Response of the ESIs of the CIMD Group to the *call for advice on the Commission's request for advice on the investment firms prudential framework*

(EBA/DP/2024/01, 3 June 2024)

Acknowledgement

The investment firms that are part of the CIMD Group welcome the possibility to comment on the EBA/ESMA call for advice on the investment firms prudential framework (hereinafter CfA), more specifically on the appropriateness and/or necessity to amend the texts of Directive (EU) 2019/2034 (hereinafter IFD)[1] and Regulation (EU) 2019/2033 (hereinafter, IFR)[2] to better adapt them to the reality of investment firms (hereinafter, ESIs) as well as to consider interactions with other regulations such as Regulation (EU) 2023/1114 (hereinafter, MICAR)[3] , as well as other texts such as Directive 2009/65/EC (hereinafter, DGOICVM)[4] and Directive (EU) 2011/61/EU (hereinafter, DGFIA)[5] due to the possible impact of the activities carried out by such management companies when providing services such as ESIs.

Context setting

The CIMD Group is made up of a group of companies whose activities are confined to the financial sector in the broadest sense of the term. The Group's parent company is a pure holding company whose corporate purpose is limited to the holding of shares; within the Group's perimeter are three investment firms (one outside the EU), two UCITS management, one closed-end fund management (AIFM), one securitisation fund management and several consultancy firms. It can be seen that only the two ESIs are directly affected by the IFD/IFR rules, with the fund managers having their own supervisory and solvency rules, while the consultancy firms are, in any case, outside the scope of the IFD/IFR rules.

The Group's composition and extensive experience in providing investment services and managing UCITS and FIAs has allowed us to analyse the CfA rigorously and we consider the areas addressed in the CfA to be of great interest, particularly with regard to:

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1 DIRECTIVE (EU) 2019/2034 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 27 November 2019 on the prudential supervision of investment firms and amending Directives 2002/87/EC, 2009/65/EC, 2011/61/EU, 2013/36/EU, 2014/59/EU and 2014/65/EU.

2 REGULATION (EU) 2019/2033 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 27 November 2019 on prudential requirements for investment firms and amending Regulations (EU) No 1093/2010, (EU) No 575/2013, (EU) No 600/2014 and (EU) No 806/2014.

3 REGULATION (EU) 2023/1114 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 31 May 2023 on crypto-asset markets and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937.

4 DIRECTIVE 2009/65/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS).

5 DIRECTIVE 2011/61/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010.

- categorisation of ESIs and the conditions required for an ESI to be considered "small and non-interconnected";
- new considerations in the requirements under the fixed overhead criterion;
- review of the criteria for the K-factor methodology;
- assessment of changes to liquidity requirements;
- interactions with other regulations;
- prudential consolidation; and
- remuneration aspects in relation to investment firms, AIFMs and UCITS management companies.

Objective and structure of the document

The purpose of this document is to reflect the views of the CIMD Group's EU-based ESIs (Intermoney Valores, SV, SA and Corretaje e Información Monetaria y de Divisas, SV, SA), drawing on the Group's knowledge and experience in carrying out other activities regulated by the Comisión Nacional del Mercado de Valores as the competent supervisory authority in Spain for ESIs and asset management.

Our views expressed here have been formulated with rigour and with the objective of helping to establish regulation that is more in line with the reality of ESIs, allowing for a wide, sustainable and safe range of ESIs for the benefit of investors and securities markets.

The CfA is structured in 11 sections, each of which addresses the analysis of specific areas and asks questions, and some of which simply provide the analysis without asking any questions. Some of the questions are addressed to national supervisory and solvency authorities as they refer to data and experiences that only these institutions have and that are not available to the ESIs.

This document deals with the analysis of sections 1 to 10 of the CfA under ten headings following the order established in the CfA. Under each of these headings we provide an argumentation for the analysis and, where appropriate, for each question an explanation justifying the answer; under the headings corresponding to the sections where the CfA does not pose any questions, such as section 4.8 of section 4 or section 8, we provide the argumentation and conclude on the actions we consider necessary or appropriate.

1. Categorisation of investment firms

After legislators identified a problem with the application of the CRR and CRD on the application of the CRR and CRD on the ESIs, a review was proposed to circumvent the main problems identified, setting out three objectives, namely (i) to establish more appropriate and risk-sensitive prudential requirements covering the risks to which ESIs are actually exposed or those they influence, (ii) to establish a framework that covers ESIs by the activity they carry out and avoids regulatory arbitrage arising from the complex and insufficiently clear process of identifying different types of ESIs; and (iii) to create a streamlined set of regulatory and supervisory tools to facilitate effective supervision.

The reorganisation moves from 11 ESI categories under CRD and CRR[6] to three categories[7] .

As a consequence of the finding of good performance and the consideration that the current categorisation is effectively adapted to the size and activities of the ESIs, the CfA focuses the possible revision solely on the harmonisation of the criteria for the consideration of the thresholds; specifically, it raises the need for the calculation of the thresholds established to determine Class 1 ESIs (15.Billion and 5 billion) to follow the same criteria as for the 30 billion threshold, including all companies established in the EU and all their branches and subsidiaries elsewhere.

In this area, the ESIs of the CIMD Group wish to make it clear that the thresholds currently established seem to us to be appropriate and we understand that it is necessary to harmonise the criteria regarding the assets to be taken into account and the scope of consolidation (only EU assets or all assets regardless of the country where they are established) in either direction, but it is obvious that, in order to avoid arbitrage by interpretation, the criteria must be homogeneous and independent of location.

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

As regards Q1, Spanish ESIs report to their regulator on a monthly basis the volume of assets at individual and consolidated level, and this without the need for this volume to be greater than 5 billion, so that the competent national authority (in our case, CNMV) has all the information to be able to transmit it to the EBA. In this regard, we consider that the deletion of the reference to the €5 billion threshold from the text of the IFR for companies that are part of a group, in order to allow the notification of all relevant investment firms, does not imply any operational limitation, especially as the objective pursued (namely that the EBA communicates to the institutions and competent authorities, including the authorities competent for authorisation as a credit institution) can continue to be fulfilled.

[6] 1 (art. 30 CRD); 2 and 3 (art. 31 CRD); 4 (art.95.2 CRR, 2nd and 3er paragraph); 5, 6 and 7 (art. 95.1 CRR); 8 (art. 96.1a CRR); 9 (art. 96.1b CRR); 10 (art. 493 and 498.CRR); and 11 (art.92 CRR).

[7] Class 1 (IFR Art 1.2 and 1.5); Class 2 (not Class 1 or Class 3) and Class 3 (IFR Art 12).

2. Conditions for ESIs to qualify as "small and non-interconnected".

As evidenced by CfA , taking into account feedback from both industry and supervisors, the Class 3 categorisation criteria are working well and the framework is achieving its objective, namely to simplify the reporting obligations that underpin the prudential supervision of small and non-interconnected ESIs.

However, it is proposed to analyse two of the conditions or characteristics, namely (i) the total amount of on- and off-balance sheet assets and (ii) the level of annual gross income, both at the individual and consolidated level.

As reflected in the CfA and taking into account that between 2013 and 2021 no significant problems were known to have arisen as a result of the categorisation described in the CRR (which excluded ESIs providing only RTO services, execution of orders on behalf of clients, portfolio management and/or investment advice without being able to provide the ancillary service of custody and without holding client money or securities) it appears that the existence or not of the quantitative criteria in (h) and (i) does not pose a risk from the point of view of control by the authorities and stability for the financial system.

However, it appears that the establishment of these conditions has led to a change in the ESI map in that many of the "small and non-interconnected under CRR" have ceased to be small and non-interconnected under IFR and have become class 2 and this entails administrative burdens and costs for many ESIs.

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

From the ESIs of the CIMD Group, we consider that the current conditions can be maintained but we consider it necessary to raise these levels, at least, when referring to the consolidation perimeter of several ESIs belonging to the same group. In addition, in line with paragraph 39 of the CfA, the scope of consolidation should not include ESIs located outside the EU but should include the subsidiaries and/or branches of ESIs located in the EU, irrespective of where these subsidiaries and/or branches are located.

On the other hand, in order to provide investment services efficiently and to be able to cover clients' requests, especially for financial instruments that are not very liquid and with a very limited credit risk (e.g. corporate bonds), the ESIs need to submit bid/offer prices without having the guarantee of finding them immediately available on other financial market participants (regulated markets, MTFs, OTFs, systematic internalisers or bilaterally with other counterparties), MTFs, OTFs, systematic internalisers or bilaterally with another counterparty) so that in order to carry out the transaction it has to make use of the "execution on own account" facility (facility set out in point 3 of Section A of Annex I of MiFID II) becoming part of Class 2 under the IFR but its balance sheet position is zero.

At this point it should be noted that the IFR, like the CRR, in dealing with this investment service is trying to control the risks associated with own portfolio positions, either for investment or trading, recorded on the balance sheet.

Thus, ESIs in this situation fall into Class 2 when the risk to the system*, ceteris paribus* the other requirements, is the same as those in Class 3. In order to avoid this discrimination, we propose that in order to be Class 3, the service of "execution on own account" should be allowed subject to compliance with restrictions/limitations to the positions reflected in the balance sheet or that the concept of this service should be redefined.

Consequently, we consider it necessary to take two actions: one, to specify the activity of "dealing on own account" by excluding from it execution by an ESI in its own name on behalf of clients and intermediation articulated through the interposition of the own account without market risk (*matched principal*); and, two, to raise the thresholds set out in Article 12 of the IFR to delimit which ESIs are considered small and non-interconnected.

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

Establishing a "freeze" period as proposed (that the ESI would be obliged to be classified as Class 2 for a period of at least one year after its reclassification) could force a Class 3 ESI that is close to the limits to comply with requirements that are not proportionate to its actual activity and does not prevent the ESI from changing category several times in the same year. For example, let us assume a Class 3 ESI that in March AAAA ceases to meet the criteria of Article 12.1 of the IFR, but in July AAAA again meets the criteria of that article, becoming a Class 2 ESI until March AAAA+1, at which point it would be classified as a Class 3 ESI and in June AAAA+1 it again ceases to meet the conditions of Article 12.1 of the IFR, becoming Class 2 again.

On the other hand, it does not follow from the IFR that a change from Class 3 to Class 2 requires prior notice to and authorisation by the competent authority since according to Article 12.3 of the IFR the change from Class 3 to Class 2 is with immediate effect as soon as the criteria of Article 12.1 are no longer met.

Limiting the number of changes from Class 3 to Class 2 may be counterproductive from a control point of view; and maintaining the classification as Class 2 for at least one year may be disproportionate. The standard already provides for a transition period (6 months) from Class 2 to Class 3 and the Competent Authority has been informed. Therefore, we consider that the competent authority should be given the power to authorise the change from Class 2 to Class 3, maintaining the current criteria for moving from Class 3 to Class 2.

3. Fixed overhead requirements (FOR)

As set out in the CfA, the establishment of this criterion is a consequence of covering the objective of providing a 'floor' to the requirements resulting from the K-factor methodology; moreover, the level set results from the idea that with these own resources the ESI can face, in an orderly manner, an assumed liquidation, or restructuring, period of three months.

3.2 Three months wind-down period;

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

Three (3) months seems a sufficient period of time to stop providing the various services for which the ESI is authorised. However, it is very likely that the liquidation of the ESI will extend well beyond those three months; nevertheless, the costs incurred by the ESI after the cessation of activity will generally be very low. We therefore consider that maintaining own resources at the level indicated is sufficient unless the winding-up is unexpected and the ESI has not been able to adjust its cost structure to the evolution of its business.

In conclusion, from the ESIs of the CIMD Group, we consider that the level should be maintained, but it could be considered to increase it in the case of providing the auxiliary service of custody and administration of financial instruments since, not being an exclusive service of ESIs, the cessation of this service will probably be prolonged beyond three months.

3.3 Deductibles related to specific business models;

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

From the ESIs of the CIMD Group, we understand that the deductible items contemplated in article 13.4 of the IFR together with those included in Delegated Regulation (EU) 2022/1455, of the Commission of 11 April 2022, are sufficient and not all apply in all cases, in such a way that they allow the computed items to be a very approximate reflection of the activity carried out by each ESI.

Consequently, it is our understanding that it is not necessary to differentiate activity-based deductions.

3.4 Expenses related to tied agents;

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

Given that the basis of calculation for this criterion is the expenses incurred by the ESI in the previous financial year, i.e. in a situation of normality in the exercise of its activity and that the objective of this criterion is to cover the expenses that the ESI may incur during the liquidation period (in principle, three months) and, therefore, its activity ceases, it does not seem to make much sense to include the expenses incurred associated with the agent, especially when an important part of the agent's remuneration is associated with the success in the performance of its duties.

Consequently, the CIMD Group of ESIs considers that only costs incurred by the ESI that are not associated with the success of the agent in the performance of his duties should be taken into account.

3.5 Expenses related to non-MiFID activities;

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

Without losing sight of the objective of establishing minimum own resources by this methodology (see question 6), the orderly winding-up of the ESI is so far not being considered to be carried out only in respect of MiFID activities, but should be intended to be complete and therefore also cover the cessation of non-MiFID activities (ancillary activities).

The non-inclusion of the costs associated with ancillary activities in the computation of the FOR may mean that the ESI in liquidation has to cover fixed costs not considered to be associated with these activities, which would generate a deficit of own resources to cover the costs associated with its main activities (services and investment activities), preventing the liquidation from being orderly; In this way, we echo the arguments set out in the CfA, but we understand that it should be clarified that under no circumstances can the majority of the costs be associated with ancillary activities, since for them to have such status, at least in the Spanish case, these activities cannot acquire a degree of importance in the overall activity of the institution that could distort their corporate purpose (Article 11.4 of Royal Decree 813/2023 of 8 November on the legal regime for investment firms and other entities providing investment services).

The only advantage we see in this procedure is that, to the extent that these costs do not count as fixed overheads, there will be a reduction in the capital requirement and a consequent improvement in the solvency ratio.

In conclusion, we understand that it is necessary to include in the computation of fixed overheads (FOR) the expenses associated with the exercise of ancillary activities, but maintaining for these activities the same deductible concepts that apply to the expenses associated with MiFID activities.

3.6 Expenses related to foreign exchange rates difference;

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

The custody of money in non-euro currencies is recorded in accounts denominated in each of these currencies, but when accounting for these positions, the equivalent value in euro has to be calculated; thus, if the currency loses value against the euro, an expense (loss) is recorded by the ESI in its balance sheet, but this expense/loss is not associated with the performance of its activity and will not actually be borne by the ESI either in the event of liquidation or in a situation of normal performance of its activities. Consequently, the negative exchange differences associated with customers' positions should be considered as a non-eligible expense, irrespective of whether the recording is individualised or not.

3.7 *Other elements.*

The text of Article 13.1 of the IFR, states that "*for the purposes of Article 11(1)(a), the requirement based on fixed overheads shall be at least one quarter of the fixed overheads of the preceding financial year*" for which "*they shall use the figures resulting from the applicable accounting framework*"; thus, in the reporting of the statements referring to the first quarter of the year 20XX, the reference would be to the fixed overheads borne by the ESI in the year 20XX-1.

However, Article 1(1) of Delegated Regulation (EU) 2022/1455 states that for the purposes of Article 13(1) of the IFR, the *figures in the most recent audited annual financial statements of an investment firm after the distribution of profits or the annual financial statements if they are not required to* have *audited statements* shall be considered as *"figures resulting from the applicable accounting framework"*. If audited statements are available, given that audits are usually closed by the end of April and the distribution of profits has to be approved by the General Meeting of Shareholders and the General Meeting has to be held no earlier than 30 days after the convocation by the Board of Directors, it is concluded that for solvency statements referring to 31 March 20XX, the reference year would be 20XX-2 and not 20XX-1 which would apply for those ESIs that are not required to have audited financial statements.

The ESIs of the CIMD Group, believe that either the text of Article 13.1 of the IFR or that of Article 1.1 of the Delegated Regulation (EU) 2022/1455 should be adjusted, the latter being preferable, so as not to give rise to different interpretations regarding the reference time period.

On the other issues raised in section 3.7, we have no opinion.

4. Review of existing K-factors

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

From the ESIs integrated in the CIMD Group we have no opinion.

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

From the ESIs integrated in the CIMD Group we have no opinion.

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

From the ESIs integrated in the CIMD Group we have no opinion.

4.8 Concentration risk in the trading book (K-CON): scope restricted to the trading book

Although no specific question is raised under this heading of the CfA in the area covered by the heading itself, we consider the following reflection to be appropriate.

The CfA proposes to include investment positions of investment firms in this factor and, to this end, argues that significant concentration risks may be very important for certain investment firms managing individual portfolios (see paragraph 104). In this way, concentration risk for the firm is being confused with concentration risk for the client, since the positions in the portfolios under discretionary management do not belong to the ESI but to the client.

From the ESI of the CIMD group, we consider that a clear distinction must be made between the two:

- For the ESI's own investment portfolio positions (held with its own resources) it may make sense to apply, as proposed in the CfA itself, a "*hard limit*" similar to the one foreseen for credit institutions in the CRR. Necessarily, it would be necessary to define what is meant by "investment portfolio" (this is in line with what is stated in section 6.3 of the CfA); one option is to define it as opposed to what is considered as "trading book", as defined in the IFR itself (point 54), Article 4(1).
- As regards the concentration of positions in portfolios under discretionary management, it does not seem justified to increase the own resources required from the ESI as it is not a risk for the ESI even in the provision of the service. However, if excessive concentration in the managed portfolios is to be avoided, portfolio diversification obligations could be established in a UCITS-like manner.

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

From the ESIs integrated in the CIMD Group we have no opinion.

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

The ESI members of the CIMD Group have no opinion.

5. Risks not covered by existing K-factors

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

The CfA proposes that cryptoassets included in the investment portfolio should be included in the calculation of the K-NPR. This undoubtedly poses a double discrimination with regard to the treatment of the positions in the different assets held in the investment portfolio, which, in turn, cannot be justified by the high volatility of the asset. On the one hand, a position in the investment portfolio is being included in the calculation of the K-NPR when, at present, this factor only takes into account positions in the trading book; on the other hand, an attempt is being made to increase the own funds burden simply because of the volatility of the security.

Avoiding this double discrimination requires, on the one hand, acting in the sense of including all the positions of the ESI's own investment portfolio (see exposure between Q11 and Q12) and, on the other hand, establishing risk weighting criteria according to volatility, liquidity, issuer credit rating, etc.

Moreover, and in line with what was stated above in reference to section 4.8 of Section 4 of the CfA, the criteria for a position to be considered in the banking book or in the trading book should be specified, since otherwise, if positions in the banking book do not count and there is nothing to prevent an ESI from unwinding a position in the banking book before the estimated deadline, some institutions will record positions in the banking book so that they do not count in the K-NPR, making the distinction between the banking book and the trading book non-existent.

In conclusion, it may make sense to include the crypto-asset position in the K-NPR calculation, but limited to the trading book, for which it is necessary to set clear and plausible criteria that prevent recording in the banking book positions that would otherwise have been recorded in the trading book. In any case, their inclusion should not be justified by volatility.

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

From the ESIs of the CIMD Group, we understand that the operational risk incurred by ESIs when trading either on their own account or on behalf of their clients is no different from the risk they incur when carrying out RTOs for their clients; therefore, any other factor or higher weighting on the current factors that is applied to the calculation of the K-DTF will not be justified from an operational point of view.

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

As noted in the answer to question 15, for ESIs there is no greater operational risk when trading on own account or in own name on behalf of their clients than when RTOs are carried out in the name and on behalf of their clients. However, it is true that this type of operations entails an additional risk not contemplated in the K-COH associated not with the operation but with the risk of settlement of the contracted transactions in the event of late settlement by the counterparty or, in the worst case scenario, failure to settle.

One way to include this risk without altering the principle of consistency with respect to the K-COH is to take into account this late settlement risk for transactions included in the K-DTF in a manner similar to the treatment given to them in Title V of Part Three of the CRR.

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

From the ESIs of the CIMD Group, we are aware that any activity carried out by an ESI must be taken into account, especially when calculating the own funds by the FOR methodology (see Q7); however, before including in the calculation of own funds by K-factors activities so far not considered (management of an MTF/SOC or investment services on crypto-assets) it should be considered whether this would not amount to discriminatory treatment with respect to other organisations/intervener that may provide such services without having own funds requirements for that purpose. For example, a governing body that is not an ESI and operates an MTF or an OTF is not subject to additional own resources; the same applies to existing crypto-asset service providers that are not required to be ESIs.

On the other hand, the inclusion of these activities in the K factors would lead us to consider whether a K factor associated with ancillary services (regulated in art. 126 of the LMVSI) and another for ancillary activities should not also be included, whether they are services and activities provided for in articles 125 and 126, referring to instruments not covered in article 2 of the LMVSI, or those that involve the extension of their business (both regulated in art. 127 of the LMVSI). In this case, as none of these activities are exclusive to the ESIs, we come to the reflection indicated above as to whether this would not represent discriminatory treatment with respect to other companies that can carry out such activities without any specific requirements.

6. Consequences of the adoption of the banking package (CRR3/CRD6)

The CfA does not ask questions and addresses an area not analysed by the ICDC Group as it does not concern its ESIs or the Group level.

7. Liquidity requirements

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

At the ESIs of the CIMD group, we understand that liquidity requirements must be aimed at covering unexpected situations or reimbursement requests from clients. In this sense, considering that the cash deposited by customers is in accounts opened in banks and that the ESI cannot use the money in these accounts to cover its own operations, we understand that any request from a customer can be covered without the need to resort to liquid instruments owned/owned by the ESI.

With regard to the activities of the ESIs authorised to carry out activities (3) and (6) of Annex A of MiFID II, it should be noted that the transactions to be covered by the ESIs in the performance of both activities entail having the necessary liquidity, which requires having it foreseen and could not be covered with the liquidity required under the IFR because it could mean failing to comply with the requirements established in article 43 of the same.

Therefore, we consider that it is not necessary to measure and include additional requirements to those set out in the IFR for the mere performance of activities (3) and (6) of Annex A of MiFID II.

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

From the ESIs of the CIMD Group, we understand that for the performance of this auxiliary service the ESI must have money and/or securities in proportion to the volume of this activity; given that securities lending cannot be open on any securities but must be limited to a specific set of securities, we understand that one criterion to ensure that the ESI has a sufficient volume of securities is to set a limit in the contract or establish a volume in each security based on the moving average of the loans granted during a period N. With regard to cash, the limits and conditions should be set out in the contract and require sufficient liquidity to cover a substantial part of these limits; however, it may be appropriate, in addition, to require ESIs carrying out this activity to have a volume of "ultra" liquid assets based on the moving average of loans granted during a period N increased by a percentage as a guarantee against unforeseen requests.

In any case, we consider that the liquidity required by this activity has to be an increase over the regulatory liquidity set out in Article 43 of the IFR.

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

The ESIs of the CIMD Group consider that it could be sufficient to establish a percentage on the average variation of the exchange rate, requiring a minimum liquidity equal to the result of applying these percentages to the value of the position in each currency.

The liquidity required by this activity has to be an increase over the regulatory liquidity set out in Article 43 of the IFR.

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

From the ESIs integrated in the CIMD Group we have no opinion.

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

From the ESIs integrated in the CIMD Group we have no opinion.

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

From the ESIs integrated in the CIMD Group we have no opinion.

8. Prudential consolidation

The CfA (paragraph 184) indicates that, in the context of the definition of IHC (investment holding company) in Article 4(1)(23) of the IFR, the focus is on financial institutions (FIs) which may become IHCs under certain conditions. However, it has been noted that there are cases where at the head of a group, instead of an FI, there is a tied agent (TA) or an ancillary services company (ASU).

The CfA proposes to amend the text of the IFR to include cases where the subsidiaries are only ancillary services firms or tied agents since, if the UPIF (Union Parent Investment Firm or "Union Parent Investment Firm") has only ancillary services firms or tied agents as subsidiaries, prudential consolidation will not apply as the ESI does not qualify as a UPIF (see paragraph 191).

In addition, it raises the issue of amending the regulatory texts as the definitions of IHC and parent IHC do not provide for the possible inclusion of the group of investment firms within the supervisory perimeter of a parent credit institution, financial holding company (FHC) or mixed financial holding company (MFHC). Consequently, in the event that such regulated entities have a subsidiary which is an ESI and which they own indirectly through one or more non-regulated entities, this entity or one of these non-regulated entities may qualify as an IHC (if its subsidiaries are exclusively or primarily investment firms or financial institutions) and therefore be subject to the consolidated requirements of the IFR, in addition to the consolidated requirements that apply to the parent credit institution, financial holding company (FHC) or mixed financial holding company (MFHC). This may be considered unnecessarily and unduly burdensome, especially in view of the fact that the undertakings that are included in the consolidated perimeter of that IHC.

Reference is made to the power of NCAs to exempt from prudential consolidation groups with a simple structure and without significant risk to customers or the market, thus applying the Group Capital Test (Art. 8 of the IFR), the consequence of applying this exception is that the group of ESIs would not be subject to the application of the rules on variable remuneration, on group governance and on risk management on a consolidated group basis, but on an individual basis in accordance with Article 25 of the IFD.

When using the Group Capital Test, remuneration, governance and risk management obligations only apply to authorised EU group entities, including investment firms, FIA managers and UCITS management companies that are subject to governance requirements. This puts non-EU group entities on a level playing field with their non-EU competitors. This advantage ceases to exist when the application of the group capital test is limited. This is particularly relevant for the ESI sector, as there are no global standards on prudential regulation, as opposed to Basel for credit institutions. Therefore, requirements for third country entities may differ significantly from EU requirements (see paragraph 199).

The CfA envisages mandating the EBA to develop a draft RTS specifying the methodology for the calculation of own funds requirements under the Group Capital Test, and listing the cases in which a group of investment firms, although within the limits set out in the text of the IFR, should or should not be eligible for the Group Capital Test.

From the ESIs of the CIMD Group, we consider that it would be very positive that this RTS would allow, in an exhaustive manner, not to consolidate on the basis of article 7 of the IFR and to apply the capital test on the basis of article 8 to the Groups comprising ESIs and other regulated entities as well as companies not considered as auxiliary companies (e.g. consultancies) and whose parent is not a parent investment services company of the Union, a parent investment holding company of the Union or a parent mixed financial holding company of the Union. This would allow them to continue to meet the solvency requirements appropriate to their size and complexity depending on the activities they carry out, allowing them to ensure stability in the financial system, without having to apply the requirements of governance over firms not subject to the DFI/IFR directly putting them in a non-competitive situation with firms with similar activities or leading to the application of requirements on matters such as remuneration not 100% in line with their sectoral regulation as is the case for UCITS and AIFM managements even if based on similar principles (see paragraph 227 of the CfA), especially when the managements do not provide MiFID services.

The CfA also suggests that consideration should be given to whether the definition of "consolidated status" could be amended to take into account crowdfunding service providers (ECSP) within the consolidation framework. If so, other activities such as crypto-asset service provision (CASP) should be included.

From the ESI of the CIMD Group, we consider that, in no case, should these activities be included as something specific in the K-factors and, in any case, if their inclusion is considered, both for the ECSP and for the CASPs, it should be articulated through the possibilities indicated in paragraph 203 of the CfA, namely:

- Permanent minimum capital: in accordance with the specific requirements of each for providers of such services without being an ESI;
- Fixed overheads (FOR): ¼ FO - Article 13 (1), (4) IFR;
- K-factors, depending on the services provided, were to be collected in: daily trading flow (K-COH/K-DTF); or client orders handled (K-COH).

9. Interactions of IFD and IFR with other regulations

– ***Interaction with the AIFM and UCITS Directives***

The CfA identifies asymmetries in the treatment of management that provide investment services and that while for AIFM they are considered as ancillary services, for UCITS managements they are not identified as such; in this way this type of activity may not have the character of ancillary, becoming an activity of high specific weight for them.

To avoid these potential asymmetries, it is envisaged to review the resource requirements for managers authorised to provide investment services in line with the IFD/IFR or to limit the weight of these activities for such entities.

In this respect, the CfA proposes a two-step approach:

1. Analyse the impact of the MiFID activities carried out by managements and compare the own funds requirements with those that would be required under the IFR/IFD.

2º.- Assess what would be the implications and effects of extending the specific requirements of the IFD/IFR for managers, and thus explore the different options that could remedy the regulatory shortcomings identified above.

Q24: Do you have any views on the possible ways forward discussed above concerning the provision of MiFID ancillary services by UCITS management companies and AIFMs?

From the ESIs of the CIMD Group, we understand that the proposal made by EBA/ESMA in the CfA is correct, but before addressing it, the proportionality of such actions should be taken into consideration, taking into account the final objective and on whom the work to be done would fall.

In order to analyse such proportionality, we believe that the following should be taken into consideration:

- It should not be overlooked that the FOR criterion for fund managements already takes into account the costs incurred by fund managements in providing these services (see justification given in the answer to Q7) as it considers fixed overhead costs and not only the costs associated with the main object of their activity (management of UCITS and/or private equity entities).
- Calculating the impact of applying IFD/IFR requirements would imply for these entities to develop calculation and recording tools whose cost may not be justified by the result obtained.

– ***Interaction of MiCAR and IFD/ IFR***

The CfA (see paragraph 218) recognises that the minimum capital requirements under the IFR/IFD that apply to an ESI are higher (Article 9 of the IFD), compared to equivalent services, than those under MiCAR.

The impact on an ESI providing services on crypto-assets if such services are taken into account in the calculation of the K-factors (K-CMH and K-COH) is also considered.

Q25: Are differences in regulatory regimes between MICAR and IFR/IFD a concern for market participants regarding a level playing field between CASPs and investment firms providing crypto-asset-related services? In particular, are there concerns on the capital and liquidity requirements regimes?

As we have pointed out in the answer to Q17 above, the ESIs of the CIMD Group believe that including in the calculation of own funds by K-factors activities not considered so far may involve discriminatory treatment with respect to CASPs, since the latter are required to have a lower level of capital than that required of ESIs and, in no case, are subject to additional resources due to criteria such as K-factors; Therefore, in the best case scenario, ESIs would have similar requirements to CASPs if the level of capital requirements is set by the FOR criterion.

As regards liquidity requirements, we reiterate what was stated in the response to Q18.

Q26: Sections 5.2, 5.4, as well as this section 9.1 all touch upon how crypto-assets (exposures and services) may influence the IFD and the IFR. Is there any other related element that should be considered in the review of the investment firms' prudential framework?

From the ESIs integrated in the CIMD Group we have no opinion.

10. Remuneration and its governance

Q27: Is the different scope of application of the remuneration requirements a concern for regarding the level playing field between different investment firms (class 1 minus and class 2), UCITS management companies and AIFMs, e.g., in terms of the application of the remuneration provisions, the ability to recruit and retain talent or with regard to the costs for the application of the requirements?

The CIMD Group considers that the amendments introduced in the IFD with respect to the CRD in the area of remuneration have provided greater flexibility to Class 2 ESIs and have allowed, to a large extent, remuneration to be more proportionate to the business models of these ESIs. Moreover, understanding the differences between the criteria applicable to Class 1 minus and Class 2, given that the thresholds set for Class 1 minus are sufficiently high for there to be very few ESIs in this category (see Table 1 in the Annex "MiFID investment firms in the EU" of the CfA itself), we do not believe that the impact should be a cause for concern.

However, we do have concerns about having to apply the remuneration provisions for ESIs contained in the IFD to entities that have their own distinct regulation (i.e. UCITS managements and AIFM) or to other entities whose business model has nothing to do with an ESI and which do not have specific remuneration regulation. As stated in section 8 above, the CIMD Group believes that applying the provisions of the DFI on remuneration to group companies that do not apply DFIs to them or, in the case of management companies, have other specific provisions, has two clear negative impacts:

- competitive disadvantages; and
- difficulty in adapting the IFD criteria to companies whose sector is governed by completely different business models to those of the ESIs.

In any case, we must point out that, even focusing on the provisions applicable to Class 2 ESIs, some of the requirements and principles contained in the DFI are not consistent to simultaneously allow the objective of maintaining a solid capital base that allows the continuity of the ESI and the retention of talent. In addition, we are at a disadvantage compared to neighbouring countries that are the main competitors for the development of securities markets in the EU.

EU as they have fewer restrictions, especially when it comes to setting variable remuneration, which is one of the main causes of brain drain. It also seems disproportionate for most Class 2 ESIs to have to pay part of the variable remuneration in equity instruments (Article 32.1.j of the IFD).

Finally, we believe that it should be clearly defined whether, apart from the restrictions on variable remuneration, the remuneration policies that the ESIs and their consolidable groups are obliged to have apply only to staff that have an impact on their risk profile, the remuneration policies that ESIs and their consolidable groups are required to have apply only to staff that have an impact on the risk profile of the ESI (defined groups in accordance with Delegated Regulation (EU) 2021/2154) or to all staff as inferred from Article 26 of the DFI, which is consistent with the EBA's interpretation in its guidelines on appropriate remuneration policies under Directive (EU) 2019/2033 (EBA/GL/2021/13).

Q28: Are the different provisions on remuneration policies, related to governance requirements and the different approach to identify the staff to whom they apply a concern for firms regarding the level playing field between different investment firms (class 1 minus under CRD or class 2 under IFD), UCITS management companies and AIFMs, e.g. in terms of the application of the remuneration provisions, the ability to recruit and retain talent or with regard to the costs for the application of the requirements?

This question is largely answered by the answer given to Q27.

Q29: Do the different provisions, criteria and thresholds regarding the application of derogations to the provisions on variable remuneration, and that they apply to all investment firms equally without consideration of their specific business model, a concern to firms regarding the level playing field between different investment firms (class 1 minus under CRD and class 2 under IFD), UCITS management companies and AIFMs, e.g., in terms of the application of the remuneration provisions, the ability to recruit and retain talent or with regard to the costs for applying the deferral and pay out in instruments requirements? Please provide a reasoning for your position and if possible, quantify the impact on costs and numbers of identified staff to whom remuneration provisions regarding deferral and pay out in instruments need to be applied.

From the ESIs of the CIMD Group, we understand that the application of different thresholds in different jurisdictions (the power of each Member State, according to article 32.5 of the IFD) leads to unfair treatment that can generate competitive imbalances between EU countries. However, the competent authority of each Member State has information on each and every one of the ESIs that make up the local sector, which allows them to have a clear idea of the size of such ESIs. Thus, given that the establishment of these thresholds is intended to derogate from the general rule in order to reduce the burdens that may be placed on the ESIs to pay in instruments and to reduce the lack of competitiveness due to the application of the deferral, it may make sense that the threshold should be raised in order to make sense of its existence since, perhaps, keeping the threshold at €100 million would only apply to such a small number of ESIs that the objective pursued, namely to reduce the burden on ESIs and maintain their competitiveness, would be ineffective.

On the other hand, we believe that, despite the CfA's own argumentation in paragraph 241, the thresholds set for Class 1 minus and Class 2 ESIs to qualify for the exemption from payment in instruments are very different (5 billion with the possibility to increase it up to 15 billion for Class 1 minus ESIs, compared to 100 million and with the possibility to increase it up to 300 million for Class 2 ESIs). We consider the thresholds set for Class 2 ESIs to be very low, especially as they include off-balance sheet assets. Thus, an ESI with very small on-balance sheet assets, but with large but not necessarily very large off-balance sheet assets (e.g. assets under custody and management of clients), would have to pay in instruments when, given its size, it would probably have a shareholder and statutory structure that does not allow it to do so, making this requirement an obstacle to management.

In conclusion, we consider it appropriate to set higher thresholds for Class 2 ESIs to avoid payment in instruments and deferral and to be the same across the EU, thus avoiding discriminatory conditions.

Q30: Are the different provisions regarding the oversight on remuneration policies, disclosure and transparency a concern for firms regarding the level playing field between different investment firm, UCITS management companies and AIFMs, e.g., with regard to the costs for the application of the requirements or the need to align these underlying provisions? Please provide a reasoning for your position.

Rather than a concern, the ESIs of the CIMS Group, we believe that the reporting obligations should be the same in the same circumstances. Although we consider the information required from each of the three types of entities considered (ESIs, UCITS managements and FIA managements) to be sufficient and proportionate, we believe that UCITS and FIA managements that provide investment services should offer the same information and with the same requirements as ESIs.

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

ESIs are currently subject to a very high information burden, both accounting, financial and non-financial, either as a result of the regulations analysed in this CfA or others (sustainability, EINF, ...) so that to cover these obligations they are incurring, either through internal developments or by resorting to third party providers, very high costs and we could even say disproportionate to the objective pursued by the various regulators, which is none other than to provide information to market participants and users.

Consequently, we do not see the benefits of extending the current reporting requirements to financial information, but we are certain that such an extension would incur costs that are difficult to pass on to clients and, therefore, will reduce the already meagre performance of the ESIs or increase the losses that some are already incurring, thus jeopardising their continuity, leading the sector to a process of concentration that will undoubtedly be detrimental to investors.

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

From the ESIs integrated in the CIMD Group we have no opinion.