of the mass retail market that was not the intention of the regulation.

conditions for suitability testing and the statement on suitability to be provided to clients, the level of detail required for MiFID II's new "target market" and their overall interaction.

**If you have suggestions to remedy the issue(s) raised in your example, please make them here:**

EFAMA would suggest that the Commission and ESMA to ensure that the regulatory regime for investment advisors at Level 2 and 3 of MiFID II remains practicable and commensurate in view of the need to warrant provision of advice to broad levels of population. This pertains in particular to regulatory provisions governing commission-based advice models.

#### **Example 4 of Issue 3 – Investor and Consumer Protection**

Additional conditions/ constraints for marketing of ELTIFs to retail investors further to the ones foreseen in MIFID II.

**To which Directive(s) and/or Regulation(s) do you refer in your example?**

ELTIFs Regulation Article 30 para 3

**Please provide us with an executive/succinct summary of your example:**

Taking retail investors out of the ELTIFs scope would in practice make the market relevance of the ELTIFs much smaller.

**Please provide us with supporting relevant and verifiable empirical evidence for your example:**

The ELTIF Regulation imposes a number of specific conditions for the marketing of ELTIFs to retail investors that for this particular product go beyond the ones foreseen in MIFID II. EFAMA understands and has stated its support for additional safeguards for marketing such long term and illiquid in nature funds to retail investors. However, we also stressed that these safeguards have to be beneficial for the retail investors and not be adding artificial barriers with no concrete added value for them.

This added value is clear in the case of those safeguards that are aligning the ELTIFs marketing to retail investors to the relevant MiFID II provisions as well as to other UCITS-like safeguards (such as the internal assessment process, the requirement for prior advice, provisions on the depositary etc.).

However, on two specific additional conditions, i.e. the 10.000 euros minimum participation and the 10% threshold as to the aggregate portfolio of the retail investor, their potential as to the protection of the retail investor and their possibility to be implemented are questionable. The 10% threshold is too restrictive and entails an assessment obligation for the ELTIFs manager that he will in many cases practically not be able to carry out (as this information is almost always accessible only to the financial advisor of the retail investor and not the ELTIF manager) or if so then with substantially increased costs for the end-investors. Further, an "entry ticket" (i.e. the minimum invested amount of € 10,000) is not the optimal way to ensure either sufficient level of investor protection or the possibility of retail investors to access investments on ELTIFs in real market terms.

The ability to split the “entry ticket” of 10.000 euros into different ELTIFs, the additional clarifications on what will be defined as the “aggregate portfolio” (“understood as including cash deposits and financial instruments, but excluding any financial instruments that have been given as collateral”) and the responsibility for providing the right and full information as to the aggregate portfolio remaining with the investor, are some points added in the text that partially improve the final outcome. Still, we believe that they cannot fully address the concern that ELTIFs will in practice not be able to be marketed to this a range of retail investors that are indeed seeking for alternative and longer term investment options. These additional rules can considerably reduce the attractiveness of retail marketing and may discourage management companies from setting up ELTIFs altogether.

**If you have suggestions to remedy the issue(s) raised in your example, please make them here:**

The conditions of the 10.000 euros minimum participation and the 10% threshold as to the aggregate portfolio of the retail investor should be left out. A robust investor protection as provided by the MiFID suitability and appropriateness test is the most efficient safeguard for retail investors in ELTIFs.

### **Example 5 of Issue 3 – Investor and Consumer Protection**

Lack of competitiveness of the ELTIF product vis-à-vis other labels / lack of incentive to invest in ELTIF.

**To which Directive(s) and/or Regulation(s) do you refer in your example?**

ELTIF Regulation

**Please provide us with supporting relevant and verifiable empirical evidence for your example:**

Regarding long-term innovation and infrastructure projects, ELTIF is in principle a positive tool. However, the uncertainty and potential high restrictions in the scope of their eligible assets, the lack of flexibility as to the portfolio diversification rules in case of ELTIFs open only to professional investors as well as the lack of flexibility concerning the lifetime of ELTIFs, but also the absence of fiscal incentives might not lead to an important take up of ELTIFs as the new label might not meet the interests and needs of all different types of investors it seeks to attract.

**If you have suggestions to remedy the issue(s) raised in your example, please make them here:**

- The interpretation of Level 1 provisions should be as flexible as possible, to allow for instance for a large array of real estate assets.
- Specific tax incentives should be introduced.
- A more favorable calibration should be introduced in Solvency 2 Level 2 to create a higher incentive for insurers to invest in ELTIFs.
- Finally, we would suggest reviewing articles 13 and 18 of the ELTIF Regulation when it comes to the sub-rules for the diversification of the portfolio or the defined ex-ante lifetime.

## Issue 4 – Proportionality / preserving diversity in the EU financial sector

### Example 1 of Issue 4 – Proportionality / preserving diversity in the EU financial sector

**To which Directive(s) and/or Regulation(s) do you refer in your example?**

MiFID II - Best execution, transparency and reporting requirements, Research Financing.

**Please provide us with an executive/succinct summary of your example:**

The whole set of MiFID II rules and in particular the best execution, transparency and reporting requirements and the research financing provisions (as proposed by ESMA) would both:

- Harm small brokers which might not be able to adapt to the proposed new processes of Research Financing, due to the cost imposed by the new operational processes to be set. It would then lead to oligopolies of big brokers, which in turn could result in a reduction of competition and consequently to higher brokerage fees for market participants, including for asset management companies and their clients;
- Harm EU asset management companies which would have to comply with this rule which does not exist for their non-EU competitors, e.g. in the USA or in Asia.

Smaller EU-based brokers will not be able to adapt to the new financial markets rules, due to the technology costs that these transparency, reporting and best execution requirements imply.

**If you have suggestions to remedy the issue(s) raised in your example, please make them here:**

EFAMA would suggest not to limit best practices to the analysis of execution costs (quality and security should also be taken into consideration) and to develop rules that foster diversity in the EU financial sector and in particular preserve small brokers.

### Example 2 of Issue 4 – Proportionality / preserving diversity in the EU financial sector

Bank-like remuneration rules for asset managers

**To which Directive(s) and/or Regulation(s) do you refer in your example?**

The EBA *Guidelines on sound remuneration policies* (EBA/GL/2015/22) of 21 December 2015, specifically paragraphs 65, 68 and 79.

The EBA *Report on Investment Firms* (EBA/Op/2015/20) of 14 December 2015, specifically section 3.1.11 thereof.

The relevant provisions of the “CRD IV” remuneration requirements intended to apply to intra-group asset management companies are those under Articles 92(2) and 94 of Directive 2013/36/EU (“CRD IV”), despite the evident references to the principle of proportionality.

The relevant provisions of the sectoral legislation are as follows:

For AIFMD: Article 13 and Annex II of the Directive (2001/61/EU), accompanied by the abovementioned ESMA Guidelines (ESMA/2013/232), and specifically paragraphs 33-34 thereof;

For UCITS: Articles 14a and 14b of the amended “UCITS V” Directive (2014/91/EU), accompanied by the draft ESMA Guidelines as published in the consultation of 24 July 2015 (2015/ESMA/1172)

ESMA 2013 *Guidelines on remuneration policies and practices (MiFID)* (ESMA/2013/606) of 11 June 2013.

**Please provide us with an executive/succinct summary of your example:**

Remuneration rules for asset managers should be focused on mitigating the risks in the business and aligning the interests of the firm with those of its investors. Moreover, these rules should be consistent and not depend on, for example, whether the manager is part of a banking, insurance group or stand-alone or whether it is managing UCITS, AIFs or segregated mandates as a MiFID investment firm.

**Please provide us with supporting relevant and verifiable empirical evidence for your example:**

Until this day, remuneration rules across the different EU frameworks (i.e. UCITS, AIFMD and MiFID) applicable to asset managers have worked well in guaranteeing the fundamental alignment as described above. Underpinning this consistency is the proper application of the remuneration principle, allowing for remuneration principles – especially within a group context – to be adapted to the complexity, size, internal organization, scope, but above all to the “agency” nature of the asset management business.

The application of such rules has been recently challenged by the EBA in final *Guidelines on sound remuneration policies* (EBA/GL/2015/22) published in December 2015. Here, the EBA has offered a controversial reading of the proportionality principle under the CRD, extending the application of the CRD-specific remuneration principles *in toto* to independent MiFID firms and group entities, including asset management companies, and largely dismissing the relevant sectoral remuneration requirements (i.e. those of the UCITS and AIFM Directives, as well as the 2013 ESMA *Guidelines on remuneration policies and practices* for MiFID firms) and practices currently in force. Detailed reasons, whether legal or factual, to substantiate this preliminary view supporting the inclusion of UCITS/AIFM management companies and independent MiFID investment firms within the CRD IV remuneration remit, have not been provided.

Generally, one should also note that identified staff employed by subsidiary asset management entities (whether based in the EEA or outside the EEA) might be over-simplistically treated as “material risk takers”, whose activities would affect the material profile of the CRD-licensed parent entity. To the EBA, this would appear enough to justify the full application of CRD remuneration rules to individuals that by function, both formally and *de facto*, perform utterly different activities that bear no balance sheet risk to the parent entity. In this context, intra-group asset management activities may be construed to imply additional group risks when this is clearly

not the case. Also, the notion of “excessive risk-taking” applied to asset management activities is used loosely and without a sufficient understanding of the “agency” nature of the asset management business overall.

The very likely effects of the EBA’s Guidelines are an uneven playing field in the remuneration of different asset management providers, depending on whether they would fall within the remit of CRD (as a group subsidiary or as a self-standing asset management company discharging individual portfolio management services under the MiFID), or outside of it (as with independent UCITS- or AIFMD–licensed management companies). Given the extreme competitiveness of today’s global pool for management talent, including a variety of ancillary profiles, different remuneration structures would certainly attract talent away from those firms having to adopt CRD remuneration rules in full. Among these, there often are non-EEA subsidiaries of EU/EEA-based entities that manage portfolios on a delegated basis. We expect that such valuable pools of local resources and local market knowledge, essential given their expertise and proximity to high value markets for European investors, may ultimately dry up as a result of the indirect application of certain very disproportionate requirements under Article 94(1) of the CRD.

In this light, the EBA’s Guidelines stand at odds with the existing AIFM remuneration requirements of the relative AIFM Directive (Annex II), as further substantiated in ESMA’s 2013 *Guidelines on sound remuneration policies under the AIFMD*, as well as with the political compromise reached by the EU co-Legislators with the “UCITS V” Directive and with ESMA’s preliminary orientation in its July 2015 consultation around on *Guidelines on sound remuneration policies under the UCITS Directive and AIFMD*.

Furthermore, in December 2015, the EBA published its *Report on Investment Firms* (EBA/Op/2015/20) concerning the application of CRD-specific remuneration requirements to investment firms (i.e. those authorised under the MiFID regime to discharge discretionary portfolio management on a client-by-client basis). Unlike the abovementioned EBA Guidelines, the Report has articulated very clearly the way that risks in investment firms are different from those in banks, enough to justify a separate and proportionate regime for these non-bank actors (as already provided under the relative ESMA 2013 *Guidelines on remuneration policies and practices*).

**If you have suggestions to remedy the issue(s) raised in your example, please make them here:**

We would suggest closer internal coordination between the competent Commission services, as well as between the EC and EBA staff. We also believe that increased understanding within these institutions about the differences between banking and non-banking activities would facilitate an appropriate outcome.

We would recommend safeguarding the EU securities markets *acquis* and, by doing this, avoid unhelpful read-across and damaging extrapolation from debates of another sector held by bank supervisors to the asset management industry. An opportunity to improve inter-service consultation on the specific issue of remuneration will be offered during the preparation of the

Commission's review of remuneration principles under CRD IV (see Article 161 thereof) by the 30 June 2016. We trust those services involved may draw from the ample and factual evidence presented by our industry on numerous recent occasions to prepare a report (to be addressed to the Council and European Parliament) whose contents reflect and uphold the principle of proportionality in its consistent application across CRD IV and the applicable asset management-specific legislation of the UCITS, AIFM and MiFID Directives.

### **Example 3 of Issue 4 – Proportionality / preserving diversity in the EU financial sector**

#### **To which Directive(s) and/or Regulation(s) do you refer in your example?**

Securities Financing Transactions Regulation

#### **Please provide us with an executive/succinct summary of your example:**

The SFTR contains specific rules for asset managers. We do not believe a horizontal piece of legislation such as the SFTR should impose specific disclosure requirements exclusively applicable to investment funds. Existing regulations (in particular MiFID II, EMIR, UCITS and AIFMD) should be taken into account before developing any new regulation on the reporting and transparency of SFTs towards investors.

#### **Please provide us with supporting relevant and verifiable empirical evidence for your example:**

Chapter IV of the SFTR applies to investment funds only. We consider this approach inappropriate as investment funds are already subject to strict and detailed transparency requirements towards investors under sectorial regulations (UCITS – e.g. reporting guidelines of ESMA/2012/832, Article 28 on the disclosure in the prospectus of cost and fees arising from efficient portfolio management techniques or Article 35 on disclosure in the annual report of exposure obtained through efficient portfolio management techniques, the identity of the counterparty(ies), the type and amount of collateral received to reduce the counterparty exposure, the revenues arising for the entire reporting period together with costs and fees - as well as Directive 2011/61/EU Article 23 and Regulation 231/2013/EU Article 109 and AIFMD, inter alia).

Existing regulations (in particular the transparency requirements under MiFID II, EMIR, UCITS Directive and AIFMD) should therefore be taken into account before considering developing any new regulation on the reporting and transparency of SFTs. This would ensure a better level of homogeneity in terms of disclosure to investors and would avoid unnecessary costs for final investors and would avoid legal uncertainty that could be caused by the need to implement new reporting.

#### **If you have suggestions to remedy the issue(s) raised in your example, please make them here:**

We would recommend that Level 2 measures recognise the existing legal framework ruling AIF and UCITS and that the European Commission provides with any possible gaps between AIFMD, UCITS and SFTR.

Should it be determined that investors need additional disclosure regarding SFT and total return swap use, such requirements should apply across the entire universe of products covered by PRIIPs. If this is not the case, investors in one product will obtain less information – and potentially be less able to make an informed decision – than investors in another product.

#### **Example 4 of Issue 4 – Proportionality / preserving diversity in the EU financial sector**

Unequal treatment of market participants regarding clearing obligations under EMIR

**Please provide us with an executive/succinct summary of your example:**

UCITS' access to liquidity is severely constrained due to the ESMA Guidelines on ETFs and other UCITS issues. According to these Guidelines, UCITS are prohibited from reusing cash obtained through repo transactions for the purpose of collateralising positions arising from OTC derivative trades<sup>9</sup>. Apart from repos, UCITS' access to liquidity is severely constrained since UCITS are under the contractual obligation towards investors to invest their monies in accordance with the relevant investment strategy. Nonetheless, UCITS do not benefit from a comparable exemption in relation to the central clearing.

In our view, the use of cash from repos for the purpose of collateralising centrally cleared derivative transactions does not entail any additional risk for the fund and its investors compared e.g. to deposits with credit institutions which are admitted as reuse of collateral under the ESMA Guidelines. Therefore, UCITS should be allowed to use cash obtained through repo transactions for the purpose of collateralising other transactions subject to central clearing.

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<sup>9</sup> Cf. para. 42, 43 letter j) of the ESMA Guidelines on ETFs and other UCITS issues as amended on 1 August 2014 (ESMA/2014/937).

## Issue 5 – Excessive compliance costs and complexity

### Example 1 of Issue 5 – Excessive compliance costs and complexity

MiFID II – best execution

**To which Directive(s) and/or Regulation(s) do you refer in your example?**

Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments - Article 27 Obligation to execute orders on terms most favourable to the client.

**Please provide us with an executive/succinct summary of your example:**

Under the “best execution” requirements, investment firms have to report to their clients’ data relating to the quality of execution of their transactions on trading venues and systematic internalisers. ESMA shall develop draft regulatory technical standards to determine the specific content, the format and the periodicity of data relating to the quality of execution to be published.

**Please provide us with supporting relevant and verifiable empirical evidence for your example:**

The volume and complexity of current required data under the proposed best execution reporting requirements is seriously disproportionate and will undermine its purpose under Level 1.

Under the proposed ESMA RTS, it seems that billions of data fields under RTS 27 and up to 36,000 data fields under RTS 28 are to be consumed and analysed by investors. The sheer volume and the complexity of these data will not help them in getting a better understanding of the quality of a bank’s best execution practices.

**If you have suggestions to remedy the issue(s) raised in your example, please make them here:**

The unconfirmed benefits of the proposed regime should be measured against the actual costs and effectiveness of implementing such a complex and disproportionate regime. A more appropriate scoping and usable data set is needed, in order to make these data “informative”.

### Example 2 of Issue 5 – Excessive compliance costs and complexity

Lack of harmonisation on tax issues.

**To which Directive(s) and/or Regulation(s) do you refer in your example?**

Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation.

**Please provide us with an executive/succinct summary of your example:**

The Directive on automatic exchange of information is based on the OECD CRS project and has been adopted without any prior consultation.

The Directive refers to many US concepts which are not applicable to most European countries. As a result, the list of exempt accounts and entities is much more reduced compared to the one for FATCA. This situation will involve the disclosure of accounts, the purpose of which is certainly not tax fraud as well as new expensive IT developments which would have been avoided should the directive have been aligned on FATCA.

**Please provide us with supporting relevant and verifiable empirical evidence for your example:**

Withholding taxes currently applied at national level and the fact that in many cases investment funds do not have directly access to reduced withholding tax rates available under tax treaties act as a barrier. The time and costs of recovery of withholding taxes in many cases act as deterrent for investment funds and pension funds to invest in states other than that of their residence where they are normally taxed at a low rate or exempt from taxes from corporate income tax.

2 solutions can be considered:

- The fund is considered as the beneficial owner (or a qualified person) and qualifies for the treaty. This solution, which is supported by the 2010 OECD CIV report, should be applied to all widely held open ended funds.
- The TRACE project.

Given that both Directive 2014/107/UE and Common Reporting Standards of the OECD provide for an exchange of tax information between countries, building on the experience on exchange of information of these initiatives, the implementation of the TRACE (Treaty Relief and Compliance Enhancement) initiative in EU countries should be fostered in order to ease the problem of recovery of withholding taxes and reduce tax barriers on cross-border investments for funds that cannot be considered as beneficial owners.

**If you have suggestions to remedy the issue(s) raised in your example, please make them here:**

The application of internal rates of withholding tax followed by the reimbursement of the excess paid over fiscal conventions constitute a major barrier to the Capital Market Union.

In 2011 the Commission already consulted on taxation problems that arise when dividends are distributed cross border to portfolios and individual investors and asked for possible solutions. Due to specific problems for investment funds to achieve cross border treaty relief (unknown investor base), our favoured solution to solve the problem - also presented as one possible option by the Commission- was to generally abolish withholding tax (WHT) on cross border dividend payments. An alternative approach was to impose an EU-wide limit on the WHT-rate equal to the rate foreseen in double taxation treaties which is 15%. These options should be again considered in the context of the CMU initiative.

### **Example 3 of Issue 5 – Excessive compliance costs and complexity**

**To which Directive(s) and/or Regulation(s) do you refer in your example?**

PRIPs Regulation.

**Please provide us with an executive/succinct summary of your example:**

The PRIIPs Regulation stipulates a temporary exemption from scope for UCITS and other retail investment funds which provide a UCITS-like KIID according to national rules, until at least 2019<sup>10</sup>. The underlying reason for this exemption has been the EU legislator's intention to avoid these funds from additional implementation costs shortly after the efforts of introducing the UCITS KIID a few years back<sup>11</sup>.

Nevertheless, under the current consultation from ESAs on the draft regulatory technical standards to the PRIIPs Regulation, UCITS would be effectively required to produce investor information conforming to the PRIIPs rules. This is due to the fact that the ESAs expect insurance undertakings offering multi-option investment products such as unit-linked insurance contracts to produce specific PRIIPs KIDs on each individual investment option. Since the insurance undertaking offering a unit-linked insurance contract would not be capable of producing such information on each underlying fund, it would refer to the fund provider for assistance and request delivery of the relevant information elements. As a consequence, many fund management companies would be effectively compelled to set up internal projects in order to provide their business partners from the insurance sector with ad hoc PRIIPs-compliant figures on the synthetic risk indicator, performance scenarios and costs.

The details of such elements should be delivered well ahead of the entry into force of the PRIIPs Regulation in order to allow insurance companies to produce PRIIPs KIDs on unit-linked insurance products by 31 December 2016. In any case, it is against the intention of the Level-1 Regulation that fund providers shall be ready for the PRIIPs regime well ahead of its formal implementation date even though they are temporarily exempted from the PRIIPs Regulation.

**If you have suggestions to remedy the issue(s) raised in your example, please make them here:**

EFAMA would suggest the Commission and the ESAs reconsider the proposed approach to the treatment of multi-option PRIIPs under the PRIIPs Regulation having regard to the EU legislator's deliberate choice to exempt investment funds providing a UCITS-like KIID from the duty to implement new information standards. Should the approach remain unchanged, we request postponement of the entry into force of the PRIIPs Regulation in order to facilitate practical implementation of the PRIIPs standards for investment funds.

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<sup>10</sup> Article 32 of the Regulation (EU) No 1286/2014 (PRIIPs Regulation).

<sup>11</sup> Cf. recital 35 of the PRIIPs Regulation.

## Issue 6 – Reporting and disclosure obligations

### Example 1 of Issue 6 – Reporting and disclosure obligations

Streamlining of reporting requirements in terms of data standards and contents.

**To which Directive(s) and/or Regulation(s) do you refer in your example?**

EMIR, AIFMD, MIFID II/MIFIR, SFTR, UCITS, SOLVENCY II, MMF

**Please provide us with an executive/succinct summary of your example:**

In the aftermath of the financial crisis several new or enhanced reporting requirements have been imposed upon asset managers and the broader financial sector. These pertain to individual transaction data on the one hand and to positions and their inherent risks on the other hand.

The applicable and pending requirements for *transaction-level reporting* under EMIR, MiFID II/MiFIR and SFT Regulation display considerable differences in terms of reporting details, reporting channels, data repositories and applicable IT standards. In particular [...]

The same is true with regards the *regulatory reporting* on positions and risks required under AIFMD, UCITS Directive and MMF Regulation as well as to *reporting obligations for institutional investors* under Solvency II/CRR which require delivery of data and further support services by asset managers. In addition, reporting is often insufficiently standardised which causes significant problems in the collection of data as currently experienced under AIFMD. In particular there are idiosyncrasies in the AIFMD reporting requirements of each member state, as many seem to use different template layouts and different software versions to the main ESMA requirements which means that each country-specific particularity has to be taken into account and no single reporting system for the whole EU exists. This leads to completing the AIFMD reporting becoming a very time and resource intensive exercise, as each AIF report (quarterly) has over 200 data fields to fill out. Some of the data points are varied and open to interpretation and calculation, whereas others need converting to a specific file format for transmission. This data is then send to and validated by the local regulators before passing it on to ESMA.

Asset managers provide assistance to their institutional clients, in particular insurance companies and banks, for fulfilling regulatory reporting duties incumbent upon these entities. Also in this regard, different risk indicators apply to investment funds under Solvency II and the CRD IV regime, thus adding to the complexity and costs of risk reporting. In addition, different national requirements for fund tax reporting constitute an additional barrier to the development of cross-border offer of funds, and should be harmonised as far as possible.

All these different data standards, formats and contents presents a huge burden for the industry in both operational and financial terms and impedes efficient supervision concerning in particular macroeconomic risks. Enhancing consistency of regulatory reporting is therefore needed in order

to enable the regulators to use the stored data for the purpose of detecting systemic risk and to keep the administrative burden for market participants at a reasonable level. Moreover, there is also an urgent need for stronger integration in technological terms. The use of common reporting channels and standardised IT formats would enable regulators to better use the loads of submitted information for supervisory purposes, especially for prompt detection of systemic risk and should entail cost savings for market participants such as fund management companies which may run into millions of Euros.

**If you have suggestions to remedy the issue(s) raised in your example, please make them here:**

We would welcome a stronger and efficient integration of regulatory reporting obligations relating to both transaction and position data. In our view, the Commission should launch an initiative for stocktaking of the existing reporting rules, including those awaiting implementation under the pending EU initiatives, and on this basis, should develop a regulatory approach to streamlining of the reporting requirements in terms of data standards and formats.

- As a starting point, data standardisation along the whole value chain should be based generally on ISO 20022. Overall we believe that ISO 20022 offers the best potential for cost-effective and future-proof implementation. It has a strong methodology and model for defining and structuring financial data, and an open governance process that ensures a level playing field for standardisers and users. It also offers expert international scrutiny of submitted content. ISO 20022 is now being implemented in a growing number of markets, which results in increasing opportunities for automation and interoperability.
- Furthermore, we call on the European Commission to ensure that regulatory reporting requirements are accompanied by practical implementation deadlines which allow all market participants to implement new regulatory obligations on time. Lessons should be learned from the practical experience with EMIR reporting obligations where the lack of sufficient implementation time combined with legal and operational uncertainty due to undefined ESMA standards have significantly hampered the ability of the market to timely implement the relevant technical specifications.
- Another possible solution to the varying reporting requirements for AIFMD may be to create a central data collation point within ESMA and which will ensure one format and with corresponding data requirements that would relieve the necessity of NCAs having to collect this data and pass in on to ESMA.
- Use the existing transaction reporting (TR) (as set in EMIR and SFTR) and the existing data under MiFID I to build up a Consolidated Tape across instruments.

### **Example 2 of Issue 6 – Reporting and disclosure obligations**

Provision of UCITS KIID to professional investors

**To which Directive(s) and/or Regulation(s) do you refer in your example?**

PRIIPs Regulation / UCITS Directive

**Please provide us with an executive/succinct summary of your example:**

The UCITS Directive requires UCITS management companies to produce a key investor information document (UCITS KIID) for each managed UCITS regardless of whether the specific fund is meant to be distributed to retail investors. Similarly, the obligation to provide a UCITS KIID is not limited to retail distribution, but applies to any fund marketing activity. As a consequence, UCITS managers are under the obligation to produce a KIID for funds set up for professional investors only and/or to provide the KIID to professional investors wishing to buy fund units even though it contains simplistic information designed for the retail public. In our view, these requirements are excessive since professional investors have generally no interest in the concise product factsheet which is the KIID, but require more detailed information which often needs to be tailored to their specific needs. The PRIIPs Regulation rectifies these idiosyncrasies by simply requiring the provision of a key information documents (PRIIP KID) to retail investors<sup>12</sup>.

**If you have suggestions to remedy the issue(s) raised in your example, please make them here:**

We would suggest aligning the UCITS rules on production and provision of the KIID with the new standards introduced by the PRIIPs Regulation.

**Example 3 of Issue 6 – Reporting and disclosure obligations**

Unnecessary dual sided reporting requirements

**To which Directive(s) and/or Regulation(s) do you refer in your example?**

EMIR/SFTR

**Please provide us with an executive/succinct summary of your example:**

Double sided reporting was supposed to increase the quality of data at a low operational cost. It proves to be unduly burdensome, costly and complex. It creates many errors signals that reduce the quantity of data processed in contradiction with the objective of getting an immediate overview of the market.

By contrast, in the USA, reporting under Dodd Franck Act is single-sided, made by the “most active” counterparty.

As consequence of the double sided reporting could be that counterparties (e.g. fund management companies) would need, in principle, to organise an uneasy transfer of data on time for them to be able to control what is reported in their name. Some buy-side actors have required their “active” counterparty, i.e. the investment bank or the clearing broker for exchange traded or centrally cleared deals, that they deal with this obligation.

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<sup>12</sup> Cf. Art. 5(1) of the PRIIPs Regulation. Furthermore, the obligation to provide the PRIIPs KID applies only in case of advice or sale services to retail investors (see Art. 13(1) of the PRIIPs Regulation).

**If you have suggestions to remedy the issue(s) raised in your example, please make them here:**

EFAMA would suggest to adopt the single-sided reporting obligation which will significantly facilitate the communication of data available to regulators by removing the requirement under the dual-sided reporting to match trades (both legal entity identifiers (LEIs) and unique trade identifiers (UTIs – which are not yet standardised), reduce the operational complexity of the current reporting framework, lower costs, and remove the reporting burden for all reporting entities as required by EMIR.

**Example 4 of Issue 6 – Reporting and disclosure obligations**

Useless front/ back loading

**To which Directive(s) and/or Regulation(s) do you refer in your example?**

EMIR

**Please provide us with supporting relevant and verifiable empirical evidence for your example:**

Due to the difference of timing between date of application and effective date of implementation, we have come to the strange situation where deals no longer live at the time of actual implementation of the reporting obligation in February 2014 could be reportable if dealt after august 2012, date of application of EMIR. New regulation should never be retroactive and should not apply to deals concluded prior to its application date.

The aim of EMIR reporting is to provide authorities with a better view of existing positions or market exposures by different stakeholders on derivative markets. Reporting deals that are no longer active is meaningless. More generally, with a view on all the regulations that require reporting, front and back loading should be very limited: first short term deals will disappear and should not be loaded, small size deals should be disregarded as insignificant, front loading should be limited to few larger actors.

The price for derivatives traded bilaterally may vary if initial margin is provided or not. Loading the positions on the new regulation and applying a new collateral obligation would simply change the economic parameters of the transactions. In that sense as well back/front loading (that does not concern reporting) should be avoided.

**If you have suggestions to remedy the issue(s) raised in your example, please make them here:**

EFAMA would suggest to suppress the requirement for front and back loading of existing deals when a new legislation is passed, except for reporting long term deals of significant size that impact the assessment of systemic risk. This, for instance, could be applied in the final text of the proposal on securitisation.

## Issue 7 – Contractual documentation

### Example 1 of Issue 7 – Contractual documentation

Protracted delays in the adoption of the “UCITS V” implementing Regulation

**To which Directive(s) and/or Regulation(s) do you refer in your example?**

The UCITS V Directive (2014/91/EU) and its delegated Regulation

**Please provide us with an executive/succinct summary of your example:**

Protracted delays in the adoption of the delegated Regulation by the Commission and placed the UCITS asset management industry – including those institutions providing depositary and other UCITS services – in the impossibility of meeting the Directive’s requirements on time for the transposition deadline of 18 March 2016.

**Please provide us with supporting relevant and verifiable empirical evidence for your example:**

The most important challenges that UCITS asset management companies and depositary institutions in Europe are facing are as follows:

I. Legal and operational challenges as a result of having only until the 18 March 2016 deadline to update existing agreements for countless UCITS fund ranges and AuM volumes, between:

- The depositary and the management company/fund; and
- The depositary and its entire sub-custody chains, including entities located in non-EU jurisdictions, with the contents of the Level 2 Regulation constituting key parameters for the drafting of the contractual documentation.

Moreover, new complications arise by having to meet those “new” requirements not foreseen under the analogous AIFMD regime, e.g. the implementation of the independence requirements between the asset management company and the depositary, and potentially delegates of the depositary, necessarily calls for a sufficient amount of time following the release of the Level 2 for firms to assess if their current arrangements are compliant, initiate and implement any required changes and carry out an adequate due diligence process where required. The additional need for independent legal advice on local insolvency law regimes for non-EU third countries would be another certain complicating factor;

II. Operational risk linked to implementing procedures and setting-up the necessary infrastructure to comply with the Level 2 Regulation. The volumes involved require scalable solutions aimed at reducing these risks and such short time-frames do not allow for this;

III. Fragmented implementation across EU Member States, undermining legal certainty, where each NCA would implement the “UCITS V” package on its own domestic terms and calendars, with an opportunity (as being considered by certain NCAs) to opt for a parallel regime of both new EU

and old domestic rules over a one- or two-year period;

IV. Costs in terms of having to re-negotiate or amend thousands of appointment contracts, service-level agreements (SLAs) and their appendices twice in the matter of six months (i.e. once to comply with the Directive's transposition deadline and subsequently to adhere to the delegated Regulation's probable application date). The time and efforts of internal legal and compliance teams could be used more efficiently. Furthermore, firms will have to rely extensively on the costlier role for external consultants within project teams;

V. Legal uncertainty, notably in relation to the liability regime. How can the liability regime in relation to the depositary apply as of 18 March 2016 at all if the exact obligations of the depositary are still unclear in the absence of the Level 2 Regulation?

VI. Problematic time-line for the adaptation of disclosures on UCITS manager remuneration in prospectuses and annual reports in the absence of ESMA's final Guidelines on sound remuneration policies for UCITS managers by the Level 1 transposition deadline.

**If you have suggestions to remedy the issue(s) raised in your example, please make them here:**

Bearing these essential considerations in mind, but cognisant of the difficulties in amending the transposition deadline of the Level 1 Directive (i.e. probably the best solution), EFAMA, acting jointly with the representatives of the European depositary and trust industry, had called on the European Commission to issue –possibly in coordination with ESMA and its NCA Members – appropriate guidance and/or communication to the UCITS industry as to transitional measures to be put in place by the industry during the period between 18 March 2016 and the application date of the UCITS V implementing measures.

We had also suggested a delay of the delegated Regulation's date of application, from the envisaged six to nine months from its entry into force, thereby granting the UCITS industry as a whole more reasonable time to comply with the new rules.

Finally, we had noted that, even in those areas where the corresponding delegated acts accompanying the earlier AIFM Directive (2001/61/EU) of 8 June 2011 do overlap with UCITS V, they can – by nature – not achieve the desirable degree of legal certainty that the European depositary institutions absolutely need, as they strive to meet their enhanced responsibilities under the recently revised "UCITS V" framework. Only the final UCITS V delegated act can provide this certainty.

As the draft Regulation has only been adopted by the College on 17 December 2015, opportunities for remedies appear to have been exhausted.

EFAMA would recommend that implementing measures be adopted and published well in advance of the transposition deadlines in the future.

## Issue 8 – Rules outdated due to technological change

### Example 1 of Issue 8 – Rules outdated due to technological change

**To which Directive(s) and/or Regulation(s) do you refer in your example?**

All pieces of EU legislation which require the sending of documents to national regulators

**Please provide us with an executive/succinct summary of your example:**

All documents to be sent to national regulators could be sent in electronic format, without faculty for national regulators to require paper original documents while currently some national regulators require paper documents and even more the original papers.

**Please provide us with supporting relevant and verifiable empirical evidence for your example:**

For instance, the German securities regulator Bafin requires KYC documents in paper version + in original version

**If you have suggestions to remedy the issue(s) raised in your example, please make them here:**

All pieces of EU legislation regarding asset management companies should allow them to send fully electronic documents to national regulators. This adaptation of EU legislation would be fully in line with the general objective of the European Commission to achieve a Digital Agenda.

### Example 2 of Issue 8 – Rules outdated due to technological change

Increasing efficiency of investor communication.

**To which Directive(s) and/or Regulation(s) do you refer in your example?**

UCITS, PRIIPs.

**Please provide us with an executive/succinct summary of your example:**

In view of the technological progress and the increased use of electronic communication devices, we believe that the legal requirements for providing information to investors should be put under closer scrutiny. For example, the UCITS Directive and the PRIIPs Regulation still consider provision of the investor information document in paper as the standard case while requiring additional safeguards for the use of a website as an information tool<sup>13</sup>. Provision of the key information with interactive features or in a more interactive way, e.g. by means of a mobile app, is generally considered not sufficient to meet the legal requirements, even in cases the investor agrees and even though it would be more engaging for the younger generation of investors used to deal with their personal matters on mobile devices.

Moreover, the UCITS Directive gives Member States significant leeway in determining how

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<sup>13</sup> Cf. Article 38(2) of Regulation (EU) 583/2010 (UCITS KIID Regulation, Article 14(5) of the PRIIPs Regulation.

relevant information needs to be provided to investors. Under AIFMD, conditions for informing the existing investors are not at all specified and generally determined by the national product regimes. As a result, different standards and practices can be observed at national level.

**Please provide us with supporting relevant and verifiable empirical evidence for your example:**

A UCITS which is domiciled in Luxembourg and marketed in Germany, France, Belgium, Austria and some other Member States makes amendments to its investment strategy. In these circumstances, the fund manager needs to establish in each jurisdiction (1) which requirements the applicable national law imposes on the respective information of investors and (2) what interaction with the local distributor network is necessary in order to fulfill these requirements. Since provision of a durable medium to several thousands of investors involves significant costs, the issue of cost reimbursement is also quite relevant.

**If you have suggestions to remedy the issue(s) raised in your example, please make them here:**

We believe that the European Commission should consider how the increased use of electronic communication tools could be utilised in order to ease the financial and administrative burden of providing information to investors.

## Issue 9 – Barriers to entry

### Example 1 of Issue 9 – Barriers to entry

**To which Directive(s) and/or Regulation(s) do you refer in your example?**

UCITS Directive, AIFMD and ELTIF Regulation article 26 para 1.

**Please provide us with an executive/succinct summary of your example:**

Investment fund passports - Lack of harmonisation in relation to marketing requirements for UCITS

Divergent national regulators' fees on imported funds (AIFs and/or UCITS)

When an EU passport is granted, MS should not be able to gold-plate this with additional requirements.

In order to facilitate cross-border fund distribution, it is very important to introduce smooth and standardised processes and to avoid as much as possible national regulations gold-plating the EU rules. This is of particular importance in relation to the functioning of the EU passports since additional requirements in this regard act as deterrents for mid-sized and smaller fund managers to offer their products cross-border. Currently, UCITS marketing and dealing with redemption requests/other payments to investors are subject to diverging national requirements under Art. 91(3) of the UCITS Directive. In this regard, some Member States require identification of a local financial institution as a paying agent who satisfies redemption requests and makes other payments to investors. This requirement which is not foreseen by the UCITS Directive significantly increases marketing costs of UCITS in the relevant jurisdictions. An extensive harmonisation of product-related marketing rules and further bundling of supervisory competences at the fund's home Member State authority has also the potential of reducing costs and thus should enhance the economic appeal of cross-border distribution.

An example of the above issue is the UCITS and ELTIF legislations, which impose obligations of national information and payment "facilities".

**Please provide us with supporting relevant and verifiable empirical evidence for your example:**

- With regard to differing national regulators' fees: From a fund managers' perspective, initial set-up costs should be further reduced by lowering the related administrative fees, especially those tied to the necessary notification for the fruition of a fund "product passport". In general, fund set-up costs include notary and advisory fees relating to the initial structuring, home NCA authorisation fees, expenses for the preparation of prospectuses and offering documents, and cross-border notification fees where a manager wishes to avail itself of a "passport". Despite the original intent of the cross-border notification regime, the number of notification files – one for each of the host competent authorities in the Member State where the manager intends to market the fund's shares or units – remains overly burdensome if compared to the actual use of the information by the host authorities. In this sense, we would suggest the

Commission seeks to identify common criteria to help NCAs set the costs related to the exercise of their supervisory activities. Such costs currently differ from Member State to Member State: creating a single harmonised system of criteria through which national supervisory costs can be calculated, in line with what has already been done for sanction regimes, would help removing barriers from cross-border marketing, reducing costs and incentivising economies of scale.

- With regard to national tax laws as barriers: National tax law can indeed be a barrier for export and accordingly also at the same time a corresponding barrier to enter a foreign market in another EU member state. In some countries withholding tax is imposed on distributions from local investment funds. In many cases such a withholding tax makes a barrier for selling units in investment funds cross border within the EU. The reason is that the withholding tax in many cases will be an additional tax for investors who are not in a tax position in their country of residence and accordingly do not have a local tax in which the withholding tax can be credited. In other cases the time and cost of recovery of withholding tax in the country where the investment fund is established and filing local tax returns in the investors' country of residence will discourage investors from investing in foreign investment funds.

Also national tax law in some cases discourages investment management companies to manage foreign funds and to exploit the company management passport. In some countries UCITS and AIFs is not exempted from the so called "Effective Seat of Management" doctrine, which means that the investment funds managed cross-border cannot remain taxable in the country of establishment which in practice creates a tax mismatch that discourages cross-border management of investment funds.

- With regard to marketing requirements for funds: It may still require several weeks before being allowed to market in the host Member State. In the case of umbrella funds, the approval on the sub-fund to be marketed is not enough (we need an agreement on all the sub-funds composing the umbrella fund, which requires obviously more time for getting the approval from the regulator)

The UCITS and ELTIF legislations impose some obligations on "facilities" for payments and information which have to be physically located in all Member States where marketing takes place, which were meaningful at the time of the initial UCITS Directive but are outdated now, when information can easily be received by internet or by phone for instance. These provisions can also increase the administrative costs for instance in the case of the ELTIF and therefore the final costs for the end-investor. Today the access to information, payments and issue handling services can be provided by other means and without having a physical facility in each member state in which the ELTIF/UCITS is marketed. It would, therefore, be appropriate to give the possibility to the manager to put in place either physical facilities or on-line and telephone ones, bringing the requirements in line with the existing market conditions. The acknowledgment by the European Commission of considering the possibility of electronic or phone distance "facilities" would be fully in line with the general Commission's objective to

achieve a Digital Agenda.

- ❑ Appointment of a local paying agent or representative agent: The modalities of UCITS marketing and dealing with redemption requests/other payments to investors are subject to diverging national requirements under Art. 91(3) of the UCITS Directive. In this regard, some Member States require identification of a local financial institution as a paying agent who satisfies redemption requests and makes other payments to investors or as an information agent whose role is to provide funds information to local investors. These requirements which are not foreseen by the UCITS Directive significantly increases marketing costs of UCITS in the relevant jurisdictions, and is not used by investors.
- ❑ Extensive review of marketing materials by host regulators whatever the means of communication (paper, internet, social networks). The possibility let to national supervisory authorities of reviewing/approving all marketing/sales documentation related to foreign domiciled UCITS marketed in their respective domestic market (option they use intensively) tends to induce implementing mechanisms/obligations that are more stringent in terms of investor disclosure/information and increase marketing costs of UCITS in spite of the passporting notification system set out by UCITS IV Directive. One of our members highlighted the fact that the extra cost may represent up to 15% per host country as compared to initial charge, not to mention the need for staff to acquire the expertise on such local regulations/constraints.
- ❑ Modification of Fund Documentation – Shareholders’ letters: As regards Shareholders’ letters, some national regulators may have specific requirements which are considered by market participants as burdensome and sometimes costly from an administrative standpoint and that add some further delays to cross border distribution of funds throughout Europe.

**If you have suggestions to remedy the issue(s) raised in your example, please make them here:**

- ❑ Building more or less implicit barriers, sometimes merely administrative, by host Member States tends to reduce the reality of the freedom to distribute product throughout Europe. For this reason, we believe marketing standards (including but not limited to the means of communications) for UCITS making use of the EU passport for marketing their units cross-border should be harmonised. Indeed, an extensive harmonisation of product-related marketing rules, including the means of communication, has the potential of reducing costs and thus should enhance the economic appeal of cross-border distribution.
- ❑ In terms of UCITS, the possibility of waiving the notification process altogether should be investigated with the perspective of introducing a truly unified Single Market in the longer term.
- ❑ In the case of ELTIFs, ESMA will need to prepare RTS concerning the local facilities. We would propose that specification of the facilities as suggested by ESMA can also include the possibility to set up such facilities exclusively on-line, but we consider that it would be better to clearly indicate that in the text of the RTS.
- ❑ With regard to regulator’s national fees, as these vary significantly, there is a need for harmonisation of the UCITS marketing files deposits and fees. The option of a single European

tariff regime for the setting-up of business and use of the UCITS & AIFM passport regimes should be explored, so as to limit divergences, intentional “gold-plating” and facilitate the take-up of an investment management business. With regard to the multiple notification requirements, we would invite the Commission to consider centralising notifications to ESMA in the future, once an initial authorisation has been granted by one Member State NCA.

### Example 2 of Issue 9 – Barriers to entry

National tax reporting to be sent to fund investors (e.g. Belgium, Austria, UK): as they are not harmonised across Europe, they represent barriers to entry for non-local players.

**Please provide us with an executive/succinct summary of your example:**

We think the European Commission should be aware that national tax reporting that need to be prepared by investment funds for their investors (e.g. Belgium, Austria, UK) are based on national legislations’ requirements. Such tax reporting obligations are not harmonised across Europe and therefore represent barriers to entry for non-local players and consequently to the development of cross-border offer of funds.

**Please provide us with supporting relevant and verifiable empirical evidence for your example:**

Local rules demand asset managers to provide specific data that are absolutely necessary to get the appropriate tax treatment. In some countries, foreign domiciled funds are even required to appoint for that purpose a tax representative while being marketed to the public which creates additional complexity and incurs extra costs for non-domestic funds (i.e tax representative fees + newspaper publication fee of this tax data).

The multiplication of these local specificities is an impediment to develop cross border distribution of funds. The same point is valid when addressing third country markets.

**If you have suggestions to remedy the issue(s) raised in your example, please make them here:**

Set a single pan-European tax-reporting format for EU funds. Within the EU, the long-term objective is to develop a harmonised framework for taxation of savings and investment products.

### Example 3 of Issue 9 – Barriers to entry

**To which Directive(s) and/or Regulation(s) do you refer in your example?**

Securitisation Regulation

**Please provide us with an executive/succinct summary of your example:**

Securitisation Regulation vs. AIFMD and MiFID (for eligibility for investment firms) and Solvency II (for capital constraints).

- Sponsor’s status: CLOs are often managed by independent asset managers and as such usually do not have an "originator" or an “original lender” from whom the portfolio is purchased and who is raising capital through the sale of the portfolio from its balance sheet.

Nevertheless, the STS Securitisation Regulation keeps the CRR definition of “sponsor”, which includes either a “credit institution” or an “investment firm”. Thus, whether a CLO manager qualifies as a “sponsor” under the CRR will depend upon the MiFID authorisations (or permissions) that the collateral manager holds from its EU home country supervisor. However most of EU national supervisors do not consider UCITS managers nor AIFMs as “investment firms”.

AIFMs are not recognised as sponsors through the Securitisation Regulation for ensuring risk retention for managed CLOs, while MiFID firms are: it raises an issue of level playing field among market participants, and therefore a barrier to entry.

- Solvency II: The existing Solvency II regime bases its risk weighting on securitisations either meeting the requirements of a “Type 1” or “Type 2” securitisation. While there are some similarities to the STS criteria, the Solvency II criteria are fundamentally different.

With Solvency II going live as of 1 Jan 2016, insurers are faced with having to implement the Solvency II due diligence and risk weighting requirements, and then needing to re-adapt these to reflect the considerable changes that the STS Regulation will bring. Adapting systems and internal controls to reflect the differences will not be a minor change.

**If you have suggestions to remedy the issue(s) raised in your example, please make them here:**

- Sponsor’s status: We would recommend amending the Securitisation Regulation to allow for recognising AIFMs to be sponsors in the context of risk retention rules for managed CLOs. This would:
  - Enable non MIFID asset managers to act as sponsor for the purpose of the retention, rather than requiring them to act as originators as is currently the case;
  - Create a common level playing field for all market participants as asset managers would be allowed to act as sponsors in both European and US environments.
- Solvency II: We would therefore ask the Commission to give some clarity over their intent as to how STS securitisations are meant to fit with the existing Type 1 – Type 2 rules in Solvency II:
  - will STS rules replace, or add to Solvency II rules; or
  - should the STS rules change the current article 177 in Solvency II?

Additionally, we would suggest that the European Commission proposes a modification to the Solvency II rules concerning securitisation rather than wait until the securitisation framework is agreed. Should this not be the case, insurers may decide to exit the securitisation market permanently.

## Issue 10 – Links between individual rules and overall cumulative impact

### Example 1 of Issue 10 – Links between individual rules and overall cumulative impact

UCITS guidelines limit access to cash for collateralisation of centrally cleared transactions

**To which Directive(s) and/or Regulation(s) do you refer in your example?**

(If applicable, mention also the articles referred to in your example.)

UCITS, EMIR, G20 Requirements

**Please provide us with an executive/succinct summary of your example:**

UCITS' access to liquidity for the purpose of collateralising derivative transactions is currently gravely inhibited due to the ESMA Guidelines on ETFs and other UCITS issues.

**Please provide us with supporting relevant and verifiable empirical evidence for your example:**

According to the ESMA guidelines, the purchase price of a repo contract shall be treated as collateral in itself and may not be reused or reinvested by the fund<sup>14</sup>. Since clearing banks accept only a limited range of non-cash collateral (not included in all UCITS), liquidity demand in UCITS will increase with broader application of EMIR. The ESMA Guidelines deprive UCITS of the main liquidity source, as short-term credits are only allowed up to 10% of the fund's NAV and generally being used for handling fund redemption requests. Moreover, UCITS are generally not able to use cash funds collected from investors as collateral, since they are contractually obliged to invest these inflows in accordance with the relevant investment strategy.

**If you have suggestions to remedy the issue(s) raised in your example, please make them here:**

In our view, the use of cash from repos for the purpose of collateralising centrally cleared derivative transactions does not entail any additional risk for the fund and its investors compared e.g. to deposits with credit institutions which are admitted under the ESMA Guidelines. Therefore, UCITS should be allowed to use cash obtained through repo transaction for the purpose of collateralising another transactions subject to central clearing.

### Example 2 of Issue 10 – Links between individual rules and overall cumulative impact

Problematic definition of the target market under MiFID II.

**To which Directive(s) and/or Regulation(s) do you refer in your example?**

MiFID II

**Please provide us with an executive/succinct summary of your example:**

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<sup>14</sup> Cf. para. 42, 43 letter i) and j) of ESMA Guidelines on ETFs and other UCITS issues (ESMA/2014/937).

The MiFID II regime requires the definition of a target market by product manufacturers and distributors taking into account the risk and reward profile and charging structure of a product<sup>15</sup>. Similar obligations will be imposed on insurance undertakings and distributors under the new IDD<sup>16</sup>. Currently, there is significant uncertainty relating to the specific criteria for identifying the target market of a product and different industry initiatives have been launched at national level in order to develop a common understanding on the concept of the target market.

Current discussions within the industry show that the target market concept has the potential to significantly change the retail distribution landscape. In order to avoid unintended consequences and additional barriers for cross-border distribution, the following actions are essential:

- ❑ Overall, a common approach to identification of the target market would be necessary since (1) many products are distributed cross-border and by different distribution channels which should be able to rely on the same description of the target market by the product manufacturer and (2) the target market specification at the manufacturer's level shall be disclosed in the PRIIPs KID according to the draft RTS currently consulted by the ESAs<sup>17</sup>.
- ❑ The approach to determining a target market has to be feasible in practice and should allow for implementation by all distribution channels legitimated by MiFID II, including execution-only distribution. Any attempts to introduce target market criteria which effectively anticipate a suitability test on a client incumbent only in case of investment advice must be rejected as impracticable in terms of non-advisory distribution. In particular, for non-complex products eligible to be sold via execution-only services, the target market must be set very broadly in order not to hamper the provision of these services which in accordance with MiFID II do not require any information on personal circumstances to be collected from the client.

In addition, it should be clear that the manufacturer of a specific financial product cannot provide for a target market definition which takes into account investors' portfolio structures comprising many different investments.

**Please provide us with supporting relevant and verifiable empirical evidence for your example:**

A UCITS (say, a bond or an equity fund) can be sold to investors on their initiative through execution-only services. When using the execution-only channel, the distributor are not obliged to obtain any information from the potential client, but is allowed to proceed with the purchase order as requested. If the target market criteria were to imply collection of personal information e.g. on the investment objectives, knowledge and experience or risk tolerance of a client, distribution of non-complex products via execution-only would be no longer possible.

**If you have suggestions to remedy the issue(s) raised in your example, please make them here:**

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<sup>15</sup> Cf. Art. 24 para. 2 of the Directive 2014/65/EU.

<sup>16</sup> Cf. Art. 25 of the IDD (as adopted by the Council).

<sup>17</sup> Cf. Joint Consultation Paper on PRIIPs Key Information Documents from 11 November 2015, Article 4(3) of the draft RTS.

We would suggest that the Commission works together with the ESAs and the market participants towards a viable concept of the target market which should allow for straightforward implementation. For financial instruments that are deemed non-complex for the purpose of execution-only services, the target market should be defined as the mass retail market in order to account for the effective lack of personal information in the execution-only distribution as admitted by the MiFID II legislator.

## Issue 11 – Definitions

### Example 1 of Issue 11 – Definitions

Diverging concepts of marketing/private placement in the EU financial services frameworks.

**To which Directive(s) and/or Regulation(s) do you refer in your example?**

Prospectus Directive, future Prospectus Regulation, AIFMD

**Please provide us with an executive/succinct summary of your example:**

The current Prospectus Directive<sup>18</sup> as well as the proposed Prospectus Regulation<sup>19</sup> require a prospectus in case of a public offer while allowing for certain specified exemptions (e.g. an offer to fewer than 150 non-qualified investors). In contrast, the AIFMD requires a marketing notification for any offering or placement of fund units at the initiative of the AIFM<sup>20</sup> and provision of information similar to a prospectus before investors invest in fund units<sup>21</sup>. This disequilibrium in marketing opportunities discriminates against AIFs especially when it comes to a non-public offering to a limited number of professional investors. Moreover, depending on their structure, closed-ended funds might need to comply with both EU frameworks and hence deal with different understandings of placements for the same marketing activity.

**Please provide us with supporting relevant and verifiable empirical evidence for your example:**

A structured note on the S&P 500 index may be offered to investors on a cross-border basis without the need to produce a prospectus as long as the offer reaches no more than 150 non-qualified investors in each EU Member State. In contrast, an AIF investing in the S&P 500 securities is bound in any case to undergo a marketing notification and to produce a prospectus-like information document. This applies also to non-public offering to a limited number of professional investors.

**If you have suggestions to remedy the issue(s) raised in your example, please make them here:**

European law should provide for a coherent concept of a private placement regime throughout all regulation related to offers or placements of financial instruments. The proposal for a Prospectus Regulation acknowledges that in certain circumstances the regulatory requirement of a prospectus is disproportionate. This should equally pertain to investor information required under AIFMD in case of fund unit placements especially in light of the strict regulation applicable to the product provider.

### Example 2 of Issue 11 – Definitions

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<sup>18</sup> Cf. Art. 3 para. 1 and 2 prospectus Directive (Directive 2003/71/EC).

<sup>19</sup> Cf. Art. 4 para. 1 and 2 in connection with Art. 1 para. 3 of the draft prospectus regulation.

<sup>20</sup> Cf. Art. 4 para. 1 lit (x) in connection with Art. 31 para. 2 of the AIFMD (Directive 2011/61/EU).

<sup>21</sup> Cf. Art. 23 para. 1 of the AIFMD (Directive 2011/61/EU).

Inconsistent application of rules in UCITS funds across Member States.

**To which Directive(s) and/or Regulation(s) do you refer in your example?**

UCITS Directive 2009/65/CE

Please refer to the ESMA Discussion Paper on share classes of UCITS (ESMA/2014/1577), specifically paragraph 10 et seq. listing the types of share classes that ESMA would deem as “non-compatible” with the underlying strategy.

**Please provide us with an executive/succinct summary of your example:**

Across European countries, practices may vary and impair competition among UCITS managers or threaten the level playing field that is intended.

In particular, we believe that the use of share classes by UCITS to respond to investor needs should not be inhibited.

**Please provide us with supporting relevant and verifiable empirical evidence for your example:**

Share classes are essential tools for cost-efficient fund management in the European and global context. They allow fund managers to respond to investors’ needs relating to e.g. maximum/minimum investment amounts, types of fees and charges, denomination of currency, allocation of revenues etc. in a prompt and cost-efficient manner all while maintaining a common investment strategy. Another significant advantage from an investor’s perspective derives from the efficiencies that are generated from the economies of scale tied to the management of a larger underlying pool of assets and visible in lower administration and transaction costs. This comes as a result of investors simply opting to switch from one share class to another, instead of triggering an additional transaction (in turn resulting in a higher portfolio turnover) every time they subscribe / redeem into / out of a fund. Specifically for a large institutional investor, the larger a fund and broader the share class offering, the lesser the risk from concentration. In certain jurisdictions, for instance, institutional investors are only allowed to invest in a fund that has sufficiently diversified liabilities (i.e. investors), that could better amortise investment losses or the rare event of the fund’s closure.

Economic benefits accrue to managers as well, especially where economies of scale translate into a larger mutualisation of costs; i.e. rather than launching several and separate individual funds, each customised to meet investor demands albeit all sharing the same investment strategy - proliferating a product offer with considerable regulatory approval, set-up, and marketing costs – far greater efficiencies can be achieved by allowing more investors into one single fund with several customised share classes in turn based on the same “engine”, i.e. the fund manager’s expertise in delivering the same strategy.

In connection with cost mutualisation and in the backdrop of the worldwide competitive landscape, ESMA should bear in mind that the capacity to create different share classes is also an important factor that allows the European asset management industry to therefore i) manage larger funds to more effectively face-off competition from non-European providers, while helping to resolve the problem of excessive fund fragmentation noticeable in Europe; and ii) to offer UCITS

shares outside the fund's base currency area to meet rising UCITS demand in non-EU, third-country jurisdictions (particularly Asia). A broader array of available share classes would also prove competitively advantageous in drawing more non-European investors towards the UCITS product brand as well.

While welcoming a common approach to the use of share classes by UCITS as envisaged by ESMA in its 2014 discussion paper, we caution against hampering the existing use of share classes for the efficient management of various investors' demands. In its discussion paper, ESMA has preliminarily adopted the view that only currency-hedged share classes would be consistent with the underlying strategy of the fund. A view that in our opinion would not be justified, as currently, in some Member States, duration-hedged share classes, as well as equity market index-hedged share classes, have been authorised to meet international investors' demands and have worked well.

As was noted in the European Commission's 2006 White Paper on enhancing the single market framework for investment funds, there is still a proliferation of small funds in Europe, where the larger the pool of assets, the more likely is the opportunity to achieve economies of scale. Such economies can in turn lead to a reduction in charges or better performance for the investor as a result of scale savings. Whilst the focus of White Paper (and in turn the updating of the Directive to UCITS IV) was on other methods to achieve larger pools – e.g. master-feeder arrangements and fund mergers - the ability to create share classes within a single UCITS fund also delivers such an outcome via the pooling of assets of investors who all seek exposure to the same underlying portfolio of investments, albeit with a degree of customisation.

As an example of the degree of fund fragmentation in Europe, the following EFAMA figures are striking: for the fourth quarter of 2014, the average size of a UCITS fund compared to the average of a U.S. mutual fund was of € 245 million against € 1.8 billion respectively.

**If you have suggestions to remedy the issue(s) raised in your example, please make them here:** Specifically, we think that UCITS managers should be still allowed to respond to their investors' requests for different degrees of protection against some elements of market risk – other than currency risk -such as interest rate, equity market or volatility risk, by setting up customised share classes of a UCITS instead of being required in each case to launch a new fund. For the reasons explained above, the establishment of an ad hoc new fund would carry additional costs both for the manager and for investors forced to invest in another sub-scale fund.

## Issue 12 – Overlaps, duplications and inconsistencies

### General comment

In general, the treatment of investment funds (both UCITS and AIF) should be consistent in banking and insurance legislation. This means that coherence and consistency is needed. The rule to be applied should be: no different treatment between an investment fund and any direct investment (i.e. in terms of liquidity ratio calculations etc).

### Example 1 of Issue 12 – Overlaps, duplications and inconsistencies

Duplication of reporting/disclosure requirements for asset managers under SRD II.

#### To which Directive(s) and/or Regulation(s) do you refer in your example?

UCITS Directive, AIFMD, Shareholder Rights II

#### Please provide us with an executive/succinct summary of your example:

The Commission's Revision of the Shareholders' Rights 'SRD II' proposal adds another layer of regulation (e.g. reporting / disclosure requirements) for asset managers although similar rules are already included in AIFMD and UCITS framework. For instance, the SRD II proposal requires asset managers to set up an engagement policy for their relationship with investee companies. This requirement, however, partly duplicates the existing duties of asset managers under AIFMD and UCITS Directive particularly in relation to the exercise of voting rights and the management of conflicts of interest. The same applies to the proposal to include reporting requirements for asset managers to specific institutional clients where both the AIFMD and UCITS Directive require client reporting on the same or similar subjects such as investment activities and portfolio turnover costs.

#### Please provide us with supporting relevant and verifiable empirical evidence for your example:

We would like to provide a concrete example of overlap on the exercise of voting rights:

- Under Chapter IB, Article 3f of SRD II, the engagement policy states that, inter alia, asset managers should develop a policy on shareholder engagement, this policy shall determine how institutional investors and asset managers conduct the exercise of voting rights.
- However, asset managers are required under UCITS and AIFMD to set up a voting policy and to report to their clients, including on the exercise of voting rights. The only difference between SRD II and sectoral legislation requirements on the exercise of voting rights is the public nature of the disclosure under SRD II. EFAMA believes it is more meaningful to report to clients and does not see any added value in reporting this particular information to the public. The corresponding text in the AIFMD and UCITS legislation is as follows:

#### UCITS

Commission Directive 2010/43/EU of 1 July 2010 implementing Directive 2009/65/EC of the European Parliament and of the Council as regards organisational requirements, conflicts of

interest, conduct of business, risk management and content of the agreement between a depositary and a management company.

Article 21(1) states:

*“Member States shall require management companies to develop adequate and effective strategies for determining when and how voting rights attached to instruments held in the managed portfolios are to be exercised, to the exclusive benefit of the UCITS concerned”.*

Article 21(3) states:

*“A summary description of the strategies [of the exercise of voting rights] shall be made available to investors. Details of the actions taken on the basis of those strategies shall be made available to the unit-holders free of charge and on their request”.*

### **AIFMD**

Commission Delegated Regulation No 231/2013 of 19 December 2012 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision.

Article 37(1) states:

*“An AIFM shall develop adequate and effective strategies for determining when and how any voting rights held in the AIF portfolios it manages are to be exercised, to the exclusive benefit of the AIF concerned and its investors”.*

Article 37(3) states:

*“A summary description of the strategies [of the exercise of voting rights] and details of the actions taken on the basis of those strategies shall be made available to the investors on their request”.*

**If you have suggestions to remedy the issue(s) raised in your example, please make them here:**

If further rules regarding asset managers are necessary, these should be integrated in the AIFMD and UCITS framework. Any rules for asset managers within the SRD II should be aligned with the AIFMD and the UCITS framework in terms of wording and identical duties should be incorporated by reference. SRD II legislation should therefore clearly acknowledge reporting and disclosure requirements of asset managers under the AIFMS and UCITS directives. To avoid duplication and maximise efficiency, SRD II should make clear that existing requirements under sectoral legislation provide adequate reporting and disclosure.

### **Example 2 of Issue 12 – Overlaps, duplications and inconsistencies**

Transparency standards for benchmark providers do not match with information needs of benchmark users.

**To which Directive(s) and/or Regulation(s) do you refer in your example?**

Benchmarks Regulation - article 16 (deleted in current discussions)

**Please provide us with an executive/succinct summary of your example:**

The level of transparency in relation to benchmarks as determined in the latest discussion on the EU Benchmark Regulation is not sufficient for investment funds and other users of indices to comply with their obligations under UCITS, EMIR and MiFID/MiFIR. Asset managers are themselves subject to extensive transparency requirements and conditions if using financial indices as benchmarks especially under the ESMA Guidelines on ETFs and other UCITS issues<sup>22</sup>. In light of the growing importance of indices and growing transparency requirements, including the regulatory reporting on an underlying index by the end users as foreseen in the EMIR and MiFID/MiFIR transaction reporting, it is necessary to impose corresponding transparency requirements upon index providers in order to enable index users to comply with the regulatory requirements. This pertains in particular to the availability of clear summary information on the index objectives and its key construction principles, complete information on the index construction and calculation methodology and historical data on constituents and weights. In this context we strongly support the ESMA assessment<sup>23</sup> related to the transparencies for alternative indices that index providers have to provide investors with a tool box of methods, data, constituents and weightings allowing the investor to replicate both the index construction and also the simulated/historical performance.

**If you have suggestions to remedy the issue(s) raised in your example, please make them here:**

Reinstall Article 16 on data transparency in the final Level 1 text or alternatively, to provide for a possibility to introduce the necessary transparency standards by Level 2 measures.

**Example 3 of Issue 12 – Overlaps, duplications and inconsistencies****To which Directive(s) and/or Regulation(s) do you refer in your example?**

IORP II, UCITS V - 2014/91/EU, AIFMD - 2011/61/EU.

**Please provide us with an executive/succinct summary of your example:**

There appear to be inconsistencies between UCITS and the IORP II. The revision of the IORP directive should take into account existing EU legislation on service providers as UCITS and AIF managers.

**Please provide us with supporting relevant and verifiable empirical evidence for your example:**

The requirement to appoint an external depositary in Article 35 should not overlap with the existing EU depositary rules that already apply to some asset classes, as is the case for investment funds.

- The appointment of a depositary should not apply when the institution has invested/outsourced all pension scheme assets in/to UCITS or AIFs, as they are already subject to strict depositary rules (Directives 2014/91/EU and 2011/61/EU, respectively).
-

- The remuneration rules in Article 24 should not overlap with existing EU remuneration rules which already apply to some service providers.

**If you have suggestions to remedy the issue(s) raised in your example, please make them here:**

The remuneration rules in the Proposal should avoid overlapping with the existing remuneration requirements for financial services providers. A reference should be included to avoid overlapping with the already existing requirements developed for other financial services sectors, such as investment firms (CRD - 2013/36/EU- and MiFID II - 2014/65/EU) and investment managers (UCITS V - 2014/91/EU - and AIFMD - 2011/61/EU).

**Example 4 of Issue 12 – Overlaps, duplications and inconsistencies**

Lack of consistency between UCITS, PRIIPS and ELTIF KIDs.

**To which Directive(s) and/or Regulation(s) do you refer in your example?**

PRIIPS/UCITS/ELTIF Regulation articles 23 and 25

**Please provide us with an executive/succinct summary of your example:**

The three pieces of work were led in parallel, but ultimately asset management companies which had applied the UCITS KIID – which works well throughout Europe for several years now – will have to abandon it to change to the PRIIPS KID. And regarding retail ELTIFs, the Regulation will become applicable prior to the PRIIPs KID entering into force which will mean the ELTIF manager will be asked to make assessment as to how the costs disclosure should be made.

**If you have suggestions to remedy the issue(s) raised in your example, please make them here:**

To set new legislation based on positive cases which should not be changed: for PRIIPs, the UCITS KIID was taken as a starting point but ultimately many features of the PRIIPS KID will be different and will therefore be difficult to implement for funds (e.g. performance scenarios).

In the case of ELTIFs it seems that with no legal clarity as to the right format of the costs disclosures it will become very difficult for the asset manager to proceed with marketing to retail investors.

## Issue 14 – Risk

### Example 1 of Issue 14 – Risk

**To which Directive(s) and/or Regulation(s) do you refer in your example?**

The final EBA Guidelines (EBA/GL/2015/20) published in 14 December 2015, in particular paragraphs 14 to 16.

**Please provide us with an executive/succinct summary of your example:**

On systemic risk, the debate is largely flawed both at global level and at EU level:

- IOSCO/FSB have until July 2015 attempted to identify systemic non-bank, non-insurance entities, with a large focus on asset managers and their funds, albeit from a very bank-centric perspective. After two separate consultations between 2014 and 2015, these global standard setters have changed tack by focusing more correctly on investment management as an activity. We currently continue to support their efforts by providing useful inputs on liquidity management tools and stress-tests as employed by asset management firms.
- Conversely, the IOSCO/FSB did not identify other important market players as being systemic players when they directly invest on markets without delegating the management of their portfolios to asset management companies, such as sovereign wealth funds or pension funds.
- Central banks when they create conditions for systemic risks to arise, e.g. ultra-loose monetary policies may create asset price bubbles, or asset prices to no longer reflect their true fundamentals. The unwinding of such extraordinary policies, where too sudden and not sufficiently priced-in by the market, can certainly cause great volatility, especially in some bond markets.
- At European level, the EBA preliminarily identified MMFs and AIFs for being “shadow banks”. A conclusion that is at odds with the comprehensive EU rules and regulations applied to asset management companies through the UCITS and AIFM Directives in particular.

**If you have suggestions to remedy the issue(s) raised in your example, please make them here:**

EFAMA would suggest that the EBA reviews the contents of its Guidelines with regard to the treatment of MMFs and, possibly, AIFs originating or investing in unsecuritised loans following the Commission’s assessment of these structures scheduled for 2016.

## Issue 15 – Procyclicality

### Example 1 of Issue 15 – Procyclicality

#### To which Directive(s) and/or Regulation(s) do you refer in your example?

BRRD Directive/EMIR clearing obligation and ISDA Rules

In relation to BRRD directive: ISDA 2014 Resolution Stay Protocol so far only applied to Banks. However there is a willingness from FSB to extend it through a separate protocol to non-banks

In relation to EMIR clearing obligation: ISDA/FOA Client Cleared OTC Derivatives Addendum.

Should such protocol be applied, this would create an illegal situation for UCITS funds which are legally bound to be able to terminate transaction “at any time”.

#### Please provide us with supporting relevant and verifiable empirical evidence for your example:

ISDA rules & Protocol are defined by banks and not for derivatives end users:

- ISDA Bail-in Protocol suspend Early Termination provision and reduced drastically liquidity on derivatives contracts in case of market stress.
- Under ISDA FOA Addendum for clearing, CM have no contractual commitment to accept trades & apply their own collateral requirements
- Final Investors are reluctant to implement standard Clearing Agreement
- Moving contractual framework on bilateral & cleared trades may increase both procyclicality and banking risk

UCITS are due to be able to terminate transactions immediately and at any point in time. This contradicts the regulators’ and legislators’ willingness to impose a period of time to facilitate recovery of CCPs.

#### If you have suggestions to remedy the issue(s) raised in your example, please make them here:

EFAMA would suggest that the European Commission:

- ensures that ISDA rules and Protocol ensure a better treatment of end users vis-à-vis clearing members.
- provides a cost/benefit analysis as to whether the banking resolution and stay protocols need to be applied to buy-side entities before considering how the Protocol could be adapted for such firms.

**ENDS**

29 January 2016