EBA/Rep/2025/29
ESMA35-24871704-2858

15 October 2025

Technical Advice

of the EBA and ESMA in response to the Commission call for advice on the investment firms prudential framework

Contents

Executive summary 11

1. Categorisation of investment firms 15

1.1 Background 15
1.2 Effectiveness of the categorisation of investment firms 19
1.3 Consistency of the thresholds 20
1.4 Additional issues related to the categorisation of investment firms 22

2. Conditions for investment firms to qualify as small and non-interconnected 26

2.1 Discussion on the conditions for qualifying as a Class 3 investment firm 27
2.2 Transition of investment firms between Class 3 and Class 2 categories 28

3. Fixed overheads requirements 30

3.1 Background 30
3.2 Three-month wind-down period 31
3.3 Considerations on specific deductibles related to specific business models 32

4. Review of existing K-factors 38

4.1 Background 38
4.2 Client Orders Handled (COH) 39
4.3 Assets under management and ongoing advice (K-AUM) 41
4.4 Daily Trading Flow (K-DTF) 43
4.5 Concentration risk in the trading book (K-CON) 44
4.6 Clearing Member Guarantee (K-CMG) 47
4.7 Assets under safekeeping and administration (K-ASA) 48

5. Risks not covered by existing K-factors 51

5.1 Non-trading book positions 51
5.2 Non-trading book positions in crypto-assets 52
5.3 Operational risk for firms calculating the K-DTF 53
5.4 Investment firms operating a trading venue 53
5.5 Other prudentially regulated services 54

6. Implications of the adoption of the Banking Package 56

6.1 Adoption of the fundamental review of the trading book for investment firms 56
6.2 Credit valuation adjustment for investment firms 57
6.3 Definition of the trading book 58

7. Liquidity requirements 62

7.1 Background 62
7.2 Level of liquidity requirements 62
7.3 List of high-quality liquid assets 63
7.4 Exemption under Article 43 of the IFR for small and non-interconnected investment firms 64
7.5 Other potential amendments 65
8. Prudential consolidation 68
8.1 Fine-tuning of definitions in the IFR 68
8.2 Proportional consolidation, step-in risk and scope of consolidation 71
8.3 Group capital test 72
8.4 Consolidation of crowdfunding and crypto-asset service providers 73
9. Interactions of the IFR and IFD with other regulations 76
9.1 Interaction with the AIFM and UCITS Directives 76
9.2 Interaction of MiCA and IFR/IFD 79
10. Remuneration and its governance 83
10.1 Remuneration 83
10.2 Scope of application 84
10.3 Remuneration policies and committees 85
10.4 Requirements on variable remuneration 88
10.5 Oversight, Disclosure and Transparency on remuneration and remuneration policies 91
11. Other elements 93
11.1 Extending reporting requirements to financial information 93
11.2 Firms active in the commodity markets currently not subject to prudential requirements 94
11.3 Elements of the CfA not covered by this report 94
12. Outcome of the data collection and quantitative analyses 96
12.1 Investment firms in the Union 96
12.2 Quantitative analysis 103
13. Feedback from public consultation 127
13.1 Respondents and general comments 127
13.2 Categorisation of investment firms 127
13.3 Conditions for investment firms to qualify as small and non- interconnected 131
13.4 Fixed overheads requirements (FOR) 133
13.5 Review of existing K-factors 135
13.6 Risks not covered by existing K-factors 141

13.7 Implications of the adoption of the Banking Package 144
13.8 Liquidity requirements 145
13.9 Prudential consolidation 150
13.10 Interactions of IFD and IFR with other regulations 152
13.11 Remuneration and its governance 154
13.12 Other elements 163

List of acronyms

AIF	Alternative investment fund
AIFM	Alternative investment funds managers
AIFMD	AIFM Directive
CA	Competent authorities
CASP	Crypto-assets service providers
CfA	Call for advice
CFSP	Crowdfunding service providers
CRR	Capital Requirements Regulation
CVA	Credit valuation adjustment
ECSP	European crowdfunding service providers regulation
EMIR	European Market Infrastructure Regulation
FHC	Financial holding company
FINREP	Financial reporting framework
FOR	Fixed overheads requirements
FRTB	Fundamental review of the trading book
GAAP	Generally accepted accounting principles
GL	Guidelines
K-AUM	K-factor assets under administration or advice
K-ASA	K-factor assets safeguarded and administered
K-CMG	K-factor clearing member guarantee
K-CMH	K-factor client money held
K-COH	K-factor client orders handled
K-CON	K-factor concentration risk in trading book
K-DTF	K-factor daily trading flow
K-NPR	K-factor net position risk
K-TCD	K-factor trading counterparty default
IFD	Investment Firms Directive
IFR	Investment Firms Regulation
IHC	Intermediary holding company
MFHC	Mixed financial holding company
MiCA	Market in Crypto-Assets Regulation
MiFID	Market in Financial Instruments Directive
MTF	Multilateral trading facility
NCA	National competent authorities
OTF	Organised trading facility
RtC	Risk-to-Client
RtF	Risk-to-Firm
RtM	Risk-to-Market
RTS	Regulatory technical standards
SREP	Supervisory review and evaluation process
UCITS	Undertakings for collective investment in transferable securities
UCITSD	UCITS Directive

List of recommendations

Recommendation 1.	Categorisation of investment firms	20
Recommendation 2.	Harmonisation of the thresholds	22
Recommendation 3.	Class 1 minus investment firms	23
Recommendation 4.	Removal of the notification requirement for the EBA in Article 55(3) of the IFR	24
Recommendation 5.	Removal of the reporting threshold in Article 55(2) of the IFR	25
Recommendation 6.	Conditions for qualifying as Class 3 firm	28
Recommendation 7.	Transition between Class 2 and 3	29
Recommendation 8.	Length of the winding down period for the purposes of the FOR	32
Recommendation 9.	FOR - Expenses related to foreign exchange differences	35
Recommendation 10.	Deducting distribution of profits from total costs for the FOR calculation	36
Recommendation 11.	Clarifications concerning COH	39
Recommendation 12.	'Name give-up' operations in COH	40
Recommendation 13.	Contracts related to market-making activities in COH	40
Recommendation 14.	K-AUM: concept of ongoing advice	41
Recommendation 15.	Provision of advice to support the performance of portfolio management services	43
Recommendation 16.	Review of the K-DTF factor	44
Recommendation 17.	Limit on large exposures in the non-trading book	45
Recommendation 18.	Notion of 'client' in the IFR/IFD framework	47
Recommendation 19.	Clearing member guarantee (K-CMG)	48
Recommendation 20.	Review of the K-ASA factor	49
Recommendation 21.	Prudential treatment of items in the non-trading book	51
Recommendation 22.	Prudential treatment of crypto-assets in the non-trading book	53
Recommendation 23.	Prudential treatment of operational risk	53
Recommendation 24.	Investment firms operating trading venues	54
Recommendation 25.	Application of the FRTB and of the simplified standardised approach	57
Recommendation 26.	CVA calculation for investment firms	58
Recommendation 27.	Definition of the trading book	59
Recommendation 28.	Holding of financial instruments for non-trading investment firms	60
Recommendation 29.	Liquidity requirements for investment firms	63
Recommendation 30.	List of high-quality liquid assets	64
Recommendation 31.	Exemption under Article 43 of the IFR from liquidity requirements	65
Recommendation 32.	Clients guarantees	65

Recommendation 33.	Information and requirements for the authorisation of investment firms	67
Recommendation 34.	Amend the definition of investment holding company	68
Recommendation 35.	Entities exempted from a MiFID authorisation in line with Article 3(1) of MiFID	69
Recommendation 36.	No action on the concept of intermediate IHC	70
Recommendation 37.	Definition of financial institution	70
Recommendation 38.	Scope and methods for prudential consolidation under the IFR	72
Recommendation 39.	Application of the group capital test	73
Recommendation 40.	Inclusion of CFSP and CASP in the definition of 'consolidated situation' in Article 4(1)(11) of the IFR	74
Recommendation 41.	Investment firms providing services related to crypto-assets	81
Recommendation 42.	SREP and provision of services related to crypto-assets	82
Recommendation 43.	Scope of application of remuneration provisions in investment firm groups	85
Recommendation 44.	Risk and remuneration committees	86
Recommendation 45.	'Remuneration bracket criterion'	87
Recommendation 46.	Threshold for derogations regarding deferral and pay out in instruments on a firm wide basis	89
Recommendation 47.	Threshold for derogations regarding deferral and pay out in instruments based on a low level of remuneration	90
Recommendation 48.	Retention periods	91
Recommendation 49.	Review of disclosure and reporting requirements	91

List of tables and figures

Table 1.	Overview of the applicable requirements by category of investment firms	18
Table 2.	Number of (individual) investment firms by Member State, as of 31 December 2023	96
Table 3.	Number of investment firms by Class, as of 31 December 2023	97
Table 4.	Number of investment firms by constraining requirement and classification, as of 31 December 2023	97
Table 5.	Number of Class 3 investment firms exempted from liquidity requirements, as of 31 December 2023	98
Table 6.	Number of investment firms for different thresholds for the metric under Article 12(h) IFR, as of 31 December 2023	98
Table 7.	Number of investment firms for different thresholds for the metric under Article 12(i) IFR, as of 31 December 2023	99
Table 8.	Number of investment firm groups by Member State, as of 31 December 2023	100
Table 9.	Number of investment firm groups by Class, as of 31 December 2023	100
Table 10.	Number of investment firm groups by constraining requirement and classification, as of 31 December 2023	101
Table 11.	Number of investment firm groups for different thresholds for the metric under Article 12 (h) IFR, as of 31 December 2023	101
Table 12.	Number of investment firm groups for different thresholds for the metric under Article 12 (i) IFR, as of 31 December 2023	102
Table 13.	Sample of investment firms participated in ad hoc data collection and coverage	103
Table 14.	Sample of investment firm groups participated in ad hoc data collection and coverage	104
Table 15.	Sample of competent authorities participated in ad hoc data collection	105
Table 16.	Sample of UCITS/AIFM participated in ad hoc data collection	106
Table 17.	Number of months that it took to wind-down the investment firm and cease activities in an orderly manner for investment firms that wind-down and ceased their operation over the last 10 years	107
Table 18.	Number of months that it took to wind-down the investment firm and cease activities in an orderly manner for investment firms that wind-down and ceased their operation over the last 10 years, by MiFID service activity	107
Table 19.	Correlation between service provided and number of months for wind-down	108
Table 20.	NTB amounts by type of investment firm, EU aggregate	110

Table 21.	Distribution of the share of NTB in each category to total NTB by type of investment firm, all firms	110
Figure 1.	Word cloud for NTB 'Other' category.	111
Table 22.	NTB amounts as % of total capital by type of investment firm, EU aggregate	112
Table 23.	Distribution of NTB amounts as % of total capital, all investment firms	112
Table 24.	Intention of authorisation under MiCA	113
Table 25.	Crypto-asset service provided by investment firms	113
Table 26.	Number of overshootings for the portfolios subject to K-CMG	114
Table 27.	Ratio of own fund risk requirements for operational risk under the TSA (trading and sales only) to K-DTF	115
Table 28.	K-factor capital requirements arising from MiFID activities (8) and (9), including a dedicated K-factor for MTF and OTF activity, EU aggregate	115
Table 29.	Distribution of K-factor capital requirements arising from MiFID activities (8) and (9), including a dedicated K-factor for K-MTF and OTF activity	116
Table 30.	Distribution of K-factor capital requirements arising from MiFID activities (8) and (9), including a dedicated K-factor for K-MTF and OTF activity (as a % of capital)	117
Table 31.	Ratio of K-ASA and total K-factor requirements to the capital requirements before introduction of IFR/IFD for firms where their main activity is ASA	117
Table 32.	Distribution Ratio of K-ASA and total K-factor requirements to the capital requirements before introduction of IFR/IFD for firms where their main activity is ASA	118
Table 33.	Distribution of the size of the on- and off-balance-sheet business subject to market risk	118
Table 34.	Distribution of the size of the on- and off-balance-sheet derivatives business	119
Table 35.	Number of investment firms exceeding the absolute thresholds under Article 325a(2) CRR	119
Table 36.	Number of investment firms exceeding the absolute thresholds under Article 273a(1) and Article 273a(2) CRR	120
Table 37.	Number of UCITS/AIFM management companies by authorisation and MiFID activities performed	121
Table 38.	Ratio of K-AUM and K-ASA over UCITS funds for management companies authorised under UCITS licence only	122
Table 39.	Ratio of K-AUM and K-ASA over AIFM funds for management companies authorised under AIFM licence only	122
Table 40.	Ratio of K-AUM and K-ASA over UCITS and AIFM funds for management companies authorised under both UCITS and AIFM licence	123
Table 41.	Information regarding IF Class 2 that could use derogations at different thresholds	126

Table 42. Number of staff and identified staff, remuneration committees in investment firms in the EU for which EBA holds data on remuneration 126

Executive summary

Reasons for publication

Article 60 of Regulation (EU) 2019/2033 (IFR) and Article 66 of Directive (EU) 2019/2034 (IFD) mandate the Commission to submit a report to the Council and to the Parliament regarding multiple aspects of the IFR and IFD. In its report, the Commission may include a legislative proposal to amend the prudential framework applicable to investment firms. The report by the Commission shall include an all-encompassing assessment of the provisions of the IFR and IFD. Against this background, on 1 February 2023 the Commission submitted a Call for Advice (CfA)[1] to the EBA and ESMA, aimed at covering the elements mentioned in those two articles.

The Commission is seeking advice from the EBA and ESMA on the following areas:

a) Categorisation of investment firms, including the conditions to qualify as small and non-interconnected investment firms and the conditions to qualify as credit institutions;

b) The adequacy of the IFR/IFD prudential requirements, including the scope of K-factors, on prudential consolidation and liquidity requirements;

c) Interactions with the CRR/CRD, implications of the adoption of the Banking Package, especially on the application of the market risk framework, variable remuneration and investment policy disclosure;

d) Future proofing the IFR/IFD regime, in particular with reference to the impact of crypto-assets on investment firm activities as well as the interactions with UCITS/AIFM;

e) Considerations on the risk related to ESG factors, and

f) Specific considerations on commodity and emissions allowance dealers and on energy firms.

Furthermore, the Commission expects the EBA and ESMA to assess the impact of the proposed changes against the current framework, in terms of own funds, requirements, operational and administrative costs incurred by investment firms, clustered with respect to the classes of investment firms, size, levels of consolidation, geographical location and activities.

This technical advice was based on considerations related to prudential requirements developed by the EBA, ESMA, the competent authorities responsible for the prudential supervision of investment firms, and in close cooperation with the other securities and markets authorities.

[1] Call for advice to the EBA and ESMA for the purposes of the reports on the prudential requirements applicable to investment firms, 1 February 2023 (link).

Against that background, and given the need to collect feedback more systematically, the EBA and ESMA issued a discussion paper (the 'Discussion paper'[2]).

Structure of the technical advice

In response to the Commission's CfA, this technical advice addresses the elements highlighted by the supervisory community as priorities for possible improvements, as well as several more detailed technical elements in all areas. This technical advice is structured as follows:

- Section 1 discusses the categorisation of investment firms, with a particular emphasis on coherence in the definitions of the applicable thresholds. This section does not elaborate on the categorisation of investment firms that must apply for credit institution authorisation (Class 1), as they are subject to dedicated technical standards that will be developed following the adoption of the Banking Package. Nonetheless, the thresholds for investment firms that must apply the CRR (without credit institution authorisation), and the monitoring of those thresholds, are part of the IFR. Therefore, this document includes an analysis on those thresholds and proposes recommendations for improving the definitions and coherence in the calculation methodologies and monitoring.

- Section 2 evaluates the conditions for investment firms that qualify as small and non-interconnected, including the criteria for their categorisation as well as considerations regarding the transition period from one category to another.

- Section 3, in the context of analysing the adequacy of the own funds requirements, considers the definitions relating to the fixed overheads requirements, the parameters and the mechanics of their calculation, as well as the length of the wind-down period.

- Section 4, also in the context of assessing the adequacy of the own funds requirements, reviews the existing K-factors and recommends improvements in definitions or calculation methodologies.

- Section 5 touches upon the possibility of including new K-factors to cover risks currently only addressed under the pillar 2 framework or as possible alternatives to existing K-factors.

- Section 6 discusses the implications of the adoption of the Banking Package (CRR3/CRD6) concerning the introduction of the Fundamental review of the trading book (FRTB) and how this would be applicable to investment firms. Furthermore, this section discusses the boundary between trading book and banking book positions, as there is no K-factor on banking book positions under the IFR and the potential risk of regulatory arbitrage.

[2] Discussion on the potential review of the investment firms' prudential framework (link).

- Section 7 assesses the existing liquidity requirements and investigates the possibility of improving the risk sensitivity of the requirements arising from certain activities or services. Liquidity requirements are harmonised at Union level under the IFR, but the methodology is based on a fraction of the fixed overheads requirements, and therefore might not consistently reflect the liquidity needs related to certain activities.

- Section 8 discusses the prudential consolidation of investment firm groups under the IFR framework, proposing improvements to the existing text and extending the scope in line with similar provisions of the CRR, as well as a possible extension of the scope to crowdfunding and crypto service providers.

- Section 9 includes an analysis of the interactions of the IFR and IFD with other regulations. This includes the potential exposure of investment firms to crypto-assets and the provision of services related to those assets, the role of other providers of financial services, and the interaction with the own funds requirements applicable to AIFMs and UCITS management companies providing ancillary MiFID services. A sub-section addresses the interaction of Markets in Crypto-assets Regulation (MiCA) and the IFR/IFD in the areas where investment firms may provide services related to crypto-assets.

- Section 10 is dedicated to aspects focused on remuneration in relation to investment firms, AIFMs and UCITS management companies, including the scope of application, remuneration policies, the requirements on variable remuneration, their oversight, disclosure and transparency.

- Section 11 summarises the remaining elements, including reporting as well as references to topics that are not addressed in this document as they are already covered by other EBA publications (e.g. risks related to ESG factors and investment policy disclosure for investment firms). The part of the CfA on commodities markets will not be covered by this document and will be developed at a later stage.

- Section 12 includes the findings of the dedicated data collection that was launched in parallel with the public consultation. The first section of the annex provides an overview of the full population of investment firms and investment firm groups in the Union. The second section of the annex provides the outcome of the data collection. This includes an overview of the data coverage (i.e. number of firms that participated in the data collection with respect to the total population), as well as a summary of the data collected. The quantitative data collection covered specific topics in multiple areas, and the technical advice includes references to the relevant tables of the quantitative analyses.

- Section 13 summarises the feedback from the public consultation and the related EBA and ESMA analyses.

Conclusions

It is worth noting upfront that the EBA and ESMA are of the overall opinion that the current framework achieves the original general objectives, providing a robust and risk-sensitive prudential framework tailored to the size, activities and complexity of the MiFID investment firms.

Nonetheless, market participants and supervisors highlighted a number of technical issues and areas for potential improvements for the prudential framework that justify changes to the IFR, the IFD or to the related delegated regulations. The current IFD-IFR framework was introduced with the objective of tailoring sound and proportionate prudential requirements to the risks investment firms might pose to their clients, the markets in which they operate, and which they themselves incur. Furthermore, the framework also introduced substantial simplification to the calculation and reporting methodologies, in accordance with the general objective of reducing the burden on investment firms. The EBA and ESMA therefore developed the recommendations in this report taking into consideration the general objectives of those regulations.

In that regard, several recommendations contained in this advice have the potential to further contribute to these objectives, but also to objectives of the European System of Financial Supervision as a whole, such as the single rule book applicable to all financial institutions in the internal market. This potential includes a more consistent application across EU Member States of different aspects of the framework, for example by clarifying terms and definitions concerning the K-factor requirements and prudential consolidation.

Additionally, there is also the potential to improve the framework's proportionality and functioning based on the experiences that supervisors and the sector have had with applying the framework since its inception, such as by increasing the thresholds for risk and remuneration committees and by harmonising the methodologies for the categorisation thresholds.

Lastly, there is the opportunity to improve the framework's ability to contribute to a level playing field among investment firms within the Union, and those that compete with market participants on an international level, while maintaining its robustness and risk sensitivity. In this regard, relevant examples are the separation of the governance and the remuneration components from other provisions of the group capital test (GCT), and replacing the high watermark in the calibration of K-CMG with a more risk-sensitive approach.

Dedicated text boxes highlight the key recommendations on the prudential framework.

1. Categorisation of investment firms

1. The CfA requires, in section B1, that the EBA and ESMA analyse a number of elements related to the categorisation of investment firms as credit institutions or the conditions under which investment firms can be subject to CRR prudential requirements. In particular, the following topics are brought up:

   a) Appropriateness and effectiveness of the categorisation of investment firms;

   b) Consistency of the thresholds;

   c) Definition of consolidated assets and subsequent impact;

   d) Overview of investment firms that have been authorised as credit institutions based on the EUR 30 bn threshold in accordance with point (b) of Article 4(1) of the CRR and in application of Article 8a of the CRD; as well as the use of the following legislative provisions:

      i) The discretion of competent authorities to subject investment firms to the CRR requirements under point (b)(iii) of Article 4(1)(1) of the CRR, in the light of potential risks of circumvention and potential risks for the financial stability of the Union;

      ii) Articles 1(2) and 1(5) of the IFR mandating CRR requirements for investment firms dealing on own account or underwriting financial instruments under certain conditions; and,

      iii) The discretion of competent authorities to subject investment firms to the CRR requirements under Article 5 of the IFD.

2. Due to the recent changes in the CRR3 definition of credit institution, some topics are better suited for the regulatory package at the EUR 30 bn threshold that the EBA is expected to develop in that context. Therefore, this technical advice does not elaborate on the definition of consolidated assets and subsequent impact.

1.1 Background

3. The introduction of the IFR and IFD had the purpose of establishing a dedicated prudential framework for investment firms, thereby taking into account the deficiencies that were identified in applying the CRR/CRD IV to investment firms during the European Commission's review of the prudential framework for investment firms in 2017. In this regard, since the requirements in the CRR/CRD IV were largely calibrated to secure the lending and deposit-taking functions of credit institutions through economic cycles, these requirements do not effectively capture the actual risks faced by the majority of EU investment firms, which do not conduct these activities as their main business. Furthermore, while there is some overlap between the services credit institutions and investment firms can provide, and the failure of

larger investment firms can result in the same overall financial stability / systemic risks as large credit institutions, their primary business models are quite different, making them qualitatively different institutions.

4. In this context, in line with the EBA report on investment firms[3], the co-legislators identified three issues with the CRR/CRD as a prudential framework for investment firms, namely its complexity and disproportionality, its lack of risk sensitivity concerning the activities of investment firms, and the differing national transpositions of, and the use of options in, this regulatory framework. Consequently, the co-legislators set three objectives for the review:

   a) Setting more appropriate, risk-sensitive prudential requirements that cover the risks actually posed and incurred by investment firms across all types of business models in a more tailored and comprehensive way than the CRR/CRD IV framework.

   b) Establishing a framework that accommodates investment firms for the business they conduct and to avoid potential regulatory arbitrage in the situation where the identification of investment firms, and the subsequent prudential requirements applied to them, is subject to an overly complex or insufficiently clear process.

   c) Creating a streamlined regulatory and supervisory toolkit to facilitate effective supervisory oversight by competent authorities regarding the actual risks posed and incurred by investment firms.

5. One of the means through which these objectives were intended to be achieved with the introduction of IFD/IFR was a new categorisation of investment firms. At the time, the CRR/CRD differentiated between 11 categories of investment firms. The EBA recommended replacing this categorisation with three main categories, with the aim of pursuing the general objective of enhancing proportionality through indicators related to systemic importance and the ability to run 'bank-like' activities[4]. In that regard, the EBA observed that the full CRD/CRR requirements should be applied to systemic, interconnected and bank-like investment firms because these firms are exposed to credit risk, counterparty credit risk and market risk for positions taken on own account, whether for the purpose of external clients or otherwise[5].

6. The EBA therefore recommended structuring the categorisation in such way that it differentiates between firms that are deemed systemic or otherwise present a clear risk to financial stability in normal conditions, firms considered to be of lesser systemic importance, or not 'bank-like' investment firms, and small and non-interconnected firms that warrant a

[3] See paragraph 2.4 of the EBA Report on Investment Firms: Response to the Commission's Call for advice of December 2014, EBA/Op/2015/20 ('EBA 2015 report')(link).

[4] See paragraph 2.5.2 of the EBA 2015 report.

[5] See Recommendation 1 on page 85 of the EBA 2015 report.

very simple regime that allows the smaller investment firms to be wound down in an orderly manner[6].

7. Regarding the first category of investment firms, the IFR identifies these as the largest and most interconnected investment firms, and they have business models and risk profiles that are similar to those of significant credit institutions, i.e. they provide 'bank-like' services and underwrite risks on a significant scale[7]. Furthermore, systemic investment firms are large enough to, and have business models and risk profiles which, represent a threat to the stable and orderly functioning of financial markets on a par with large credit institutions[8]. Due to these considerations, it is concluded that the CRDV/CRR regime is an appropriate prudential framework for those firms that are conducting activities of dealing on own account or underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis.

8. In addition, a differentiation has been made in the first category between investment firms that conduct one or both of the aforementioned activities and meet a EUR 30 bn threshold for their consolidated assets ('Class 1' investment firms), investment firms that conduct one or both of the aforementioned activities and meet a EUR 15 bn threshold in terms of their consolidated assets[9], investment firms included in the supervision on a consolidated basis of a credit institution[10] or which meet a EUR 5 bn threshold and are designated by their competent authorities following specific criteria in accordance with Article 1(2) or Article 1(5) IFR ('Class 1 minus' firms)[11]. The 30bn threshold was chosen by the European legislators, as it would then give the ECB a direct mandate to supervise those investment firms that provide 'bank-like' services, despite outcomes that have, at times, diverged from this aim[12].

9. Regarding the second category of investment firms ('Class 2' firms), these are the firms that classify as neither Class 1 nor Class 3 firms. The European Commission described these as firms that either deal on own account and incur market and counterparty credit risk, safeguard and administer client assets, hold client money or are above the following size thresholds (assets under management under both discretionary portfolio management and non-discretionary (advisory) arrangements higher than EUR 1.2 bn; client orders handled of at least

[6] See paragraph 2.5.3 of the EBA 2015 report.

[7] The IFR and IFD proposals did not contain a clear elaboration on the bank-like nature of these activities, especially since these activities are not included in the original definition of credit institution in the CRR. The Class 1 regime could benefit from a further refinement and explanation on what activities should classify as bank-like. This would then also help with determining an adequate threshold.

[8] Recital 9 of the IFR.

[9] Article 1(2) of the IFR.

[10] Article 1(5) of the IFR.

[11] Article 5 of the IFD.

[12] Draft IFR Proposal for a Regulation of the European Parliament and of the Council on the prudential requirements of investment firms and amending Regulations (EU) No 575/2014, (EU) No 600/2014 and (EU) No 1093/2010. Brussels, 20.12.2017. COM (2017) 790 final, 2017/0359 (COD): EUR-Lex - 52017PC0790 - EN - EUR-Lex

EUR 100 mn/day for cash trades and/or at least EUR 1 bn/day for derivatives; balance sheet total higher than EUR 100 mn; total gross revenues higher than EUR 30 mn).

10. Regarding the third category of investment firms, these are the firms that do not conduct investment services which carry a high risk for clients, markets or themselves, and where their size means they are less likely to cause widespread negative impacts for clients and markets if risks inherent in their business materialise or if they fail ('Class 3' firms)[13]. The actual conditions that must be fulfilled are listed in Article 12 of the IFR.

11. Both Class 2 and Class 3 investment firms are subject to the IFR and IFD. Class 3 firms are subject to a requirement to hold the higher of a permanent minimum requirement[14], consisting of an ongoing requirement at the level of the required initial capital and the fixed overhead requirement[15]. Class 2 investment firms are also subject to a K-factor requirement that may be the higher capital requirement[16]. The table below describes the requirements:

Table 1. Overview of the applicable requirements by category of investment firms

Class	Undertakings qualified as credit institutions (Class 1)	Undertakings subject to CRR for various reasons, including systemic relevance (Class 1-minus)	Non systemically important investment firms not qualifying as small and not interconnected (Class 2)	Investment firms small and not interconnected (Class 3)
Classification criteria	Activity 3 and/or 6 MiFID + Assets equal at least to €30 bn at individual or consolidated level Both EU and extra-EU assets are taken into account for the threshold	Activity 3 and/or 6 MiFID + Assets between €15 bn and €30 bn at individual or consolidated level or Inclusion in the supervision on a consolidated basis of a credit institution or Assets equal at least to €5 bn at	Investment firms not meeting the criteria for any of the other classes	Meeting all the requirements under Article 12 of the IFR

[13] Recital 17 of the IFR.

[14] See Article 11(1)(b) and Article 14 of the IFR.

[15] See Article 11(1)(a) and Article 13 of the IFR.

[16] See Article 11(1)(c) and Article 15 of the IFR.

		individual or consolidated level; and Decision by NCA subject to Article 5 of the IFD criteria Investment firms subject to Article 1(5) IFR Only EU assets are taken into account for the thresholds		
Applicable framework	CRR/CRD	CRR/CRD (Title VII-VIII)/IFD	IFR/IFD	IFR/IFD with lower prudential requirements and some simplifications
Authorisation	CRD	MiFID	MiFID	MiFID
Supervisory Authority	ECB if operating within the Banking Union	NCA	NCA	NCA

1.2 Effectiveness of the categorisation of investment firms

12. Given the constant interactions with stakeholders in the investment firm ecosystem and the feedback received during the public consultation, it is apparent to the EBA that the IFR/IFD framework is working well and is effectively tailored to the size and activities of investment firms. However, the EBA acknowledges the concerns related to the lack of clarity on the classification of Class 1 investment firms, as well as the criteria based on which the classification is carried out.

13. Nonetheless, considering the diverse population of investment firms, it would be overly burdensome to tailor the regulatory response to each specific type of firms, not to mention using different indicators to structure the population of investment firms. The activity-based model was retained for its ease of implementation, and the categorisation system was designed to enable the tailoring of the prudential framework to the needs of firms.

14. Finally, the built-in links between the IFR/IFD and the CRR/CRD regulatory frameworks, i.e. i) the definition of a 'credit institution' in Article 4(1)(1) of the CRR, and ii) the existence of investment firm(s) consolidated under banking groups, plead in favour of maintaining coherence between the two regulatory frameworks (i.e. IFR/IFD and CRR/CRD), while

providing the necessary regulatory space for the two categories to evolve in their unique environments.

Recommendation 1.	**Categorisation of investment firms**
Maintain the current methodology for the categorisation of investment firms.	

1.3 Consistency of the thresholds

15. One of the longstanding issues related to the system of thresholds in the IFR/IFD has been represented by the inconsistency in the definition of the thresholds, resulting in a significant lack of clarity with regards to i) how each threshold is calculated; and ii) how they are supposed to work together.

1.3.1 Harmonisation of the thresholds in the IFR/IFD framework

16. The EUR 30 bn threshold, the 15 bn threshold and the 5 bn threshold, as detailed at the beginning of this section, are fundamental for the functioning of the prudential regime for investment firms. It is therefore of utmost importance that the thresholds constitute a continuous scale of reference for the categorisation of investment firms, and thus they ought to be calculated based on a similar scope and based on a similar methodology. However, as shown in the table above, there are significant differences in how the IFR text approaches each of the three thresholds, which may result in inconsistent application of the thresholds across jurisdictions and opens the door to significant regulatory arbitrage. Hence the need to harmonise the scope of the calculation of the three thresholds.

17. The EUR 30 bn threshold has been the subject of careful scrutiny and as such is also the threshold that is the most detailed in the CRD text in terms of scope: the group test is carried out at European level, i.e. by including all undertakings established in the EU (and all their branches and subsidiaries anywhere else) that have total assets below EUR 30 bn. Given that it reflects the agreement reached by the co-legislators, it makes sense to use the EUR 30 bn threshold to benchmark the harmonisation of all the thresholds in the framework. Therefore, the scope of calculation of the EUR 15 bn threshold and the EUR 5 bn threshold should include all undertakings established in the EU (and all their branches and subsidiaries anywhere else), in line with the total assets constraint corresponding to the threshold that is being analysed (i.e. either the EUR 15 bn or the EUR 5 bn threshold).

18. This proposal for harmonisation is brought forward in particular in the context of the EUR 30 bn threshold in conjunction with the EUR 15 bn threshold, where the IFR text now clearly provides for two different scopes of calculation (i.e. one explicitly includes and the other explicitly excludes assets of subsidiaries in third countries belonging to EU undertakings), which could be considered counter-intuitive, given that the consequences of the two thresholds are similar (i.e. both involve the application of the CRR: one through a re-

authorisation as credit institutions and the other by simply applying the CRR to the investment firm).

19. In the context of the EUR 5 bn threshold, this proposal for harmonisation is intended to bring clarity and certainty with regards to scope and calculation, as the IFR text is silent in regard to both aspects. Since this particular threshold serves two purposes (i.e. for applying the CRR to systemically relevant investment firms based on Article 5 of the IFD, and for the reporting of the information needed to monitor the EUR 30 bn threshold), it is particularly relevant to have a harmonisation of the scope of the threshold in order to allow consistency in any of the analysis and in the monitoring of the thresholds. This would provide for a coherent scale on which investment firms may place themselves, therefore enabling comparability throughout the whole scale and smoothing out cliff effects and inconsistencies, particularly for investment firms that have total assets in the vicinity of any of the thresholds.

20. Furthermore, the EBA proposal for the harmonisation of the thresholds does not include a harmonisation of the waiver and opt-in clause that is included in the latest version of the EUR 30 bn threshold. This is mainly because the national discretion in Article 5 of the IFD already functions as an opt-in clause of the Class 1 minus investment firms, and an opt-in is needed as an anti-circumvention failsafe provision. Moreover, the lack of a waiver provides a more conservative framework on the part of the total assets scale, where most of the investment firm population is concentrated (i.e. up to EUR 15 bn).

21. Based on the IFR text, it appears necessary that the language defining all three thresholds should be aligned. The following clarifications would be welcome:

    a) The notion of 'combined value' should be clarified in the IFR text as referring to the addition of amounts without any deductions (e.g. accounting for intragroup transactions), as it is used to identify different concepts in different phrases in the IFR text (e.g. in the definition of credit institution, as well as in Article 12(2) of the IFR).

    b) While outside the scope of an IFR/IFD amendment, it should be highlighted that Article 4(1)(1)(b)(i) of the CRR now refers, in the context of the solo test, to the 'total value of consolidated assets of the undertaking established in the Union, including any of its branches and subsidiaries established in a third country', while Article 8a(1)(a) of the CRD refers to 'the average of monthly total assets, calculated over a period of 12 consecutive months'. Given the fact that Article 8a(1) of the CRD makes a direct reference to Article 4(1)(1)(b) of the CRR, the EBA's interpretation is that Article 4(1)(1)(b)(i) of the CRR is the one that provides the scope and methodology for the calculation of the EUR 30 bn threshold at solo level. Nonetheless, it would be advisable for the CRR and CRD texts to align in order to provide clarity on the expectations of the law.

    c) The scope of the consolidated assets (and total assets, for that matter) in the context of the EUR 5 bn threshold is not clear from the IFR text. For more efficient supervision, and for ease of reporting and monitoring, it should be clarified in the IFR what the scope is, in the

context of the calculation of the EUR 5 bn threshold, both at solo and group level. This is also due to the fact that the notion of group remains global, based on the considerations presented during the work on the 1st and 2nd version of the EUR 30 bn threshold package.

22. This harmonisation would also solve an interpretation issue related to Article 55 of the IFR, where, in paragraph 3 of this Article, the EBA needs to notify firms and CAs when either the EUR 15 bn threshold is passed or the EUR 30 bn threshold is passed, while the EBA mandate in paragraph 5 of this Article only refers to the monitoring of the EUR 30 bn threshold. In this specific case, the monitoring of the information related to the EUR 15 bn threshold (based on the scope of calculation provided so far in Article 1(2) of the IFR) would not be fully feasible.

23. Finally, in addition to the analysis detailed above, it has been flagged to the EBA that there may be situations where the EUR 30 bn threshold is surpassed, but the significance threshold in the SSM Regulation is not. The EBA recognises this situation may be conducive to a lack of certainty regarding the supervisory framework for the institutions in this very specific situation.

Recommendation 2. Harmonisation of the thresholds

1) Use the scope and methodology of the EUR 30 bn threshold as a benchmark for the calculation of the other two thresholds (i.e. EUR 15 bn threshold and EUR 5 bn threshold) on which the categorisation of investment firms is based.

2) Provide a clarification in the IFR/IFD with regards to the understanding of the expression 'combined value'.

3) Further clarify in Article 8a(1)(a) of the CRD what the scope of the solo test is, i.e. 'total value of consolidated assets of the undertaking established in the Union, including any of its branches and subsidiaries established in a third country'.

1.4 Additional issues related to the categorisation of investment firms

1.4.1 Categorisation of Class 1 minus firms

24. The Call for Advice requests an analysis of the use of Article 1(2) and 1(5) of the IFR mandating CRR requirements for investment firms dealing on own account or underwriting financial instruments (i.e. Class 1-minus investment firms). In this regard, it is relevant to recall that Recital 42 of the IFR states that '*it is possible that large investment firms which are not of systemic importance, but which deal on own account, underwrite financial instruments or place financial instruments on a firm commitment basis have business models and risk profiles that are similar to those of other systemic institutions. Given their size and activities, it is possible that such investment firms present some risks to financial stability and, although their*

conversion into credit institutions is not deemed to be appropriate in light of their nature and complexity, they should remain subject to the same prudential treatment as credit institutions'. Furthermore, the IFR has been created to address the risk and vulnerabilities specifically inherent in investment firms, which are only partially addressed by international regulatory standards set for large banks by the Basel Committee on Banking Supervision (with reference to Recital 2 of the IFR).

25. NCAs have the discretion to categorise an investment firm as a Class 1 minus firm, and this can also be done at the request of the investment firm. Given the flexibility provided by the categorisation system in general, and this category in particular, it is not advisable to delete this category (i.e. Class 1 minus), as it provides solutions in a wide array of cases. Based on the responses to the qualitative questionnaire circulated at the same time as the Discussion paper, investment firms have been classified as Class 1 minus in line with all the requirements mentioned above.

26. In the specific case of Article 1(2) of the IFR, it should be discussed whether a feature similar to Article 5(1)(c) of the IFD could be introduced. For instance, should an investment firm meet the EUR 15 bn threshold but not meet the additional metrics similar to those in Article 5(1)(c) points (i), (ii) and (iii) of the IFD, the investment firm could remain categorised as a Class 2 firm and under the scope of the IFR/IFD framework. This potential way forward would be in line with early-stage considerations regarding the systemic relevance of investment firms with more than EUR 15 bn in total assets. The proposal to supplement the assessment with additional indicators would provide a more comprehensive view of the investment firm risk profile in terms of systemic importance and whether the firm is engaging in 'bank-like activities'. This addresses a persistent critique of the thresholds in general, and the EUR 15 bn threshold in particular, whereby the balance sheet size does not fit all business models and risk profiles of the investment firm population.

Recommendation 3. Class 1 minus investment firms

1) Maintain the current category of Class 1 minus investment firms.

2) Supplement the assessment with indicators reflecting IFs' risk profiles more accurately. The EBA, in consultation with ESMA, should be given a mandate to specify, and in a way that is harmonised with Article 5(1) of the IFD and the associated RTS (EU) 2021/2153 on criteria for subjecting certain investment firms to the requirements of the CRR[17], the points to be analysed when determining systemic relevance, and NCAs should be responsible for carrying out this criteria-based assessment.

[17] Commission Delegated Regulation (EU) 2021/2153 of 6 August 2021 supplementing Directive (EU) 2019/2034 of the European Parliament and of the Council with regard to regulatory technical standards specifying the criteria for subjecting certain investment firms to the requirements of Regulation (EU) No 575/2013 (OJ L 436, 7.12.2021, p. 9, ELI: http://data.europa.eu/eli/reg_del/2021/2153/oj).

27. In the context of Article 55(3) of the IFR, the EBA has an obligation to notify investment firms when they surpass the EUR 30 bn threshold, either on an individual or on a group basis.

28. Based on the requirements in Article 55 of the IFR, currently only undertakings with total assets above EUR 5 bn should report their information to the EBA to enable the monitoring of both the EUR 30 bn threshold and the EUR 15 bn threshold. This 5 bn floor on the data reported to the EBA hinders the process of accurately monitoring the thresholds. This introduces a legal risk of ineffectively carrying out the activities necessary to notify investment firms of threshold breaches, due to a lack of sufficient information. The following information gaps have been identified by the EBA:

    a) There is no information available for any investment firm with total assets below EUR 5 bn;

    b) The information is only transmitted to the EBA for investment firms which are part of an investment firm group;

    c) Articles 55(1) and 55(2) of the IFR do not require other relevant institutions (i.e. credit institutions performing MiFID (3) and (6) activities) to report the value of their total assets to the EBA;

    d) A combined reading of Articles 55(1) and 55(2) of the IFR suggests that a threshold of EUR 5 bn is set at both individual level and group level for reporting information to the competent authority.

29. In any case, the obligation to 'verify the value of their total assets on a monthly basis' falls to the entity, in line with the requirements in Article 55(1) and 55(2) of the IFR. In light of the issues noted above, the extensive information gaps introduce a risk that the EBA cannot effectively carry out the monitoring activities necessary to notify investment firms of threshold breaches and may result in a missed notification. The burden of proof should therefore fall on entities to notify the competent authorities of threshold breaches.

Recommendation 4. Removal of the notification requirement for the EBA in Article 55(3) of the IFR
Remove the notification requirement for the EBA in Article 55(3) of the IFR.

1.4.2 Monitoring of the thresholds

30. In line with the requirements in Articles 55(1) and 55(2) of the IFR, entities carrying out MiFID services 3 and 6 are required to 'verify the value of their total assets on a monthly basis' and this information shall be transmitted on a quarterly basis to competent authorities using the EBA monitoring template in line with the mandate in Article 55(5) of the IFR. The EBA shall then receive the information from the competent authorities.

31. Investment firms of banking groups are excluded from the reporting framework developed under Article 55, as specified in the level 2 provisions, as any investment firm that is part of a banking group falls under the scope of the CRR. Furthermore, investment firms with total assets below EUR 5 bn and part of investment firm groups play a role in the calculation of the EUR 30 bn threshold at group level.

32. The EBA recommends removing the EUR 5 bn threshold for investment firms that are part of investment firm groups for the reporting of information in line with the requirements in Article 55(2) of the IFR. The risk of entities circumventing the notification requirements for threshold breaches to the competent authority is minimal in the context of Article 55(1) of the IFR (i.e. individual investment firm); however, the risk increases for groups which are, under certain circumstances, not required to report their consolidated total assets. The proposed removal of the reporting floor would decrease the risk of circumvention and also provide necessary information to supervisors to monitor consolidated total assets in line with Article 55(2) of the IFR.

33. Where the calculation of the consolidated total assets is considered disproportionately complex, competent authorities may allow investment firm groups to report the combined total assets (i.e. the simple sum of the total assets of the relevant investment firms in the group) instead of the consolidated total assets amount.

Recommendation 5. Removal of the reporting threshold in Article 55(2) of the IFR

1) Remove the EUR 5 bn threshold for the reporting of the information in line with the requirements in Article 55(2) of the IFR for investment firms that are part of groups.

2) CAs may allow investment firm groups to report the combined total assets (i.e. the simple sum of the total assets of the relevant investment firms in the group) instead of the consolidated total assets amount.

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

34. The CfA requires the EBA and ESMA Report to 'provide, where applicable, per Member State, an overview of investment firms currently qualifying as 'small and non-interconnected', together with an estimation of their corresponding own funds requirements per risk category, should they be subject to K-factors. The report should include an assessment of the appropriateness of the prudential treatment of investment firms qualifying as 'small and non-interconnected' as well as of the conditions for such qualification'.

35. Class 3 entities are considered, in general, as not posing significant risks to clients, to the market or to themselves. Therefore, Article 11(2) of the IFR alleviates the prudential requirements for these firms and removes these entities from the scope of own funds requirements based on the K-factor system and from some parts of the IFD. Small and non-interconnected investment firms must therefore only maintain own funds based on a maximum rule between the required permanent minimum capital (PMC) in Article 14 of the IFR, or the own funds amount calculated on the basis of their fixed overheads requirement (FOR) in accordance with Article 13 of the IFR.

36. There are nine conditions that must be cumulatively met in order to qualify as a small and non-interconnected investment firm in line with Article 12 of the IFR:

    a) AUM measured in accordance with Article 17 is less than EUR 1.2 bn;

    b) COH measured in accordance with Article 20 is less than either:

        i) EUR 100 mn/day for cash trades; or

        ii) EUR 1 bn/day for derivatives;

    c) ASA measured in accordance with Article 19 is zero;

    d) CMH measured in accordance with Article 18 is zero;

    e) DTF measured in accordance with Article 33 is zero;

    f) NPR or CMG measured in accordance with Articles 22 and 23 is zero;

    g) TCD measured in accordance with Article 26 is zero;

    h) The on- and off-balance-sheet total of the investment firm is less than EUR 100 mn;

i) the total annual gross revenue from investment services and activities of the investment firm is less than EUR 30 mn, calculated as an average on the basis of the annual figures from the two-year period immediately preceding the given financial year.

37. Article 12 of the IFR also provides a regulation to avoid circumventions. Conditions (a), (b), (h) and (i) shall apply on a combined basis for all investment firms that are part of the group. Currently the notion of 'group' also includes investment firms located in a third country.

38. Finally, Article 12 of the IFR contains an elaborated and differentiated system regulating cases when firms no longer meet one of the conditions described above, as well as cases when a firm has not yet met one of these conditions but subsequently meets all the conditions. The regulation provides proportionality for firms that no longer meet the conditions set for small and non-interconnected firms. Where an investment firm no longer meets the conditions set out in points (a), (b), (h) or (i), but continues to meet the conditions set out in points (c) to (g) of that paragraph, it shall cease to be considered a small and non-interconnected investment firm after a period of three months. This gives the firm time to adopt the expanded regulations it must comply with. Conversely, where an investment firm no longer meets any of the conditions set out in points (c) to (g), it will have to comply with the enlarged framework immediately when exceeding the threshold. Where an investment firm that has not met all of the conditions for a small and non-interconnected firm subsequently meets these conditions, it will be considered a small and non-interconnected investment firm only after a period of six months from the date on which those conditions are met. This period ensures that the firm now permanently meets the conditions set out for small and non-interconnected firms.

39. All conditions have been formulated quantitatively and not qualitatively. Conditions (a) to (g) are based on the fact that they have actually occurred. However, while conditions (a) to (g) determine the level of risk that a firm may have to be classified as small and non-interconnected, conditions (h) and (i) follow a different approach. They classify an investment firm as small and non-interconnected not by the risks the K-factor system stands for but instead based on size. The rationale was that, from a certain size onwards, a firm can no longer be regarded as small and non-interconnected.

2.1 Discussion on the conditions for qualifying as a Class 3 investment firm

40. Based on the evidence gathered so far, feedback from both industry and supervisors shows that the Class 3 categorisation criteria function well and that the framework is achieving its aim of de-complexifying the prudential treatment of small investment firms.

41. In particular, with regards to conditions (h) and (i), the EBA considers that having criteria that reflects more than one feature, and size-related information, is particularly relevant for a framework built around the value of total assets (as is the IFR/IFD framework). Therefore, the EBA does not consider it necessary to eliminate conditions (h) and (i). As the amounts in the

Article 12 (1) a) and b) criteria of the IFR have proved appropriate, adequate and sufficient for distinguishing between Class 2 and Class 3, based upon the risk the firm in question poses, there is no need to reduce those amounts.

42. While criteria a) to g) are based upon the risk each service imposes, criteria h) and i) follow the idea that pure size should also be considered as a risk-factor. This justifies keeping both criteria, but it is worth considering increasing the amounts of both criteria. Therefore, the EBA recommends, firstly, not introducing any further criteria in Article 12(1) IFR, and secondly increasing the amounts for criteria h) to EUR 200 mn and the amount for i) to EUR 50 mn.

43. Tables 6 and 7 in Section 12 of this document present the number of investment firms that would be reclassified in the context of an increase in the thresholds in Articles 12(1)(i) and 12(1)(h) respectively, while Tables 11 and 12 in Section12 of this document summarise the impact of an increase in these thresholds for investment firm groups.

Recommendation 6. Conditions for qualifying as Class 3 firm

The EBA recommends firstly not introducing further criteria in Article 12(1) of the IFR, and secondly to increase the amounts for criteria h) to EUR 200 mn and the amount for criteria i) to EUR 50 mn.

2.2 Transition of investment firms between Class 3 and Class 2 categories

44. Two issues have been flagged, notably by CAs, on the transition of an investment firm from Class 3 to Class 2: i) the lack of a transitional period regarding the application of prudential requirements corresponding to categorisation as Class 2; and ii) the frequency of the migration of investment firms between the two classes.

45. With regards to a transitional period for investment firms between Class 3 and Class 2 categories, on the one hand it has been pointed out by supervisors that a three-month transition period could be granted to all investment firms no longer meeting the conditions set in Article 12(1) of the IFR. In their view, it is not clear why some investment firms have to comply with the full requirements of IFR/IFD immediately and others do not.

46. On the other hand, the calculation of K-factor requirements in line with Article 12(3) of the IFR already includes transitional periods where this is considered relevant. An additional transition period would thus stand in the way of prudent management of investment firms, since a move from Class 3 to Class 2 would represent an acknowledgement of an increase in activity of the investment firm and the investment firm is expected to manage the additional risks coming from the additional activity in line with the regulatory framework. The EBA thus considers the current framework to be adequately built.

47. As far as the frequency of the migration between the two classes is concerned, this may happen for entities that are close to the thresholds that separate the two classes. However, as it currently stands, in order to qualify as a small and non-interconnected investment firm in line with Article 12 of the IFR, conditions need to be met cumulatively. While in theory Article 12 does not contain any provision to prevent an entity from being reclassified more than once during the same year, which could result in a volatile categorisation, limiting the number of changes could potentially be counterproductive as it also may result in investment firms being 'stuck' in a category due to a one-off event and unable to return to their regular category once the event is over. This would be disproportionate and burdensome for the firms and their national competent authority. It is therefore recommended that the current situation be maintained.

Recommendation 7. Transition between Class 2 and 3
It is recommended that the current framework be maintained with regards to the transition of investment firms between Class 2 and Class 3 categories.

3. Fixed overheads requirements

3.1 Background

48. The CfA requires[18] an assessment of the adequacy of the prudential requirements and specifically refers to the calculation of the fixed overheads requirements (FOR).

49. The own funds requirements on the basis of the fixed overheads laid down in Article 13 of the IFR finds its origins in Article 4 and Annex 4 of Directive 93/6/ECC on the capital adequacy of investment firms and credit institutions. It remained largely unchanged by Article 21 of Directive 2006/49/EC on the capital adequacy of investment firms and credit institutions and Article 97 of the CRR. According to the FOR, an investment firm must have an amount of own funds equal to a quarter of its fixed overheads. Two methods for calculating the FOR were possible under both directives.

50. The subtractive approach has been determined as the relevant method for calculating FOR in accordance with Article 13 of the IFR. While under the CRR the items for deduction were determined exclusively by the Delegated Regulation, in the application of Article 97 of the CRR, under the IFR some deduction points are already listed in Article 13(4). Delegated Regulation 2022/1455[19] then adds further items for deduction. The experiences of the years since 2014 have been taken into account and the wording of the deductible items that are being used has been adjusted accordingly. While Delegated Regulation (EU) 2015/488 under the CRR listed eight items that can be deducted from the total expenditure, under Article 13(4) of the IFR and Delegated Regulation (EU) 2022/1455, the number of items for deduction was increased to 14, also as a result of the experience of the previous years.

51. The purpose of the FOR is to provide a 'minimum' for the capital requirements resulting from the K-factors methodology. This minimum level was set under the assumption that an investment firm would be required to hold own funds for an assumed wind-down period, or a period for restructuring, of three months. The underlying idea is that this would ensure firms hold enough capital to close their operations in an orderly manner, as during such a period the investment firm may not generate sufficient revenue to sustain its clients' operations properly. This is directly relevant to mitigating the risk to clients.

52. Under Article 96(2) of the CRR, the FOR also acted as a substitute to cover operational risk for investment firms dealing on own account (and which fulfilled the criteria set out in

[18] See section B.1.a) of the CfA.

[19] Commission Delegated Regulation (EU) 2022/1455 of 11 April 2022 with regard to regulatory technical standards for own funds requirement for investment firms based on fixed overheads (link).

Article 96(1) a) and b) of the CRR), as the provisions covering operational risk did not apply to investment firms.

53. For the purposes of the CfA, this analysis covers the following topics:

    a) Length of the wind-down period;

    b) Treatment of specific deductibles.

3.2 Three-month wind-down period

54. As stated above, the FOR set a minimum for the capital requirements of an investment firm, based on the idea this amount was calibrated at the same level as the capital that might be needed for an orderly wind-down of the firm's operation over a three-month period. That length, however, is assumed to be the same for all business models. There is therefore a case to consider whether the three-month period remains appropriate for all types of investment firms, or whether some type of firms may need a longer period.

55. For this analysis, one should bear in mind that the FOR is not the relevant own funds requirement when the own funds requirement on the K-factor basis results in a higher amount of own funds requirements. Furthermore, the SREP guidelines for investment firms explicitly require competent authorities to consider wind-down capital and to address specific cases where the wind-down period may extend beyond the envisaged three months.

56. The data collection was carried out in parallel with the public consultation on the Discussion paper and competent authorities were asked to provide a history of cases where the wind-down period was longer than three months. The aim of this data collection was to assess whether the quantitative data regarding historic winding down periods support the three months set in the IFR for calculating the FOR.

57. The outcome of the analysis is reported in Table 19 of Section 12, which shows there is no correlation between the historical number of months required for the winding down of an investment firm and the services they provide. Table 19 is based on data provided by the competent authorities on the basis of historical cases.

58. It is worth noting the following element. In accordance with the data collection, (i) the three-month length of the assumed wind-down period was sufficient for only 50% of cases; and (ii) there are nonetheless several reported cases where the actual wind-down period exceeds one quarter, extending to a full year and up to several years.

59. Therefore, the respondents' opinion that the wind-down period does not depend on the services provided is supported by the available data. According to the respondents, there is no need to tailor the winding down period to the business models, also taking into account that Class 2 firms would be subject to K-factor capital requirements. Concerning the possibility of extending the FOR to six or more months, it is worth noting that only 25% of the cases, in

Table 19, exceed one year for the winding down and, as stressed earlier, some of those investment firms would be subject to K-factors.

60. Those elements prove that the reference time length of three months for a potential wind-down period is hard to link to the types of activities of an investment firm, in either direction, which highlights the importance of the K-factors as a more risk-sensitive measure.

Recommendation 8. Length of the winding down period for the purposes of the FOR

Concerning the length of the wind-down period as reference for setting the FOR, the following is recommended:

1) keeping the current calibration (i.e. the equivalent of three months of fixed overheads); and

2) including the same requirements for all investment firms, independent of the services provided.

3.3 Considerations on specific deductibles related to specific business models

3.3.1 Deductibles related to specific business models

61. It seems appropriate to reflect on whether the current number of deductible items are sufficient for the purpose of the FOR, or whether further items should be developed. To that end, one may argue that different business models of investment firms would justify dedicated treatments.

62. On the one hand, Delegated Regulation (EU) 2022/1455 introduces a specific requirement for market-making firms, which is an example of a special treatment for a particular activity. On the other hand, fixed overheads requirements arise from how different investment firms set up their internal organisation, even if maintaining similar business models in terms of services provided and activities carried out.

63. Furthermore, it is worth noting that identifying deductibles and relating them to business models would make the FOR calculation more complex, by increasing the calculation methods and the cases to be considered. As an additional drawback, this approach would potentially reduce the consistency of application of those requirements.

64. It is therefore recommended that the deductibles should not be adjusted in relation to different business models, in order to keep the calculations as simple as possible.

3.3.2 Expenses related to tied agents

65. One might question whether the expenses of tied agents should be added to the investment firm's total expenses, thereby increasing them. The reason behind this is that firms delegate activities to tied agents that they would otherwise carry out themselves.

66. In general, one has to distinguish between: (i) expenses arising from the specific tied agent activity as described in Article 29 (1) of MiFID; and (ii) expenses arising from other activities the investment firm may outsource to the tied agent.

67. As the tied agent acts on behalf of the investment firm when providing the investment service, the investment firm derives an economical advantage from that activity from which it usually pays the fees to the tied agent. In this case, the fees paid to tied agents are already covered by income gained from the activity of the tied agent.

68. This justifies deducting fees from the investment firm's costs in the calculation of the fixed overheads. If fees paid to the tied agents for a tied agent activity, within the meaning of Article 29(1) of MiFID, are not covered, e.g. the tied agent purely promotes the investment firm's business, such costs are variable as they do not occur in a wind-down scenario.

69. However, in cases where the investment firm has outsourced own activities not described in Article 29(1) of MiFID to the tied agent, either the firm pays the tied agent, and the payment is then an expense of the investment firm and within the FOR or, if the investment firm does not pay, it must take expenses for the outsourced activity into account under Article 1(5) of Delegated Regulation (EU) 2022/1455, which leads to the result that such costs are also within the FOR calculation.

70. If a breakdown of such costs is not available, an investment firm should be required to add to the figure representing total expenses only its share of the third party's expenses as it results from the investment firm's business plan, as per Article 1(5) of Delegated Act 2022/1455.

71. If considered from the point of view of the FOR, being the amount of fixed costs expected for a three month wind-down period, a preliminary conclusion would be that adding expenses of the tied agent arising from the activity as described in Article 29(1) of MiFID or other activities, as described above, to the firm's own expenses may be questionable because the investment firm can usually terminate the tied agent in the wind-down period. Nonetheless, this might not always be the case, as it might depend on the contractual agreement between the investment firm and the tied agent.

72. All these elements suggest that such costs should not be included in the calculation and the relevant regulations should not be amended.

3.3.3 Expenses related to non-MiFID activities

73. Investment firms may provide additional services outside the scope of MiFID investment services; examples would be crowdfunding services within the meaning of Regulation

(EU) 2020/1503 or other services whose legal basis for the providing firms requires the FOR. Another example would be investment firms offering, on the basis of the equivalence criterion, services under MiCA which are not subject to the own funds requirements set for CASP. Currently, MiCA services-related expenses are already included in the calculation of the FOR, as set out in the Delegated Regulation (EU) 2022/1455, as they are not carved out. There might therefore be a case to consider whether only the expenditure resulting from the investment firm's MiFID activities and services should be used in the calculation of the FOR, excluding the costs arising from other activities.

74. One element to be considered is therefore, on the one hand, that the expenses resulting from non-MiFID activities could be regarded as not necessary for the wind-down period. On the other hand, although that might be true when having exclusively the winding down of the investment services in mind, it could be problematic from the perspective of the wind-down of the investment firm itself. For example, in cases where most costs come from business outside the MiFID service or related service, ignoring these costs could lead to a disorderly wind-down of the investment firm itself. This would be in contrast to the objective of the FOR of protecting clients from a disorderly wind-down of the investment firm.

75. Furthermore, as the FOR is calculated on the basis of the investment firm's financial statement, it often seems difficult to distinguish for some expenses which part of the business they come from. In cases where it is possible to distinguish, it may lead to further administrative effort and costs.

76. Should the calculation of the FOR potentially exclude costs related to non-MiFID activities, an option could be to set the costs according to the ratio of the income from the different business areas. Difficulties would also arise under this approach. For example, the ratio of the income from the different business areas might be volatile over time, making the calculation of FOR also more volatile. Furthermore, such an approach would lead to further administrative effort and costs on the part of investment firms.

77. All these elements lead to the conclusion that a differentiated treatment of costs for non-MiFID activities should not be recommended and that the relevant regulations should not be changed in that direction.

3.3.4 Expenses related to foreign exchange rates difference

78. One example of a further deductible item is related to foreign exchange rate differences. These are relevant for the money belonging to clients in foreign currency, and for which the investment firm provides custody services in accordance with MiFID. The question is then whether fluctuations related to exchange rate changes should be considered as fixed costs or as variable costs. When they are considered variable costs, they should be eligible for deduction from the total costs for the purposes of the FOR.

79. To see how these costs might be eligible for deductions from total costs, it is worth recalling the requirements of the directive on the safeguarding of financial instruments and funds belonging to client[20]. Article 2(1) of Delegated Directive 2017/593 prescribes: 'investment firms […] to keep records and accounts enabling them at any time and without delay to distinguish assets held for one client from assets held for any other client and from their own assets'. However, Article 3 of that directive allows a certain degree of divergence: 'If the applicable law of the jurisdiction in which the client funds or financial instruments are held prevents investment firms from complying […] Member States shall prescribe requirements which have an equivalent effect in terms of safeguarding clients' rights.'

80. Therefore, in the first case (i.e. where client money is segregated in accordance with the applicable conditions in Article 2 of Delegated Directive 2017/593), there is a case for supporting the deduction of costs related to foreign exchange fluctuations from the total costs for the FOR calculation. However, in cases where the derogation in Article 3 of the same directive was used, it appears more difficult to support the same conclusion.

81. If the considerations above are noteworthy, since this aspect does not appear in the current text of the IFR, nor in Delegated Regulation (EU) 2022/1455, it might be appropriate to consider including it, together with the two conditions explained above.

82. One element to consider is that the implementation of this deduction could be complicated, as in accounting practice foreign exchange differences are not clearly distinguished according to the sources of their origin (e.g. clients' money accounts). If it is not clearly documented, this new deductible item can cause a reduction in the transparency of FOR calculation.

Recommendation 9. FOR - Expenses related to foreign exchange differences
Foreign exchange fluctuations resulting from clients' money should be considered a deductible from the total costs for the FOR calculation only in cases where the client money is segregated in accordance with the applicable conditions in Article 2, paragraph 1 of Delegated Directive 2017/593. Foreign exchange fluctuations should not be considered a deductible in cases where the derogations in Article 2, paragraphs 2 or 3 of the same directive were used.

3.3.5 Deductions of distribution of profits from total costs

[20] Commission Delegated Directive (EU) 2017/593 of 7 April 2016 supplementing Directive 2014/65/EU with regard to safeguarding of financial instruments and funds belonging to clients, product governance obligations and the rules applicable to the provision or reception of fees, commissions or any monetary or non-monetary benefits (link).

83. Article 1, paragraph 1, of Delegated Regulation (EU) 2022/1455[21] states that: '*the "figures resulting from the applicable accounting framework" shall refer to figures of an investment firm's most recent audited annual financial statements after distribution of profits or annual financial statements where investment firms are not obliged to have audited financial statements*'.

84. This raises interpretative issues. Firstly, some firms believe that the distribution of profits must be deducted from the total expenses. This misinterpretation could be solved by modifying Article 13(4) of the IFR, specifying that items may only be deducted where they are reported under total expenses. A second issue is that the expression 'after distribution of profit' may be interpreted for a time criterion, i.e. only after the balance sheet has been approved and profits have been distributed, the investment firm is allowed to calculate FOR using the costs as represented in the balance sheet.

85. For the purposes of the FOR calculations, the only items that can be deducted are those that are part of the total costs. Otherwise, the calculation would not lead to an accurate calculation of the fixed overheads. This applies to any item, including the distribution of profits.

86. It is worth recalling that the wording '*after distribution of profits*' in Delegated Regulation (EU) 2022/1455 was introduced to address cases where, based on some national GAAPs, profit distributions may be reported under total expenses. It was never intended to allow the deduction of the distribution of profits, as this practice would improperly reduce the FOR, nor was it intended as a time criterion.

Recommendation 10. Deducting distribution of profits from total costs for the FOR calculation

The reference to 'distribution of profits' mentioned in Article 1, paragraph 1, of Delegated Regulation (EU) 2022/1455 should be clarified as follows:

3) The reference to distribution of profits in Article 1, paragraph 1 of Delegated Regulation (EU) 2022/1455, Calculation of the fixed overheads requirement, should be removed.

4) 'Distribution of profits' should be mentioned and treated as any other deduction point in paragraph 6 of the same article.

5) Paragraph 6 of the same article should also be amended, specifying that any of the deductible items set out in Article 13(4) of the IFR and in Delegated Regulation (EU) 2022/1455 Article 1(6) points (a) to (g), as well as the additional item 'distribution of profits', can be deducted from total costs only if they are part of the total costs in

[21] Commission Delegated Regulation (EU) 2022/1455 of 11 April 2022 supplementing Regulation (EU) 2019/2033 with regard to regulatory technical standards for own funds requirement for investment firms based on fixed overheads (link).

accordance with the applicable accounting standards mentioned in paragraph 1 of the same article.

4. Review of existing K-factors

87. With the CfA, the Commission expects[22] an assessment of whether all relevant risk categories pertaining to the activities and operations of an investment firm are adequately captured by the K-factors methodology. In particular, the assessment should consider whether the range of operational risks that are faced by investment firms are adequately reflected in their own funds requirements.

88. This section provides a description of the main points of discussion regarding the existing K-factors and presents the possible way forward. Section 5 discusses the possibility of introducing new K-factors.

4.1 Background

89. The calculation of own funds requirements via K-factors is one of the key innovations brought by the IFR/IFD regime. The K-factors under Risk-to-Client (RtC) capture client assets under management and ongoing advice (K-AUM), client money held (K-CMH), assets safeguarded and administered (K-ASA), and client orders handled (K-COH). The K-factor under Risk-to-Market (RtM) captures net position risk (K-NPR) in accordance with the market risk provisions of the CRR or, where permitted by the competent authority for specific types of investment firms that deal on own account through clearing members, based on the total margins required by an investment firm's clearing member (K-CMG). Investment firms have an option to apply K-NPR and K-CMG simultaneously on a portfolio basis.

90. The K-factors under risk-to-firm (RtF) capture an investment firm's exposure to the default of its trading counterparties (K-TCD) in line with the provisions for counterparty credit risk based on the CRR, albeit slightly simplified. Concentration risk in an investment firm's large exposures to specific counterparties is addressed by K-CON, which is based on the provisions of the CRR that apply to large exposures in the trading book. K-DTF captures the transactions that an investment firm enters through dealing on own account or the execution of orders on behalf of clients in its own name.

91. The overall own funds requirement under the K-factors is then the sum of the requirements of the K-factors under RtC, RtM and RtF. In principle, all MiFID core investment services and activities should have a K-factor associated with them[23], but this might not always be explicit. K-AUM, K-ASA, K-CMH, K-COH and K-DTF relate to the volume of activity referred to by each

[22] See section B.1.c) of the Call for advice.

[23] The list of core services investment firms can provide or perform is in Section A, Annex I of MiFID (link).

K-factor. If a firm does not undertake the relevant activity, the amount of the K-factor requirement equals zero.

4.2 Client Orders Handled (COH)

4.2.1 Client Orders Handled (COH): Placing of financial instruments without firm commitment

92. Concerning the placing of financial instruments without a firm commitment, slightly different transpositions of MiFID in national regulations lead to different readings on whether and how the K-COH would capture this particular service. Investment firms would then have the possibility of deciding how to capture this service in their calculations.

93. An investment firm performing this activity for another entity performs only a 'sales' function, in that the investment firm agrees to sell the financial instruments of a third party to the public, without the investment firm having an obligation to buy any of the financial instruments that could not be sold to the public. There is also a level playing field issue, since only minor differences distinguish placement agents from firms transmitting or executing orders, as in one case the service is connected to the issuance of financial instruments, as opposed to the secondary market sale of these instruments.

94. Furthermore, the risk faced by the investment firm itself while performing this activity is limited, but this is not necessarily the case for the investment firm's clients. There is therefore a risk for clients.

95. There might therefore be a case for clarifying the IFR definitions, stating explicitly that the activities related to placing without a firm commitment basis should either be captured under the COH or, should the process be carried out on the book of the investment firm, under the DTF, so that the activity is always captured under one or the other K-factor.

Recommendation 11. Clarifications concerning COH

Concerning the 'Placing of financial instruments without firm commitment' service, it is suggested clarifying, either in the IFR definitions or in a recital, that the activities related to the placing without a firm commitment basis should either (i) be captured under the COH or (ii) be captured under the DTF should the process be carried out on the book of the investment firm. This should ensure that this activity is always to be captured under one or the other K-factor.

4.2.2 Client Orders Handled (COH): Name give-up operations

96. 'Name give-up' is an informal term for an order execution service whereby the institution puts the two counterparties to the transaction in touch with each other without interposing itself and just receives a commission.

97. The EBA has already clarified this point in a QnA[24] by specifying three cases to be considered, depending on whether the activity should be taken into account in the calculation of the K-COH.

98. It would be beneficial for this activity to be explicitly mentioned either in the IFR or in the relevant Delegated Regulation[25] as well as the three possible cases of treatment mentioned in that QnA.

Recommendation 12. 'Name give-up' operations in COH

Concerning 'Name give-up operations', it is recommended that this activity be explicitly mentioned either in Delegated Regulation (EU) 2022/25 as being required to be included in the K-COH calculation, including the three possible cases of treatment mentioned in that QnA 2021/6316.

4.2.3 Client Orders Handled (COH): contract related to market-making activities

99. Investment firms authorised to trade on own account as part of market-making are mandated to provide liquidity by buying and selling securities on the market but acting solely on behalf of third parties. The gains or losses linked to the transactions are posted to the issuer's account and the investment firm's remuneration is a flat fee.

100. A clarification may be needed on whether liquidity contracts are included in the K-factors, as the interpretation seems unclear and differs across investment firms. As a result, under one interpretation, some investment firms that assume that this activity is not explicitly covered by an existing K-factor calculate a zero own funds requirement against that activity. Other firms, however, seem to assume that those activities should be included in the calculation of the K-COH or of the K-DTF. Because of these different interpretations, there is a risk of regulatory arbitrage.

101. It is therefore worth considering that this activity should be explicitly mentioned in the IFR text and covered by a K-factor, being either the K-COH and K-DTF.

Recommendation 13. Contracts related to market-making activities in COH

[24] See QnA QA2021_6316 (link).

[25] Commission Delegated Regulation (EU) 2022/25 of 22 September 2021 with regard to regulatory technical standards specifying the methods for measuring the K-factors (link).

Concerning contracts related to market-making activities, these should always be included in the calculation of the K-factors, either as K-COH or in the K-DTF, as they case may be. Delegated Regulation (EU) 2022/25 should be amended to mention the treatment of this specific activity.

4.3 Assets under management and ongoing advice (K-AUM)

4.3.1 K-AUM: definition of ongoing advice

102. 'Investment advice' is defined in the IFR via reference to MiFID, Article 4(1), point (4). 'Investment advice of ongoing nature', however, is not a MiFID definition, and it is defined in Article 4.1(21) of the IFR as: 'investment advice of an ongoing nature means the recurring provision of investment advice as well as the continuous or periodic assessment and monitoring or review of a client portfolio of financial instruments, including of the investments undertaken by the client on the basis of a contractual arrangement'. Subsequently, the term 'Assets under management' for the purposes of the IFR is defined in in Article 4.1(27) as: 'the value of assets that an investment firm manages for its clients under both discretionary portfolio management and non-discretionary arrangements constituting investment advice of an ongoing nature'.

103. Concerns were raised about whether the wording 'recurring provision of investment advice' in those definitions is clear enough to ensure a harmonised application, in particular because it impacts the calculation of the K-AUM.

104. Various options could be considered in clarifying this terminology. For example, the recurring provision of investment advice could be conditional on the existence of a contract with the clients, envisaging the provision of that service on a non-occasional basis. This would result in a narrow interpretation of that definition. At the opposite end of the spectrum, the regulation may define what constitutes 'non-recurrent' advice, to have a broader interpretation of that definition. In both cases, it is not clear whether these specifications would facilitate the implementation of the K-AUM calculation or would instead add complexity because of the additional constraints.

105. In seeking clarification, it should be borne in mind that, should the IFR include a narrow definition, this could lead to a very limited application of the concept of ongoing advice for the purpose of calculating the AUM, which might not be in line with the original EBA advice[26] and might result in an increase in risk to clients.

Recommendation 14. K-AUM: concept of ongoing advice

[26] See Opinion of the European Banking Authority in response to the European Commission's Call for Advice on Investment Firms, Recommendation 28, p. 8 (link).

Concerning the concept of 'ongoing advice':

1) It is recommended that the definition in Article 4.1(21) of the IFR, as follows, is clarified: 'investment advice of an ongoing nature' means the provision of investment advice on the basis of the continuous or periodic assessment and monitoring or review of a client portfolio of financial instruments resulting from a contractual arrangement'.

2) As this type of advice can be provided in different ways, it is also suggested that the 'frequency' of such advice should not be elaborated on further, as all cases should be covered by the clarification of the definition provided above.

4.3.2 K-AUM: delegation to asset management companies

106. An exemption from the general measurement of the AUM is envisaged in Article 17(2) of the IFR: 'Where the investment firm has formally delegated the management of assets to another financial entity, those assets shall be included in the total amount of AUM measured in accordance with paragraph 1. Where another financial entity has formally delegated the management of assets to the investment firm, those assets shall be excluded from the total amount of assets under management measured in accordance with paragraph 1'.

107. However, whereas the first subparagraph of Article 17(2) refers to the AUM, the second subparagraph states that 'assets shall be excluded from the total amount of assets under management' if another financial entity has formally delegated the management of assets to the investment firm.

108. There is no reference to the delegation of non-discretionary ongoing investment advice, which is nonetheless part of the K-AUM.

109. This is reflected accordingly, and more explicitly, in the wording of Article 2(2) of Delegated Regulation (EU) 2022/25. The result is that assets under advice are not included in the exception of the second subparagraph of Article 17(2) of the IFR.

110. This aspect was already addressed in the EBA original advice[27]: 'The same principle should apply to investment firms that provide advice to support the performance of the portfolio management service – regardless of whether the portfolio management is carried by an AIFM, a UCITS firm or an investment firm – where the investment firm providing the advice would not be charged by K-AUM. The objective is for the firm that holds the responsibility towards the customer to hold the adequate level of capital related to this activity under either AIFMD/UCITS or the new prudential regime'.

[27] Annex to the EBA Opinion EBA-Op-2017-11, issue on 29 September 2017, paragraph 130 (link).

111. Therefore, including investment advice provided by an investment firm to an asset management company into the exemption of Article 17(2) of the IFR would avoid a double counting of assets if the assets under advice are already covered by the own funds requirement of the financial institution that asked for advice. This occurs (and is limited to) in situations where an investment firm provides investment advice to an asset management company to support the performance of the portfolio management service.

Recommendation 15. Provision of advice to support the performance of portfolio management services

It is recommended that the following be added to the third sentence of paragraph 2 of Article 17 of the IFR:

'Where an investment firm provides investment advice to a financial entity to support the performance of the portfolio management service, the amount of asset under that advice shall be excluded from the K-AUM.'

Should the IFR be updated in this sense, Article 2(2) of Delegated Regulation (EU) 2022/25 should be deleted.

4.4 Daily Trading Flow (K-DTF)

112. The K-DTF should capture the operational risks connected to trading (as explained in Recital 26 of the IFR: 'K-DTF captures the operational risks to an investment firm in large volumes of trades concluded for its own account or for clients in its own name in one day, which could result from inadequate or failed internal processes, people and systems or from external events'). Nonetheless, Article 4(33) of the IFR defines the DTF as: 'daily trading flow means the daily value of transactions that an investment firm enters through dealing on own account *or* the execution of orders on behalf of clients in its own name […]'. In this sense, the K-DTF is similar to the other K-factors in capturing the activities performed by an investment firm as the volume of operations (then multiplied by given coefficients) and is not limited to operational risk only.

113. Despite the fact that the K-DTF is not conceptually different from other K-factors, some market participants expressed concerns about the effectiveness of the K-DTF in setting the capital requirements for firms trading on own account and/or executing orders on behalf of clients in their own name. In certain cases, K-DTF seems to lead to outcomes consisting of either low amounts of capital requirements, or to counterintuitive results if compared across investment firms. It can be questioned whether the current design of K-DTF measures the actual risk of trading large volumes of trades, as the current calculation is performed as the multiplication of the amount of trades and their value. For example, this results in a higher K-DTF requirement for a firm that concludes a single trade of EUR 1 bn than a firm concluding 1 bn trades of EUR 0.01 each: it may be argued that the large number of transactions in the

second case may result in a profile that is not less risky than the first case, despite the overall volume of operations being lower.

114. One further aspect to consider in the calculation of the K-DTF is that certain investment firms conclude buy/sell transactions simultaneously, with the firm's remuneration being made based on the price difference. In these cases, the investment firm therefore finds the buyer and seller of the securities to conclude the transaction and only interposes its balance sheet over the settlement period, e.g. for a maximum of five days. It is implicit, in the current definition of the K-DTF, that both legs of this operation should be taken into account in the calculation. This could be clearly mentioned either in the IFR text or in the relevant Delegated Regulation[28].

115. One important feature behind the design of the K-factors is their simplicity, and this characteristic should be preserved and assessed against the non-financial costs of any increase in risk sensitivity of the framework. Given the specificities of K-DTF and the overarching aim of keeping the framework simple and proportionate, the IFR should not be changed. However, the limited risk sensitivity of this K-factor should be addressed in the relevant Delegated Regulation.

Recommendation 16. Review of the K-DTF factor
Concerning the review of the existing K-DTF, its structure and mechanics should not be changed. However, the EBA should be given a mandate to draft, in consultation with ESMA, regulatory technical standards to better specify the scope, calculation and calibration of K-DTF to address situations where the current calibration might lead to disproportionate results.

4.5 Concentration risk in the trading book (K-CON)

4.5.1 Scope restricted to the trading book

116. The scope of K-CON, outlined in Article 36(1) of the IFR, limits its application only to financial instruments in the trading book of an investment firm, leaving out of scope non-trading book instruments. The current scope of application leaves incentives for arbitrage, since investment firms have a capital advantage in booking instruments in the non-trading book.

117. In the CRR, credit institutions are subject to a different treatment of concentration risk, depending on whether the financial instruments are booked in the trading book or in the non-trading book: items in the trading book face a prudential treatment similar, though proportionate, to the one envisaged in the IFR, while for items in the non-trading book, Article 395 of the CRR mandates a hard limit that cannot be breached by credit institutions.

[28] Commission Delegated Regulation (EU) 2022/25 of 22 September 2021 with regard to regulatory technical standards specifying the methods for measuring the K-factors (link).

Section 6.3 discusses the role of the definition of trading book and its demarcation in more detail.

118. The design of K-CON explicitly disregards significant concentration risks that are not part of the trading book. These can be very significant for certain investment firms providing individual portfolio management, which might not be exposed to concentration risk via the trading book, but might be via the non-trading book, relative to their balance sheet.

119. To take into account the risk stemming from concentration in the non-trading book, it would be proportionate to introduce a hard limit on these exposures. In this way, the capital requirement of investment firms would not be impacted, while at the same time the concentration risk would be limited. To keep the framework simple and proportionate, the limit on concentration risk in the non-trading book should be applied to Class 2 investment firms trading on own account. It should also be noted that investment firms trading on own account already also report the top exposures to clients with regard to concentration risk for items in the non-trading book, so this provision does not impact the reporting burden either.

120. To avoid excessive burden and increased costs for investment firms, money deposited at a credit institution should not count towards the concentration risk limit. Intragroup exposures should also be exempted as well. If this option is pursued, the notion of 'client' for the purposes of Part Four of the IFR should be revised in order to avoid unintended consequences (e.g. including segregated accounts in the scope of K-CON).

121. Furthermore, to avoid confusion around the limits on exposure in the non-trading and in the trading book, the possibility provided in Article 38(2) of the IFR for competent authorities to grant a limited time period to comply with the limitation set out in Article 37 of the IFR should explicitly refer to the limit set out in Article 37(3) of the IFR, as it may be interpreted as referring also to the limit set out in Article 37(1) of the IFR.

Recommendation 17. Limit on large exposures in the non-trading book

For Class 2 investment firms holding a licence pursuant to activities (3) or (6) of the MiFID, Article 37(1) of the IFR should also be applicable to exposures in the non-trading book. Conversely, Article 37(2) of the IFR should not be applicable to exposures in the non-trading book: when the thresholds set out in Article 37(1) of the IFR are breached, the investment firm should notify the competent authority and define a plan to reduce the exposure in compliance with Article 37(1) of the IFR.

Exemptions granted by Article 400 of the CRR should be extended to investment firms.

Money deposited at credit institutions, either in the name of the investment firm or on behalf of clients, should be exempted from the limit on large exposures in the non-trading book.

Intragroup exposures may be exempted by the competent authority in line with the provisions of Article 400(2)(c) of the CRR.

4.5.2 Notion of 'client'

122. In the IFR, the notion of 'client' is not consistent in determining concentration risk exposures (K-CON) and counterparty default risk exposures (K-TCD), resulting in a different scope of application, complication of the overall framework, and increased operational complexity.

123. In Recital 22 of the IFR, it is stated that 'the K-factors under the denomination RtF reflect an investment firm's exposure to K-TCD in accordance with the simplified provisions on counterparty credit risk based on Regulation (EU) No 575/2013, to the concentration risk related to an investment firm's large exposures to specific counterparties based on the provisions of that Regulation that apply to K-CON, and to the operational risks related K-DTF'.

124. This suggests that concentration risk applies to all large exposures in the trading book. However, the definition of concentration risk appears to be limited to client exposures: Article 4(1)(31) of the IFR refers to 'concentration risk' (or K-CON) as 'exposures in an investment firm's trading book to a client or group of connected clients in excess of the limits set out in Article 37(1)'. Finally, Article 4(1)(4) of the IFR includes the following definition: 'client means a client within the meaning of Article 4(1)(9) of Directive 2014/65/EU, except that for the purposes of Part 4 of this Regulation, "client" means any counterparty of the investment firm'.

125. On the basis of the definition of the notion of client, some investment firms may consider all their intragroup or external cash credit positions towards clearing members as a concentrated risk on its non-client partners. This interpretation does not appear to be contrary to Article 4(1)(4) of the IFR, which applies to the calculation of concentration risk, according to which any counterparty, even a bank counterparty or an intragroup counterparty excluding financial instrument transactions, is a client.

126. On the other hand, it is not entirely clear whether the calculation of large exposures should take into account the balances of an investment firm's accounts with its banks, for example with a broker that is in the same group and the initial margin accounts as its clearing agents. These transactions would therefore not be accounted for as transactions with counterparties.

127. The consideration of separate accounts is clear (i.e. they are excluded from the calculation of large exposures) and, from a strict reading of the IFR/IFD, the exposures to banks/counterparties related to cash positions and security deposits should also be included in the concentration risk, even though these 'partners' are not clients as such. There are merits in exploring whether the inclusion of the latter is proportionate and fit for the business model of investment firms.

128. In light of this, the notion of 'client' should be aligned in the IFR/IFD framework. In particular, the provisions for K-TCD and K-CON should not diverge or allow for different interpretations.

Recommendation 18. Notion of 'client' in the IFR/IFD framework

The definitions in the recitals, in the K-TCD and in the K-CON, should be aligned so that investment firms should be allowed to exclude from K-CON exposures to banks and counterparties related to cash positions and security deposits.

In addition, exposures towards general clearing members should be excluded from the scope of application of K-CON.

4.6 Clearing Member Guarantee (K-CMG)

129. In accordance with the IFR, the K-NPR captures net position risk in line with the market risk provisions of the CRR. As an alternative methodology, the IFR allows certain investment firms that deal on own account through a clearing member to set their capital requirements based on the total amount of margins required by that clearing member (K-CMG), where authorised by the investment firm's competent authority.

130. The IFR specifies that, to be eligible for the use of K-CMG, the clearing and settlement of the investment firm must take place under the responsibility of a clearing member that is a credit institution or a Class 1 minus investment firm. It should also be clarified that credit institutions in third countries that are clearing members of a QCCP should be within the scope of Article 23(1)(b) of the IFR.

131. Further criteria have to be met for the use of the K-CMG, in accordance with Article 23 of the IFR as well as the related Delegated Regulation (EU) 2022/244[29]. In addition, the IFR provides some constraints on the calculation of the margins (and therefore of the K-CMG), which include that the margin models used by the clearing member has to be designed to achieve a level of prudence similar to that required in EMIR[30] and a multiplier of 1.3 has to be applied to the amount of collateral requested by the clearing member.

132. It is also worth recalling that the IFR does not fully implement the EBA recommendation, which envisaged that, for position risk, 'the overall capital requirement for RtM would then be the higher of K-NPR and K-CMG'[31]. Therefore, there is room for regulatory arbitrage, with an investment firm opting between K-NPR and K-CMG merely because one is lower. Some of

[29] Commission Delegated Regulation (EU) 2022/244 of 24 September 2021 with regard to regulatory technical standards specifying the amount of total margin for the calculation of the K-factor 'clear margin given' (K-CMG) (link).

[30] Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (link).

[31] The EBA opinion EBA-OP-2017-11 in response to the European Commission's call for advice of September 2017 – Annex, paragraph 152, p. 48 (link).

this is constrained by the requirements in Delegated Regulation 2022/244, which limit how permission for the use of the K-CMG is granted.

133. In order to analyse and address potential issues with the use of K-CMG, the EBA performed data collection analysing, among other things, the level of prudence of K-CMG with reference to the *ex post* losses not covered by the capital requirements. The data analysis shows that in no instances is the level of K-CMG inadequate to cover the losses on the trading book, thus the level of prudence appears to be adequate. In light of this analysis, the combined effect of the multiplication factor and of the watermark envisaged in Article 23(2) of the IFR may be overly conservative.

134. In particular, the high watermark (the third-highest amount of total margin required on a daily basis by the clearing member from the investment firm over the preceding three months) does not seem to be sufficiently risk-sensitive and may lead to counterproductive results, for instance locking in a high capital requirement that is no longer in line with the riskiness of the investment firm's trading book, incentivising risk-taking activities.

135. For this reason, the watermark should be replaced by a more risk-sensitive approach that is responsive to a sudden increase in risk while acknowledging the risk reduction of the trading book when it takes place. A moving average of the total margin required on a daily basis by the clearing member would be a more appropriate and risk-sensitive measure. Conversely, the multiplier ensures an appropriate degree of conservativeness and should not be dismissed.

136. In addition, it should be clarified that, for the purposes of Article 23(1)(b) of the IFR, clearing members that are credit institutions or investment firms not established in the EU should also be allowed for the purpose of K-CMG when they are clearing members of a QCCP.

Recommendation 19. Clearing member guarantee (K-CMG)

The watermark (the third-highest amount of total margin required on a daily basis by the clearing member from the investment firm over the preceding three months) envisaged in Article 23(2) of the IFR should be replaced by the following watermark: the highest of the average for the most recent 5 business days, 30 business days and 90 business days.

Article 23(1)(b) of the IFR should clarify that K-CMG may also be allowed when the clearing member of a QCCP is a credit institution outside of the EU.

4.7 Assets under safekeeping and administration (K-ASA)

137. Another element highlighted by some competent authorities concerns the K-ASA. It was noted that, if the current calibration of the K-factor coefficient for K-ASA is too high, this would put

investment firms at a competitive disadvantage with respect to peers, including banks, that do not have the same 'direct' capital requirement.

138. Nonetheless, it should be kept in mind that the ASA are related to the risks of clients experiencing losses because of failure by the investment firms in safekeeping the securities. Credit institutions have capital requirements, including those against operational risk, that should cover losses resulting from inadequate or failed internal processes, people and systems or from external events. They are also subject to multiple other requirements. In this sense, it is not obvious whether there is a competition issue in this specific area.

139. Because of that, revising the definition or the calibration of the K-ASA in the context of the IFR revision would require some strong evidence. Nonetheless, since most of the investment firms provide multiple services, a one-to-one comparison (i.e. comparing the requirements for banks and requirements under IFR specifically for the safekeeping and administration of assets) may be challenging, because of the limited data available.

140. Concerning the calibration of the K-ASA, data collection was conducted in parallel with the public consultation. Investment firms having more than 50% of the capital requirements stemming from K-ASA were asked to report the capital requirements they had before the introduction of the IFR. The results are reported in Table 31 and Table 32 of Section 12.

141. For this particular sample (96 firms in total participated in the data collection), the data shows that the K-factor requirements would be on average 52% of the capital requirements before the introduction of the IFR, thus a reduction of almost half of the requirements (Table 31).

142. However, Table 32 shows that the capital requirements would consist of a reduction or remaining the same for three quarters of the firms. For the remaining 25% of the firms in the sample, there would be an increase in the requirements. For 5% of the firms, Table 32 shows an increase of up to around four times the requirements with respect to the previous framework.

143. Respondents to the public consultation suggested having different treatments (and therefore different calibrations of the K-ASA) between structural separation (separate entity) and statutory separation (i.e. legal separation). This could, in theory, be an option to consider. However, this approach would make the methodology considerably more complex, not to mention the effort in documenting the different treatments. Considering the quantitative data (mentioned above), it is difficult to recommend such a change, given the limited expected benefits.

Recommendation 20. Review of the K-ASA factor

Concerning the review of the existing K-ASA, the EBA and ESMA have the following recommendations:

1) The evidence gathered does not seem to justify a change in the calibration of the K-ASA.

2) Introducing a distinction on how the safekeeping and administration is performed, in the sense of a structural versus statutory separation, is also not recommended, nor in the direction of anchoring the K-ASA on national implementations.

144. Remaining clarifications can be provided in the relevant delegated regulations[32] without the need to amend the IFR.

[32] Commission Delegated Regulation (EU) 2022/25 of 22 September 2021 with regard to regulatory technical standards specifying the methods for measuring the K-factors (link).

5. Risks not covered by existing K-factors

145. This section discusses risks or activities that are not captured by existing K-factors and could therefore suggest the need for new K-factors. It should be recalled that the decision to leave some risks (and therefore K-factors) outside the Pillar 1 framework was a conscious decision when IFR was developed. The question is therefore whether the experience of the competent authorities so far justifies modifying the current framework, whether such risks could be captured under the existing K-factors or instead be left to the supervisory review process.

5.1 Non-trading book positions

146. Other than items subject to exchange and commodity risk, non-trading assets and commitments are not considered in Pillar 1 capital requirements in the IFR/IFD framework, although they may be relevant for some investment firms. The current K-factor regime does not envisage any capital requirement for exposures outside the trading book, other than for items subject to exchange and commodity risk referred to in Article 21(4) of the IFR for trading investment firms. Items currently not subject to Pillar 1 capital requirements include, for instance, loans to customers, exposures to credit institutions, illiquid financial assets, financial instruments held for purposes other than trading, or off-balance-sheet commitments (e.g. capital or performance guarantees).

147. These risks have deliberately and explicitly been kept outside the Pillar 1 requirements for investment firms as part of creating a proportional regime customised to the specific nature of investment firms. This is visible in other parts of the regime as well, including Article 29 of the IFD ('Treatment of risks'), which requires investment firms to have robust strategies, policies, processes and systems for the identification, measurement, management and monitoring of risks.

148. For investment firms, the non-trading book business should be ancillary to the main business. This is confirmed by the data analysis, which shows that most investment firms have little or no exposures in the non-trading book, which justifies addressing the risk in the Pillar 2 framework.

149. However, the absence of Pillar 1 capital requirements for non-trading book exposures may incentivise regulatory arbitrage. In this regard, the adoption of the boundary of the trading book discussed in Section 6.3 would minimise the risk of arbitrage and appears proportionate when compared to the introduction of a Pillar 1 requirement.

Recommendation 21. Prudential treatment of items in the non-trading book

In continuity with the IFR regime, items in the non-trading book (except for items subject to exchange and commodity risk for trading investment firms) should not be capitalised under Pillar 1, thus a dedicated K-factor should not be introduced. The risk stemming from the non-trading book should continue be addressed in the context of Pillar 2.

5.2 Non-trading book positions in crypto-assets

150. Exposures in crypto-assets accounted in the non-trading book are not currently subject to Pillar 1 capital requirements in the IFR.

151. Data collected are inconclusive, since no exposure in crypto-assets in the non-trading book was reported by the investment firms in the sample. Nevertheless, some competent authorities reported this issue, thus it is worth recommending a harmonised treatment for these exposures. However, if Recommendation 27 on the definition of the trading book is implemented, crypto-assets should not be allowed in the non-trading book.

152. While an alignment to the treatment envisaged for credit institutions would be desirable for crypto-assets held in the trading book, it may be disproportionate to envisage this treatment for crypto-assets held in the non-trading book by non-trading investment firms. For such exposures, the use of the treatment envisaged for commodity risk in K-NPR would be appropriate. The holding of crypto-assets in the non-trading book would not trigger the reclassification of the investment firm to Class 2, but the investment firm should report the K-NPR template with reference to its crypto-asset holdings.

153. Conversely, for trading investment firms, the treatment of crypto-assets held in the non-trading book should be aligned with the treatment envisaged for credit institutions, including the relevant RTS developed by the EBA (e.g. RTS under Article 501d(5) of the CRR 3 on the specification of the technical elements necessary for institutions to calculate their own funds for exposures to crypto-assets)[33]. It should be noted, however, that the definition of the trading book in CRR3 (the so-called 'boundary') does not allow crypto-assets to be included in the non-trading book, thus the implementation of the boundary also for investment firms would make the framework simpler while reducing the room for regulatory arbitrage.

[33] https://www.eba.europa.eu/activities/single-rulebook/regulatory-activities/own-funds/regulatory-technical-standards-calculation-and-aggregation-crypto-exposure-values

Recommendation 22. Prudential treatment of crypto-assets in the non-trading book
Crypto-asset exposures held by non-trading firms in the non-trading book should be capitalised in the Pillar 1 framework by using the methodology for the calculation of commodity risk included in K-NPR. Crypto-asset exposures held by trading firms in the non-trading book should be capitalised in the Pillar 1 framework by extending the scope of the treatment of crypto-assets in the trading book to the non-trading book, too. The exact scope and treatment of crypto-assets held in the non-trading book should be addressed in the Level 2 Regulation.

5.3 Operational risk for firms calculating the K-DTF

154. In the IFR framework, operational risk is explicitly capitalised for firms trading on own account or executing orders for clients on own name via the K-DTF (this K-factor is addressed in Section 4.4). The current design of K-DTF measures the actual risk of trading large volumes of trades, as the current calculation is made by the amount of trades multiplied by value of trades. From the definition in Article 4(33) of the IFR, it may be inferred that the K-DTF is similar to the other K-factors in capturing the activities performed by an investment firm, as the volume of operations (then multiplied by given coefficients) and not limited to operational risk only.

155. In the IFR framework, there is no dedicated K-factor for operational risk. This choice keeps the framework simple but may lead to an underestimation of this risk in the Pillar 1 capital requirements. However, the application of the operational risk framework of the CRR appears to be disproportionate for the business model of investment firms and would counter the aim of keeping the IFR/IFD framework simple and separated from the CRR/CRD framework. The issue of risk sensitivity should be addressed, as suggested in Recommendation 16.

Recommendation 23. Prudential treatment of operational risk
It is the EBA and ESMA's opinion that introducing a new K-factor for operational risk is not necessary as it would provide limited benefits.

5.4 Investment firms operating a trading venue

156. In principle, all MiFID investment services and activities should have a K-factor associated with them. However, there is no K-factor associated with operating an MTF or an OTF (MiFID services 8 and 9), which gives rise to a concern that the risk associated with operating a trading venue may not be adequately addressed by the current IFR/IFD.

157. It is worth recalling that also this specific aspect was not overlooked in the development of the IFR/IFD, but instead a deliberate recommendation aiming at keeping the framework as simple as possible.

158. However, because of their specific role as trading venues, a few elements should be considered. Firstly, all MTFs and OTFs could be excluded from the definition of small and non-interconnected investment firms, so that they would have the requirement to always calculate and apply the K-factors relevant to them. In this case, the definition of 'small and non-interconnected investment firm' in Article 12 of the IFR would need to be amended.

159. Second, depending on how the trading venue operates, it is possible to envisage that they should be required to calculate either the K-COH or the K-DTF, based on whether or not they operate on their own name. However, MTF operators may not receive and transmit, execute or deal on own account as they operate a multilateral system bringing together buyers and sellers in a way that results in a contract. For the MTF that only facilitates transactions via a system, without receiving transmitting or executing the transaction, a different K-factor would need to be considered.

160. Finally, it should also be considered that investment firms, on the basis of the equivalence criterion under MiCA, could operate a trading platform for crypto-assets and they would not be subject to any own funds requirement under MiCA[34].

161. In practical terms, this would increase the capital requirements with respect to the ones applicable today. As it is not possible to estimate the cost of such a change, ad hoc data collection is necessary before concluding on a policy recommendation.

Recommendation 24. Investment firms operating trading venues
It is the EBA and ESMA's opinion that introducing a new K-factor for investment firms operating a trading venue and amending the definition of 'small and non-interconnected investment firm' in Article 12 of the IFR is not necessary as it would provide limited benefits.

5.5 Other prudentially regulated services

162. In some cases, investment firms are authorised or permitted to also provide other services and activities that are not covered by the prudential requirements of the IFR and IFD. However, these could pose potential risks to clients. It was therefore relevant to review and assess whether these activities should be covered by separate (potentially new) K-factors, which would also include the non-core activities of investment firms.

163. As contemplated in Sections 5.4 and 9.2, there could be a case for considering K-factors suitable for other regulated services which investment firms can provide, such as the provision of services under MiCA, covering not only transactions with crypto-assets as above, but also

[34] The interaction of IFR with other regulations is also addressed in Section 9.

the provision of other services relating to crypto-assets, especially credit granting, by extending crypto-asset based facilities and/or facilities backed by crypto-asset collateral.

164. Similarly, in the case of the provision of crowdfunding services, the IFR could explicitly cover cases where the investment firm is also authorised to provide crowdfunding services. Article 11 of ECSPR [35] lays down the prudential requirements for crowdfunding services providers.

165. The services provided by an CFSP are listed in Article 2, Definition, paragraph 1.(a): '"crowdfunding service" means the matching of business funding interests of investors and project owners through the use of a crowdfunding platform and which consists of any of the following activities: (i) the facilitation of granting of loans; (ii) the placing without a firm commitment basis, as referred to in point (7) of Section A of Annex I to Directive 2014/65/EU, of transferable securities and admitted instruments for crowdfunding purposes issued by project owners or a special purpose vehicle, and the reception and transmission of client orders (RTO), as referred to in point (1) of that Section, in relation to those transferable securities and admitted instruments for crowdfunding purposes'.

166. The elements under point (i) are not subject to K-factors, as they would fall under the considerations of Section 5.1, Non-trading book positions. The activities under (ii) are already covered by the K-factors. Similarly, FOR would already be taking into account costs related to these activities, as discussed in Section 33, Expenses related to non-MiFID activities.

167. Therefore, from the point of view of its application at individual level, it appears that there is no need to amend the IFR. Section 8.4 discusses the consolidation of CFSP in an investment firm group.

[35] Regulation (EU) 2020/1503 of 7 October 2020 on European crowdfunding service providers for business (link).

6. Implications of the adoption of the Banking Package

6.1 Adoption of the fundamental review of the trading book for investment firms

168. The CRR3 introduced the use of the fundamental review of the trading book (FRTB) for capital requirement purposes, starting 1 January 2025 (delayed to 1 January 2026 by the Commission Delegated Act[36]). For institutions below the thresholds specified in Article 325a(2) of the CRR [37], the simplified standardised approach will be available, which consists of the standardised approach of the CRR2 with specific multipliers for each risk category that increases capital requirement.

169. The FRTB is a highly sophisticated and risk-sensitive approach for the calculation of the capital requirement for market risk. Its precision is counterbalanced by its complexity and significant implementation costs, which may be disproportionate for investment firms.

170. For investment firms, capital requirements for market risk are calculated under K-NPR and K-CMG. Article 22(b) and (c) of the IFR gives the option for investment firms to use the FRTB (either alternative standardised or alternative internal model approach). However, the provisions of Article 57(2) of the IFR shift the use of the FRTB for investment firms until the latest date between 26 June 2026 and the date of application for banks as capital requirements.

171. The scope of the recommendations on the use of the FRTB for investment firms is limited only to Class 2 investment firms authorised to perform activities (3) and (6) of MiFID, since other Class 2 and all Class 3 investment firms cannot have a positive K-NPR or K-CMG, and Class 1 minus and Class 1 investment firms are subject to CRR3 (thus already in the scope of the FRTB).

172. In light of the feedback received, and with a view of keeping the framework simple and proportionate, the FRTB alternative standardised approach should be kept as an optionality for investment firms, regardless of the size of their trading book, in continuity with the current framework. The FRTB, when chosen by the investment firm, should be used as the only

[36] https://webgate.ec.europa.eu/regdel/#/delegatedActs/2528

[37] On- and off-balance-sheet business that is subject to market risk is equal to or higher than each of the following thresholds, on the basis of an assessment carried out on a monthly basis using data as of the last day of the month:

a) 10% of the institution's total assets;

b) EUR 500 million.

methodology for calculating the RtM capital requirement (i.e. the FRTB should not coexist with the current standardised approach or the K-CMG). The use of the FRTB alternative internal model approach may be allowed by the CA, subject to all the requirements envisaged for banks. Finally, investment firms should not use the FRTB before its date of application to banks for Pillar 1 purposes.

173. In addition, the standardised approach envisaged in both the IFR and the CRR2 has been amended in the CRR3 to incorporate the latest changes in the Basel standard. In particular, the standardised approach (defined as 'simplified standardised approach' in the CRR3) now features multipliers for the different asset classes. Under the IFR, investment firms will continue to use the current standardised approach (i.e. the method envisaged in the CRR2) and will not be subject to the new simplified standardised approach envisaged in the CRR3.

174. It appears proportionate to allow investment firms to continue to use the standardised approach envisaged in the CRR2 (i.e. without the multipliers). The addition of the multipliers was provided by the Basel standard in order to calibrate this approach with the FRTB and encourage banks to migrate towards the more sophisticated approach. However, the calibration was performed having the banking business and trading portfolio as a reference, while the incentives for the migration to the FRTB are not entirely applicable to investment firms.

Recommendation 25. Application of the FRTB and of the simplified standardised approach

Concerning the implications of introducing the Banking Package, the EBA and ESMA have the following recommendations:

1) Investment firms should continue to use the standardised approach envisaged in the CRR2 for the calculation of the K-NPR.

2) Investment firms should be allowed to use the FRTB alternative standardised approach as an option (no sooner than the application of the FRTB for banks for capital requirement purposes). When an investment firm decides to use the FRTB alternative standardised approach, it should immediately notify the competent authority, and should use that methodology for the whole trading book (and for foreign exchange and commodity risk in the non-trading book).

3) Investment firms should be allowed to use the FRTB alternative internal model approach (no sooner than the application of the FRTB alternative internal model approach for banks for capital requirement purposes), provided they fulfil all the conditions set up for banks envisaged in the CRR3 and are authorised by the competent authority.

6.2 Credit valuation adjustment for investment firms

175. Basel 3 introduced new methodologies for the calculation of the credit valuation adjustment (CVA), replacing the existing methodologies. These methodologies have been transposed in the EU via the CRR3. In ascending order of complexity, the CVA methodologies in the CRR3 are the following:

    a) Simplified approach;

    b) Basic approach (without hedges or with hedges);

    c) Standardised approach.

176. For investment firms, the CVA is capitalised in accordance with Article32 of the IFR, applying a multiplication factor of 1.5 to K-TCD.

177. Under the CRR3, in continuity with CRR and CRR2, there are financial instruments exempted from the CVA capital requirements (i.e. transactions with sovereigns, with pension funds, with non-financial counterparties and intragroup transactions), that are matched in the IFR.

178. The methodologies envisaged in the Basel standards (and transposed in the CRR3) were engineered and calibrated, taking as a reference the banking business model and typical risk, as well as capital requirement impact on these intermediaries.

179. In light of this, and of the feedback received, the CVA methodologies envisaged in Article 383 and 384 of the CRR3 should be optional for investment firms, while the approach set out in Article 385 of the CRR3 should not be allowed. Investment firms that opt for the use of the CVA approach set out in Article 383 of the CRR3 should receive the approval of the competent authority.

Recommendation 26. CVA calculation for investment firms

Concerning the calculation of the CVA, the EBA and ESMA have the following recommendations:

1) Investment firms should have the option to use the CVA methodologies set out in Article 383 and 384 of the CRR3. If an investment firm opts for the use of any of the methodologies of the CRR3, it should not be allowed to apply Article 32 of the IFR.

2) Investment firms that opt for the use of the methodology set out in Article 383 of the CRR3 should receive the prior approval of the competent authority.

6.3 Definition of the trading book

180. The definition of the trading book, included in Article 4(1)(54) and (55) of the IFR, has implications beyond the calculation of the capital requirements for RtM and risk-to-firm: items in the non-trading book are not capitalised under the Pillar 1 framework of the IFR, and

investment firms may need a dedicated MiFID authorisation if they hold items in the trading book.

181. The definition of the trading book of the IFR, which is closely aligned with the definition of the CRR2, may leave room for interpretation and arbitrage, as some instruments may be booked in the non-trading book with the main intention of avoiding the Pillar 1 capital requirements.

182. The CRR3, in Article 104, introduced a new definition of the trading book ('inclusion in the trading book'), the so-called 'boundary'. Though the implementation of the boundary is envisaged for 1 January 2025, the EBA issued a no-action letter advocating for the postponement of its application [38]. The main reason for the delay in the application of Article 104 of the CRR3 lies in the operational challenges of applying the boundary and the FRTB standardised and internal model approaches at different timings.

183. Nevertheless, Article 104 of the CRR3 provides a presumptive list of items that shall be booked in the trading or in the non-trading book, with limited room for arbitrage. The boundary will apply to banks that will use the FRTB as well as to banks that will use the simplified standardised approach.

184. No evidence has been provided that it would be unduly burdensome to implement the CRR3's definition of the trading book. This provision would reduce the possible regulatory arbitrage of booking items in the non-trading book with the main intention of avoiding Pillar 1 capital requirements, thus the conditions for the inclusion in the trading book in the IFR should be aligned with Article 104 of the CRR3. The implementation of the boundary would also reduce the need for a dedicated K-factor for items in the non-trading book.

Recommendation 27. Definition of the trading book

The definition of the trading book in Article 4(1)(54) and (55) should continue to be aligned with the provisions of Article 4(1)(86) and Article 104 of the CRR3. These provisions should not be applicable to investment firms before they become fully applicable to banks.

185. In addition, it should be better specified which items should not be considered trading book items when held by investment firms that do not hold an authorisation pursuant to points (3) or (6) of the MiFID, as under Article 29(4) of the CRD, which was not replicated in the IFD.

186. To require that non-trading firms hold their own funds and their liquidity in cash only may be disproportionate from a risk perspective and may lead to sub-optimal capital allocation strategies. Thus, as an exception to the rules defining the trading book, investment firms that

[38] Opinion of the European Banking Authority on the application of the provisions relating to the boundary between trading book and banking book, and on the internal risk transfer between books as referred to Article 1, points (34), (35) and (38) of Regulation (EU) No 2024/1623 (link).

do not hold an authorisation pursuant to points (3) or (6) of the MiFID should be allowed to invest an amount equal to their own funds in all of the following financial instruments:

a) financial instruments that are assigned 0% risk weight according to Title II, Part Three, Chapter 2, Section 2 of CRR3;

b) minority holdings held for industrial purposes;

c) assets eligible for the liquidity requirements in accordance with Article 43 of the IFR;

d) equity instruments that fulfil the definition of large market capitalisation in accordance with Article 7, paragraph 1, of Commission Delegated Regulation (EU) 2022/2058.

187. The maximum amount of investments allowed should be increased by the appreciation of the financial instruments (i.e. the appreciation of the market value of instruments should not count towards the limit of investable funds). Furthermore, a buffer of 15% on this threshold should be envisaged to avoid unintentional breaches.

188. Investments in instruments listed in letters a), c) and d) should be subject to the limits of concentration risk in the non-trading book discussed in Section 4.5. The combined value of the investments in instruments listed in letter d) should not be higher than 10% of the own funds of the investment firm.

189. Any capital requirement for these items, when their size and risk is considered relevant by the NCA, may be performed under Pillar 2.

Recommendation 28. Holding of financial instruments for non-trading investment firms

Investment firms that do not hold an authorisation pursuant to points (3) or (6) of the MiFID should be allowed to invest in financial instruments an amount equal to their own funds.

Such investment firms should be allowed to invest in the following financial instruments:

a. financial instruments that are assigned 0% risk weight according to Title II, Part Three, Chapter 2, Section 2 of CRR3;

b. minority holdings held for industrial purposes;

c. assets eligible for the liquidity requirements in accordance with Article 43 of the IFR;

d. equity instruments that fulfil the definition of large market capitalisation in accordance with Article 7, paragraph 1, of Commission Delegated Regulation (EU) 2022/2058, up to 10% of the own funds of the investment firm.

The financial instruments should be issued in the same currency as the investment firm (i.e. without foreign exchange risk).

The appreciation of the financial instruments should not count towards the limit of investable funds. Furthermore, a buffer of 15% on that limit should be allowed. When the limit of investable funds is breached in excess of the buffer, the investment firm should immediately notify the competent authority, which will take the appropriate measures (setting a divestment plan or requiring the investment firm to apply for a licence pursuant to activities (3) or (6) of the MiFID).

7. Liquidity requirements

7.1 Background

190. With the introduction of the IFR/IFD, a specific liquidity requirement became applicable to investment firms in Article 43 of the IFR. This requirement requires investment firms to hold an amount of liquid assets equivalent to at least one third of the FOR. In this regard, the IFR/IFD Review will be an occasion to analyse the functioning of this requirement. It is worth recalling that liquidity requirements are also covered by the SREP guidelines for investment firms, as well as by the technical standards on specific liquidity measurements.

191. In broad terms, investment firms face different liquidity risks compared to credit institutions, due to their different operations and business models. Additionally, their funding structures are different. For example, credit institutions may fund their operations using deposits that can be easily withdrawn, while investment firms commonly use equity as their main source of funding. Both can use debt, such as bonds, notes, loans, etc., but for small investment firms it is often not a feasible option.

192. Since liquidity requirements also apply to small and non-interconnected investment firms, the IFR/IFD liquidity requirements should not be set out by relying on excessively complicated methods.

7.2 Level of liquidity requirements

193. Under Article 43 of the IFR, liquidity requirements are set at one third of the FOR, regardless of the size of the investment firm and the activities performed. The issue is whether the current liquidity requirements are fit for purpose or not. The requirement to hold just one third (i.e. equivalent to one month) of the FOR in liquid assets is not very risk-sensitive and there may be merit in considering increasing it in relation to certain activities. Thus, while this approach has the advantage of being very simple, it is not necessarily tailored to the services provided or activities performed.

194. In order to keep the framework easy to implement, one option would be to increase the liquidity requirements in line with the level of FOR, e.g. three months (or more) instead of only one. This would be in line with the argument that a three-month wind-down period is deemed feasible for an investment firm and the FOR requirement would ensure that the investment firm would have sufficient own funds as well as liquid assets to withstand these wind-down period. However, such an approach would not assist in improving the risk sensitivity of the current liquidity framework and it is not clear whether this is appropriate for the very diverse set of investment firms' business models.

195. The EBA and ESMA focused on the qualitative aspects pondering if the liquidity risk management of investment firms is of sufficient strength or could benefit from additional requirements in the IFR or should rather be left to the risk management requirements already part of the IFD.

196. In this sense, the EBA considered whether the elements of the Delegated Regulation on specific liquidity measurement for investment firms could be included in the scope of application of the liquidity framework, as it already gives greater emphasis on the activities performed by investment firms. That analysis, however, suggests that it is difficult to translate most of the elements in those technical standards into the liquidity requirements of Article 43 of the IFR, as they are often designed to address very specific cases.

197. Market participants were invited to provide their inputs to better understand the liquidity profiles of investment firms. An overview of the comments from the public consultation is available in Section 13.8. The prevailing suggestion was that the current requirements should not be changed. However, some respondents did provide different recommendations (especially concerning investment firm trading on own account) that would, however, have made the framework more complex.

Recommendation 29. Liquidity requirements for investment firms

In accordance with the overarching goal, concerning the level of the liquidity requirements, it is recommended that the framework is kept as simple as possible.

Although it is recognised that investment firms providing MiFID services 3) and 6) have, inherently, different liquidity profiles than other investment firms, it is not recommended extending the requirements to more than one third of the level of the current FOR, as this would not meet the objective of having a framework that is more risk-sensitive.

It is also not suggested that more complex methodologies be introduced, to avoid introducing additional burden on a broad set of investment firms. It is therefore recommended, in continuity with the current framework, to address cases of concern under the SREP for investment firms.

7.3 List of high-quality liquid assets

198. In the list of assets eligible for meeting the liquidity requirements in Article 43, paragraph 1(c) of the IFR does not include the requirement that those assets should be unencumbered. This is inconsistent with the other elements of that list.

199. The same Article 43 of the IFR, paragraph 1(d), refers to 'short-term deposits' without a definition tailored for this particular application. Although such a definition could be deduced from similar wording in other regulations, in this context it would be reasonable to assume a deposit could be eligible if the full amount is available within one month, as this is the horizon

of the liquidity requirements. If the liquidity requirements' horizon changes in the IFR following the considerations above, such definition should be adjusted accordingly.

Recommendation 30. List of high-quality liquid assets

The following corrections to the existing list of high-quality liquid assets would require a modification of the IFR:

1) Article 43, paragraph 1(c) of the IFR should further specify that the financial instruments mentioned in that paragraph should be unencumbered, in order to be eligible to meet the liquidity requirements;

1) Article 43, paragraph 1(d) of the IFR should specify that 'short-term deposits' are eligible if the full amount is available within one month.

200. Finally, other clarifications do not require an explicit mention in the IFR, such as the fact that cash or other eligible collateral in excess of the net equity over the margin required by a clearing member may be used to meet the liquidity requirements, should they meet the criteria in paragraphs 1 and 2 of Article 43 of the IFR.

7.4 Exemption under Article 43 of the IFR for small and non-interconnected investment firms

201. It is worth noting that the liquidity requirements in the IFR may be interpreted in two different ways. In accordance with Recital (28) of the IFR: 'all investment firms should have internal procedures to monitor and manage their liquidity requirements. Those procedures are intended to help ensure that investment firms can function in an orderly manner over time, without the need to set aside liquidity specifically for times of stress. This recital highlights the 'going concern' view in setting the liquidity requirements.

202. On the other hand, since the level of liquidity requirements are set to a fraction of the FOR, one may argue in favour of interpreting those requirements as an amount of liquidity to be kept ensuring an orderly wind-down (or 'gone concern') for at least one month, although this is not mentioned in the IFR.

203. The IFR allows the possibility of exempting small and non-interconnected investment firms from liquidity requirements in accordance with Article 43(1), subparagraph 2. Competent authorities should grant the use of that derogation in accordance with the relevant EBA Guidelines[39].

[39] Guidelines on the criteria for the exemption of investment firms from liquidity requirements in accordance with Article 43(4) of Regulation (EU) 2019/2033 (link).

204. That framework, exempting small and non-interconnected investment firms from liquidity requirements on an 'ad hoc' basis, seems to be in line with the aforementioned Recital (28) of the IFR. There is, however, a case for considering completely removing the possibility of the exemption in Article 43 of the IFR, under the assumption that all investment firms, including the small and non-interconnected ones, should have some liquid assets available, no matter how small, to always ensure an orderly wind-down.

205. Data on the number of investment firms to which the derogation has been granted should be available at the EBA[40]. This data[41] provides an overview of the number of firms that are authorised to derogate from the liquidity requirements and whether there is any inconsistent application within the Union.

206. The current data show a very limited application of that derogation. Therefore, removing the possibility of granting the possibility to exempt Class 3 investment firms from the liquidity requirements would have a limited impact. On the flip side, there are clear indications of inconsistent application of such derogation in specific Member States.

207. Therefore, keeping the possibility of granting an exemption and to address any unharmonised application in the context of the relevant guidelines, particularly considering the fact that the current guidelines already places emphasis on the fact that such an exemption should be granted by a competent authority on a case-by-case basis.

Recommendation 31. Exemption under Article 43 of the IFR from liquidity requirements

Concerning the exemption from the liquidity requirements for small and non-interconnected investment firms, keeping the possibility of an exemption, despite the current limited application, is recommended.

7.5 Other potential amendments

208. A clarification should be introduced relating to Article 45 of the IFR. The current wording may be interpreted as allowing either to add the amount of guarantees to the requirement or deduct it from liquid assets. For clarity, the text may be amended with reference to paragraph 1 of Article 43.

Recommendation 32. Clients guarantees

[40] In accordance with Article 43(1) of the IFR, the EBA is notified when an investment firm is exempted from the liquidity requirements.

[41] See Table 5 'Number of Class 3 investment firms exempted from liquidity requirements, as of 31 December 2023'.

The text of Article 45 of the IFR (Clients guarantees) should be amended, specifying that investment firms shall increase the liquidity requirements specified in Article 43(1) by 1.6% of the total amount of guarantees provided to the clients.

7.5.1 Liquidity risks from provision of credit and foreign exchange exposures

209. The Discussion paper included two questions on the possibility of including in the liquidity requirements specific provisions concerning the risks investment firms may be exposed to arising from the provision of credit or the presence of foreign exchange exposures.

210. In both cases, it is suggested to have no additional liquidity measure related to the activities mainly because the activity is considered to be residual and, where this was not the case, it can be better captured in the SREP framework.

7.5.2 Third country service and liquidity providers

211. Another aspect to consider is to what extent the liquidity profiles of investment firms are affected by their activities in third countries or their dependencies on third country service and liquidity providers and whether to reflect this in the IFR or in the relevant delegated regulation[42].

212. The feedback from the public consultation did not identify cases that are not already addressed in other regulations (e.g. for IT service providers under DORA) or that are likely to be idiosyncratic and should therefore remain under SREP (e.g. a geopolitical situation).

213. Therefore, at this stage, modifying the IFR or the related delegated regulations is not recommended, as those cases can be considered as already covered by existing regulations or guidelines.

7.5.3 Information and requirements for the authorisation

214. In Article 5(a)(iii) and 5(c) of the Delegated Regulation (EU) 2017/1943[43], which specifies information and requirements for the authorisation of investment firms, there is a reference to the capital and liquidity requirements under the CRR. However, this was not supplemented with a reference to the requirements under the IFR, which was most likely unintended.

215. Since Class 1-minus investment firms are subject to CRR and part of the CRD, then the reference to the CRR in that regulation should be maintained.

[42] Commission Delegated Regulation (EU) 2023/1651 of 17 May 2023 with regard to regulatory technical standards for the specific liquidity measurement of investment firms under Article 42(6) of that Directive (link).

[43] Commission Delegated Regulation (EU) 2017/1943 supplementing Directive2014/65/EU with regard to regulatory technical standards on information and requirements for the authorisation of investment firms (link).

Recommendation 33. Information and requirements for the authorisation of investment firms

Articles 5(a)(iii) and 5(c) of the Delegated Regulation (EU) 2017/1943, which specifies information and requirements for the authorisation of investment firms, include a reference to the capital and liquidity requirements under the CRR. This should be supplemented with a reference to the requirements under the IFR.

Furthermore, as investment firms can also be subject to the CRR, the reference to that regulation should be left in Article 5 of the Delegated Regulation.

8. Prudential consolidation

216. The topic of prudential consolidation has been discussed at length before the EBA provided its RTS on the scope and methods for prudential consolidation of investment firm groups under Article 7 of the IFR[44]. During the work carried out by the EBA, it became clear that several elements provided by the IFR text needed to be amended in order to limit arbitrage opportunities, as well as to provide for the wide range of situations that exist across jurisdictions as far as the structures and composition of investment firm groups are concerned. Notably, there are two main directions for the amendment of the IFR text that could boost the effectiveness of the prudential consolidation of investment firm groups:

a) Fine-tuning the definitions on the basis of which prudential consolidation is built and carried out;

b) Amending the IFR text by including provisions in line with the amendments carried out in the CRR, in order to enable further comparability between the banking and the investment firms' regulatory framework.

8.1 Fine-tuning of definitions in the IFR

The definition of investment holding company (IHC)

217. In the context of the definition of IHC in Article 4(1)(23) of the IFR, the focus is on financial institutions (FI), which can become an IHC under specific conditions. However, it has been flagged there are cases where, instead of a FI, a tied agent (TA) or an ancillary services undertaking (ASU) is at the head of the group. In this case, based on the current definition, it would not be possible for a TA or an ASU to be at the head of a group, since the definition of Union parent IHC is also based on the IHC definition.

218. It is the EBA's recommendation to amend the IFR text to include these two types of undertakings in the definition of IHC, to allow the proper consolidation of investment firm groups with this specific structure.

Recommendation 34. Amend the definition of investment holding company
Amend the IFR text to include TA and ASU in the definition of IHC, in order to allow the proper consolidation of investment firm groups with TA or ASU at the top of the group.

[44] EBA-CP-2020-06 CP on draft RTS on prudential requirements for Investment Firms.docx (link).

219. Moreover, entities exempted from a MiFID authorisation in line with Article 3(1) of MiFID should be included in the scope of consolidation (as they are carrying out a MiFID service, RTO) and should be allowed to be at the top of an investment firm group, provided there is a relationship in the sense of Article 22 of the Accounting Directive[45] with any other entity within the group.

220. The EBA considers that the definition of IHC should be amended to allow the inclusion of this specific type of entity. In addition, the definition of 'consolidated situation' in Article 4(1)(11) of the IFR should also be amended for the same reasons.

Recommendation 35. Entities exempted from a MiFID authorisation in line with Article 3(1) of MiFID

1) Amend the definition of IHC to allow the inclusion of entities exempted from a MiFID authorisation in line with Article 3(1) of MiFID.

2) Amend the definition of 'consolidated situation' in Article 4(1)(11) of the IFR to allow the inclusion of entities exempted from a MiFID authorisation in line with Article 3(1) of MiFID.

221. It should also be flagged that the definition of 'financial holding company' in Article 4(1)(20) of the CRR has been revised, but even before this revision there was a clear indicator with regards to what proportion of the indicators triggered the qualification as a financial holding company. In the IFR, the definition of IHC does not contain a clear indication of how many investment firms or FIs there should be for an entity to be considered an IHC; instead, the word 'mainly' is used. Clarity is welcomed in this context. Furthermore, alignment between the IFR and the CRR on the two definitions should be achieved.

The case of an intermediate IHC

222. It has been brought to the EBA's attention that the application of the definition of IHC may trigger the supervision of undertakings, which appears to be unnecessarily complex and burdensome compared to the prudential stakes. In particular, the definitions of IHC and parent IHC do not consider the possible inclusion of the investment firm group within the supervision perimeter of a parent credit institution, Financial Holding Company (FHC) or Mixed Financial Holding Company (MFHC). In such cases, the application of IFR requirements on a consolidated basis at this 'IHC level' may be considered as unnecessary and unduly burdensome, especially considering that the undertakings which are included in the consolidated perimeter of that IHC would be properly considered under the applicable rules: where the ultimate parent is a credit institution, FHC, MFHC, subsidiaries that are investment

[45] Directive - 2013/34 - EN - ifrs - EUR-Lex

firms, financial institutions (including non-regulated financial institutions) and ASUs would be included in the consolidated perimeter under CRR (Article 18 of CRR).

223. The EBA considers that the IFR prudential consolidation rules are intentional with regards to the consolidation of investment firm-related activities under a 'specialised' parent undertaking. Should there be a change made and should banking supervisors consider it appropriate, this fine-tuning that is needed to avoid duplication of requirements should be done in the CRR.

Recommendation 36. No action on the concept of intermediate IHC
Consolidation of investment firm-related activities should remain under a specialised parent undertaking in line with the requirements in the IFR.

Ancillary services undertakings and potential for regulatory arbitrage to avoid consolidation

224. In cases where a parent undertaking has one investment firm subsidiary and one ASU subsidiary, that would provide the technical infrastructure for the investment services provided and considered as representative of the main activity. Given the current IFR definition of IHC (which allows organisational arbitrage as the ASU, while included in the definition of 'consolidated situation', is not currently considered for the purpose of the definition of IHC), that undertaking would not qualify as an IHC and therefore has no need to comply with the IFR on a consolidated basis. The supervision in that case would be limited to the investment firm on a solo basis.

225. In light of recent cases that led to the review of the definition of an ASU and a financial institution as part of the revised CRR framework, it seems therefore important to ensure that similar adjustments are considered for IFR. This should be done by ensuring the inclusion of an ASU in the definition of 'financial institution', which would then also bring these entities into scope when considering the structure of an investment firm group and an entity's role as IHC.

Recommendation 37. Definition of financial institution
Include ASUs in the definition of 'financial institution' in Article 4(1)(14) of the IFR.

226. Additionally, in application of the definition of 'Union Parent Investment Firm' ('"Union parent investment firm" means an investment firm in a Member State that is part of an investment firm group and which has an investment firm or a financial institution as a subsidiary or which holds a participation in such an investment firm or financial institution'), an investment firm which only has ASU subsidiaries would not be required to comply with the IFR on a

consolidated basis should the definition of 'financial institution' not be amended to include ASUs.

227. Finally, alignment with the definition of 'financial institution' in Article 4(1)(26) of the CRR should be explored. Notably, the notion of 'owning holdings' should be added to the IFR definition of financial institutions in order to align it with its CRR counterpart.

Definition of Union parent investment firm (UPIF)

228. One aspect of consolidation, and possible unintended consequences in definitions, is the definition of UPIF in Article 4(1)(56) of the IFR. This definition is similar to the definition of 'union parent investment holding company' (UPIHC) in Article 4(1)(57) of the IFR:

a) (56) 'Union parent investment firm' means an investment firm in a Member State which is part of an investment firm group and which has an investment firm or a financial institution as a subsidiary or which holds a participation in such an investment firm or financial institution, and which is not itself a subsidiary of another investment firm authorised in any Member State, or of an investment holding company or MFHC set up in any Member State;

b) (57) 'Union parent investment holding company' means an investment holding company in a Member State which is part of an investment firm group, and which is not itself a subsidiary of an investment firm authorised in any Member State or of another investment holding company or MFHC set up in any Member State;

229. However, the UPIF definition states that the UPIF must have at least one subsidiary that is an investment firm or a financial institution. It should be flagged that only in the cases where the definitions of IHC and 'financial institution' are amended as discussed in the sections above do the two definitions (i.e. UPIF and UPIHC) become comparable.

8.2 Proportional consolidation, step-in risk and scope of consolidation

230. As highlighted during the discussion on the RTS on IFR consolidation, the limitation induced by IFR definitions of 'investment firm group' and 'consolidated situation', referring only to Article 22 of Directive 2013/34/EU, i.e. to entities under exclusive control, prevents the application of proportional consolidation or step-in consideration as part of IFR Pillar 1 requirements, thus deviating from the CRR consolidation requirements applicable to credit institutions under the CRR. Such a limitation is not warranted and ultimately results in considering this limitation as part of Pillar 2 requirements, as the risk related to jointly controlled investment firms, for instance, still needs to be addressed. The revision of the IFR consolidation framework should therefore be considered to align it with Article 18 of the CRR to the extent possible, in order to avoid the unwanted consequences that the current wording of the IFR has led to.

Recommendation 38. Scope and methods for prudential consolidation under the IFR
The IFR should be aligned with Article 18 of the CRR.

231. Regarding the consolidation of fund managers, these have their own prudential requirements, i.e. minimum own funds, governance and remuneration requirements, under the UCITSD and AIFMD. However, in practice, the same governance and remuneration requirements are applied across the group and the employees are servicing all the group entities, e.g. an internal outsourcing of risk management. Therefore, the EBA considers the consolidation of fund managers in the investment firm groups to be in line with the operational structure of groups, and takes into account the total fixed overheads of a group.

8.3 Group capital test

232. Article 8 of the IFR allows the use of the GCT instead of prudential consolidation when the CA assesses that the group structure of the investment firm group is sufficiently simple and that it does not pose a significant risk to clients or to the market. These conditions are not further elaborated in the IFR.

233. The GCT allows an investment firm group to disapply the prudential consolidation envisaged in Article 7 of the IFR, provided that the group fulfils the requirements of Article 8 of the IFR and that it receives authorisation from the competent authority. A group that uses the GCT calculates the capital requirements differently from the consolidation methodology and is waived from the governance and remuneration requirements at consolidated level. On 11 April 2024, the EBA published guidelines to harmonise the conditions for the use of the GCT[46].

234. From the experience of supervisors, investment firm groups have different interpretations on how to calculate capital requirements pursuant to Article 8(3) of the IFR (e.g. how to treat accounting goodwill or the own funds requirement at each level of the group structure). In order to harmonise the calculation of capital requirements, the EBA should be given a mandate to develop an RTS on the calculation of the capital requirements pursuant to Article 8(3) of the IFR, as well as specify the definition of 'notional own funds requirements' included in Article 8(4) of the IFR.

235. From the experience of supervisors, the GCT is used by two different kinds of investment firm groups: on one hand, groups with a simple structure and with limited activities, for which prudential consolidation would be disproportionately burdensome; and on the other hand, large and internationally active groups, for which the GCT is attractive thanks to the waiver it provides from the application of the governance and remuneration rules on a group basis,

[46] Guidelines on the application of the group capital test for investment firms (link).

which may allow subsidiaries in third countries to compete on a level playing field with local firms. However, the application of the GCT results in the loss of some information for supervisors when compared to the application of the prudential consolidation, though it does not necessarily result in lower capital requirements.

236. In light of the above, for groups with subsidiaries in third countries, the provisions of the GCT should be amended to separate the governance and the remuneration components from other provisions of the GCT. In other words, these groups might be subject to prudential consolidation according to Article 7 of the IFR, while having the possibility of waiving third country subsidiaries of the group from the governance and/or remuneration requirements applied on the group basis, subject to the authorisation of the competent authority. When granting such a waiver, the competent authority should assess: i) whether the governance and remuneration requirements of the IFD create a prejudice to the level playing field to the third country subsidiary, and ii) that the investment firm group does not arbitrage the governance and remuneration rules (e.g. by hiring employees through the third country subsidiary that are, in fact, employed in the operations in the EU). It should be noted, however, that investment firm groups that include at least one Class 1 minus investment firm should apply the provisions of Article 109 of the CRD.

Recommendation 39. Application of the group capital test

The EBA should be mandated to develop a RTS to specify in greater detail the calculation of the capital requirement of investment firm groups that use the group capital test (e.g. the treatment of goodwill or the own funds requirement at each level of the group structure), as well as the definition of 'notional own funds requirements' included in Article 8, paragraph 4, of the IFR.

Investment firm groups with subsidiaries in third countries should be allowed to waive such subsidiaries from the governance and/or remuneration requirements of the IFD on a consolidated basis, subject to the authorisation of the competent authority, while remaining subject to the prudential consolidation under Article 7 of the IFR, for the prudential requirements, and for the governance and remuneration requirements for the group in the EU. When granting such a waiver, the competent authority should assess: i) whether the governance and/or remuneration requirements of the IFD create a prejudice to the level playing field to the third country subsidiary; and ii) that the investment firm group does not arbitrage the governance and remuneration rules.

8.4 Consolidation of crowdfunding and crypto-asset service providers

237. With the ECSPR already being in force since November 2021, the IFR/IFD framework should clearly define how crowdfunding service providers (CFSPs) are taken into account as part of an investment firm group. In several instances, there are some overlapping requirements

coming from multiple regulations (ECSPR, IFR/IFD, etc.), and these should be streamlined to facilitate the coexistence of all these types of entities and ensure clarity with regards to the applicable regulatory provisions.

238. For instance, CFSPs are currently not in the scope of entities to be consolidated. Their inclusion could only be achieved through a clarification in the IFR. Amending the definition of 'financial institutions', however, would not be appropriate in this case. However, the definition of 'consolidated situation' could achieve the desired result.

239. Moreover, should CFSPs be part of an investment firm group, they could be factored in in the following manners:

a) Nominal initial capital: EUR 25 000 in line with ECSP requirements;

b) FOR: ¼ FO – Article 13 (1), (4) of the IFR;

c) Specific K-factors, depending on services provided, as follows: placing of securities – K-COH/K-DTF; reception and transmission of securities – K-COH.

240. Similarly, with the introduction of MiCA[47], the IFR/IFD framework should clearly define how crypto-assets service providers (CASPs) as well as issuers are taken into account as part of the prudential consolidation of investment firm groups.

241. Commission Delegated Regulation (EU) 2024/1771[48] would then need to be modified to specify the details concerning the scope and methods of consolidation as well as the own funds requirements calculations. Specifically, this review may distinguish the role of the issuers depending on their specific identification under MiCA (e.g. stablecoin issuers), and of CASPs depending on the services provided.

242. For a preliminary analysis of how to include the provision of crypto-assets services in the IFR/IFD framework, please see also Section 9.2 of this Report.

Recommendation 40. Inclusion of CFSP and CASP in the definition of 'consolidated situation' in Article 4(1)(11) of the IFR

The definition of 'consolidated situation' in Article 4(1)(11) of the IFR should be amended to include crowdfunding services providers (CFSPs) in the scope of prudential consolidation.

[47] Regulation (EU) 2023/1114 of 31 May 2023 on markets in crypto-assets (link).

[48] Commission Delegated Regulation (EU) 2024/1771 of 13 March 2024 on supplementing Regulation (EU) 2019/2033 with regard to regulatory technical standards specifying the details of the scope and methods for prudential consolidation of an investment firm group (link).

The same definition should also be amended to include crypto-assets services providers (CASP) as well as crypto-assets issuers in the scope of prudential consolidation.

For both cases, the mandate to develop technical standards under Article 7(5) of the IFR on prudential consolidation of an investment firms' group should be extended, with a requirement to further specify scope and methods of consolidation and own funds requirements calculation in relation to those entities.

9. Interactions of the IFR and IFD with other regulations

243. The discussion on the future proofing of the IFR/IFD regime can be developed along two main lines:

a) External coherence: Ensuring that the framework is well integrated into the regulatory backdrop and its interplay with other regulatory provisions; and

b) Content adjustment: Enabling the adjustment of the framework to an ever-changing landscape of the industry by clarifying how new players fit into the regulatory provisions.

9.1 Interaction with the AIFM and UCITS Directives

244. Regarding the future proofing of the IFR/IFD regime, it is essential to identify regulatory loopholes that allow entities to conduct investment firm activities or provide investment firm services without being covered by the IFR/IFD.

245. Capital requirements for UCITS management companies and AIFMs are set out in Article 7 of Directive 2009/65/EC and Article 9 of Directive 2011/61/EC. In summary, AIFMs and UCITS management companies are required to hold:

a) Initial Capital Requirement: at least EUR 125 000[49];

b) Additional capital of 0.02% of excess assets over EUR 250 million subject to a limit of EUR 10 mn (in respect of collective portfolios managed only, individually managed portfolios are excluded);

c) Own Funds must at no time be less than the amount prescribed in Article 13 of the IFR (FOR).

246. The UCITS/AIFM Directives only reference the fixed overheads requirements in line with the IFR, while MiFID directly sets out, in the IFR, the initial capital requirements for asset management companies.

247. Under Article 6(3) of Directive 2009/65/EC (UCITSD) and Article 6(4) of Directive 2011/61/EC (AIFMD), UCITS management companies and AIFMs may provide the following services:

[49] The AIFM/UCITS initial capital requirement exceeds the initial capital requirements applicable to investment firms providing the same MiFID services: Article 9(2) of the IFD only requires EUR 75 000for investment firms providing RTO, execution of orders, portfolio management, investment advice.

a) management of portfolios of investments, including those owned by pension funds in accordance with mandates given by investors on a discretionary client-by-client basis;

b) non-core services comprising:

i) investment advice;

ii) safekeeping and administration in relation to shares or units of collective investment undertakings.

248. Additionally, AIFMs may also provide reception and transmission of orders in relation to financial instruments.

249. UCITS management companies and AIFMs can be authorised, on top of their collective portfolio management activity, to carry out discretionary portfolio management, which is a MiFID service. Nonetheless, when this is the case, the own funds requirements established in UCITS and AIFM directives under points a) and b) above do not, in principle, unless national own funds requirements similar to those investment firms have been put in place, explicitly take into account investment services performed by UCITS asset management companies and AIFMs (i.e. individual portfolio management, investment advice, safekeeping and administration and – for AIFMs only – reception and transmission of orders), thus resulting, in certain cases, in an asymmetric treatment compared to investment firms providing the same MiFID services and having to set aside regulatory capital under the K-factor regime.

250. The provision of discretionary portfolio management services by UCITS managers and AIFMs is, under EU Regulations, not subject to any specific prudential requirements which may give rise to a risk of an inadequate level of capital being held by those firms if such services were provided in large scale proportionally to the applicable requirements, and if the associated capital was not covered by one quarter of fixed overheads requirement. This is unless national own funds requirements similar to those in place for investment firms have been put in place, for which there are several cases.

251. Information on this topic was collected via a dedicated data collection[50]. The main findings are shown in Section 12.2.13. That section summarises the number of asset management companies who contributed to the data collection (Table 16). These were asked to provide the volume of additional activities calculated using the same criteria and methodologies as for the K-factors in IFR. The outcome of the data collection is provided in Table 37 to Table 40.

252. The two tables show the ratio of the volume of additional MiFID services provided and size of the managed funds. For UCITS managers, 25% of the respondents reported that they offer

[50] It should be noted that the survey was conducted on a voluntary basis, and therefore the data does not provide a comprehensive overview of the provision of MiFID services by UCITS management companies and AIFMs across the EU. Section 12 provides an overview of collected data.

additional MiFID services almost of the same size as the mutual funds (81%)[51]. For limited cases (5% of the respondents) that ratio may be much bigger (additional services are up to 10 times larger than the size of the mutual funds). Furthermore, it is worth noting that the service that leads these results is primarily discretionary portfolio management related to tradeable financial instruments.

253. The same data provided by AIF management companies differ substantially, as similar ratios are reported by less than 5% of the respondents (where the MiFID services are up to four times larger than the size of the fund itself). It should be noted that asset managers can have UCITS and AIFM authorisations at the same time, and that some jurisdictions have flagged similar situations as for UCITS managers.

254. Therefore, should those figures be representative of the whole population, there is quantitative evidence to raise concerns that the provision of these additional services by UCITS managers might not be covered by adequate own funds in comparison to what is required for MiFID investment firms by using the K-factor requirements. This seems to be more a UCITSD issue than an AIFMD issue.

255. The fact that the same services, such as the provision of discretionary portfolio management services by UCITS managers, can be provided under one licence with no dedicated own funds requirements, means that, if performed on any material scale, it would put investment firms in a competitive disadvantage. This aspect is therefore highlighted to the legislators.

256. Furthermore, while at this point in time data collection highlighted a greater magnitude of additional services provided by UCITS managers, it would be reasonable that any specific prudential requirements, if further assessment is carried out showing a shortfall of own funds requirements, should be kept aligned for both UCITS management companies and AIFMs.

257. Nonetheless, due attention should be paid to avoiding duplications of requirements and to ensuring proportionality, taking into account the specificities of the framework applicable to UCITS management companies and AIFMs.

258. It should also be flagged that, in some jurisdictions with a higher concentration of investment firms, this unlevel playing field has been considered significant enough to have already put in place national requirements that require such firms to hold capital based on the higher capital amount determined under either the funds framework or that of the IFR. It would, however, be in the spirit of harmonisation of practices and a level playing field to have a consistent approach to these cases across jurisdictions.

[51] The value 81% is the ratio between the volume of additional services provided over the size of the mutual funds.

259. Finally, it should be noted that specific recommendations concerning amendments to the respective directives, UCITSD and/or AIFMD, would be outside the scope of IFD and IFR review and therefore beyond the scope of this Call for Advice.

9.2 Interaction of MiCA and IFR/IFD

9.2.1 Background

260. The EBA's review of the IFR/IFD aims to assess the role the IFR/IFD could play in regulating crypto-assets and crypto-asset services provided by investment firms under MiCA. In particular, there could be room for the IFR/IFD to regulate governance arrangements, risk management processes and transparency requirements for investment firms when they are involved in the trading of crypto-assets or provide services related to crypto-assets.

261. The review focused on crypto-asset services that may be provided by investment firms that, therefore, would qualify as a crypto-asset service provider under MiCA. This review did not cover the issuance of crypto-assets, as investment firms are not authorised to issue them (those that do not qualify as financial instruments, deposits or other products indicated in Article 2, paragraph 4, MiCA), and which would require a separate authorisation under MiCA.[52]

262. The authorisation requirement for CASPs under MiCA does not necessarily apply to investment firms. Specifically, an investment firm may provide crypto-asset services in the Union equivalent to the investment services and activities for which it is specifically authorised under MiFID, provided that it notifies the competent authority of the home Member State in accordance with Article 60(3) and (7) of MiCA. In such cases, some of the other requirements under MiCA, beside the authorisation requirement, for crypto-asset services providers do not apply to the investment firm. Other MiCA requirements do, however, still apply to the investment firm. Similar notification requirements apply within MiCA to UCITSD and AIFMD.

9.2.2 Requirements under MiCA not applicable to an investment firm

263. Entities referred to in paragraphs 1 to 6 of Article 60 of MiCA that provide crypto-asset services are not subject to the authorisation requirements under Articles 62, 63, 64 of MiCA, prudential requirements under Article 67 of MiCA and qualifying holding requirements under Articles 83 and 84 of MiCA. Regarding the prudential capital requirements, MiCA sets PMC requirements – which, depending on the type of crypto-asset services provided, range from EUR 50 000 to EUR 150 000, according to Annex IV of MiCA – or one quarter of the fixed overheads of the preceding year.

[52] If an investment firm wishes to *issue* crypto-assets that are within the scope of MiCA, then it may qualify as an issuer of crypto-assets, in which case the investment firm must meet requirements under MiCA depending on the specific type of crypto-asset issued, which may include prudential requirements in the case of e-money tokens and asset-referenced tokens.

264. The minimum capital requirements under the IFR/IFD that apply to an investment firm are higher (Article 9 of the IFD), when compared to the equivalent services, than those under MiCA.

9.2.3 Capital requirements under IFR/IFD and interaction with crypto-assets services providers (CASPs)

265. The IFR provisions on capital requirements have not been amended by MiCA.

266. Questions may therefore arise regarding the impact of the provision of crypto-asset services by an investment firm on its K-factor requirements under the IFR. For instance, whether K-CMH also applies to client money held in relation to crypto-asset services (provided that the client money is not deposited on a (custodian) bank account in the name of the client itself). Similarly, it may be doubted whether K-COH applies only to the RTO in financial instruments, or whether it may also capture the RTO in crypto-assets.

267. The EBA report should therefore explore the need to clarify the impact of the provision of crypto-asset services on the capital requirements under the IFR, specifically in relation to the application of the K-factors, such as K-COH, K-AUM, K-CMH, K-ASA and K-NPR.

268. Furthermore, the adequacy of the current prudential reporting should be assessed, including whether some adaptations would be needed to reflect activities and services related to crypto-assets.

269. For the role of crypto-assets service providers and issuers in the context of the prudential consolidation of an investment firm group, see Section 8.4.

9.2.4 EBA/ESMA analysis

270. The EBA and ESMA collected data on the investment firms' activities related to crypto-assets in parallel with the public consultation. The results are summarised in Table 21 and Table 23, concerning positions in crypto-assets, and Table 24 and Table 25 concerning the provision of crypto-assets related services.

271. Specifically in Table 24 Table 25, and in accordance with the sample of participants to the data collection, none of the investment firms provides services related to crypto-assets as per end 2023. Accordingly, the level of the K-factors related to crypto-assets if calculated on the same basis as the current definitions in IFR are null everywhere.

272. If based on the data of the sample, there is no quantitative evidence to support the introduction of new K-factors nor the immediate need to extend the existing IFR K-factors to crypto-assets, as these would have no impact. Nonetheless, competent authorities highlighted that there are investment firms that might be of interest, although they did not participate in the data collection.

273. It is worth noting that Table 24 shows that seven investment firms responded on the intention to provide such services, of which three under a MiCA authorisation and four under the existing MiFID authorisation following the MiCA notification process.

Recommendation 41. Investment firms providing services related to crypto-assets

With the application of the MiCA, investment firms may provide services related to crypto-assets with or without a MiCA authorisation. In the latter case, the performing such activities is restricted to a limited set of services. These are the services referred to in Article 60, paragraph 3 of the MICA Regulation.

Based on the collected data, the level of such activities as per end-2023 is virtually inexistent. Nonetheless, as it is likely that this market will evolve rapidly, it is advisable to require the investment firms to calculate the K-factors including services and positions related to crypto-assets.

To achieve that, the IFR text needs to be amended to extend the scope of the relevant K-factors to the provision of services related to crypto-assets. This should then be included in the calculation of K-COH, K-AUM, K-CMH, K-ASA and K-NPR.

Should this be the chosen way forward, no new K-factor is needed, as the existing K-factors can be used to cover all the services mentioned in Article 60(3) of MiCA.

Nonetheless, introducing mandate for the EBA to draft regulatory technical standards, specifying the details on how to include services related to crypto-assets in the aforementioned K-factors, is recommended.

9.2.5 Requirements under MiCA that are applicable to an investment firm

274. MiCA requirements that also apply to an investment firm include governance arrangements (Article 68 MiCA), the safekeeping of clients' crypto-assets and funds (Article 70 MiCA), the operation of a trading platform for crypto-assets (Article 76 MiCA) and specific obligations in respect of specific crypto-asset services (Title V, Chapter 3, MiCA).

275. The relationship between these two frameworks may require further clarification. It may be questioned whether, and if so to what degree, the ICAAP (Article 24 IFD) and SREP (Article 36 IFD) requirements under the IFD also encompass crypto-asset services provided by an investment firm.

276. The relevant texts should therefore clarify the overlap between the MiCA and the IFD, and whether the requirements under the IFD (including ICAAP and SREP) should also relate to crypto-asset services provided by an investment firm.

Recommendation 42. SREP and provision of services related to crypto-assets

The SREP guidelines for investment firms should clarify the overlapping areas between the MiCA and the IFD, and should specify how the requirements under the IFD concerning ICAAP and SREP address the provision of services related to crypto-assets provided by an investment firm.

10. Remuneration and its governance

10.1 Remuneration

277. Article 66 IFD requires that 'by 26 June 2024, the Commission, in close cooperation with EBA and ESMA, shall submit a report, together with a legislative proposal if appropriate, to the European Parliament and to the Council, [… on] (a) the provisions on remuneration in this Directive and in Regulation (EU) 2019/2033 as well as in Directives 2009/65/EC and 2011/61/EU with the aim of achieving a level playing field for all investment firms active in the Union, including the application of those provisions; and (b) the appropriateness of the reporting and disclosure requirements in this Directive and in Regulation (EU) 2019/2033, taking into account the principle of proportionality…'.

278. It needs to be considered that some investment firms are subject to the remuneration requirements under Articles 74, 92, 94 and 95 of Directive 2013/36/EU as they fall under Article 2(2) IFD. All those directives set out requirements on a minimum harmonisation basis; hence, the national implementation of the directives may have an additional impact on the level playing field for different firms in the investment services sector. A general review between the remuneration framework of investment firms and the remuneration framework for credit institutions that are subject to the CRD and the limitation of the ratio between variable and fixed remuneration of 100% (200% with shareholder approval) is not intended under this technical advice. The present review is focused on the consequences of the different frameworks for investment firms under the IFD and other asset managers (Class 1 minus investment firms that are subject to CRD requirements, Class 2 that are subject only to IFD requirements on remuneration and Class 3 that are subject only to the MiFID remuneration requirements, UCITS management companies and AIFMs that are subject to their sector-specific requirements). Overall, a close alignment of all these frameworks would be beneficial to ensure a level playing field between these companies.

279. While being based on the same principles, the detailed provisions on remuneration policies and variable remuneration under the aforementioned directives[53] differ. When analysing the differences, and the impact of the different requirements on a level playing field, it also needs to be taken into account that Directive 2014/65/EU (MiFID) contains requirements on investment firms' remuneration policies for sales staff that aim at eliminating any conflicts of interest with regard to the distribution of different financial instruments, and to avoid any detrimental effects of such conflicts for investors. Similar requirements that aim at avoiding conflicts of interest are also included in the UCITS Directive and in the AIFMD. Moreover, MiFID II Delegated Regulation 2017/565 contains additional requirements on remuneration

[53] Articles 30–34 IFD, Articles 92–95 CRD, Article 13 AIFMD, Articles 14a and 14b of UCITS Directive.

that apply to all investment firms (by virtue of Article 1(1) of the aforementioned MiFID II Delegated Regulation) and to UCITS management companies and AIFMs when providing MiFID services in accordance with Article 6(3) of UCITS Directive and Article 6(4) of AIFMD. Therefore, such provisions should have no impact on the level playing field.

280. The sections below provide an overview of the main aspects and differences in the remuneration regimes for the different types of firms that are covered by the review. For each of the material parts of the remuneration provisions, where differences in the regulatory regime exist, the EBA, in close cooperation with ESMA, has investigated whether such differences have an impact on the level playing field, in particular, with regard to firms' ability to recruit and retain talent and with regard to the costs of applying the requirements. This technical advice has benefited from remuneration benchmarking data collected by the EBA and data collected on the application of gender-neutral remuneration policies.

10.2 Scope of application

281. Investment firms subject to the IFD do not fall under the provisions of the AIFMD or UCITS Directive. These two directives establish a specific remuneration framework for the respective firms. While the remuneration provisions within the UCITS Directive and the AIFMD apply to nearly all EU asset management companies, unless the exceptions for subthreshold AIFMs under Article 3 AIFMD apply, the IFD requirements on remuneration do not apply to investment firms that qualify as small and non-interconnected (Class 3 investment firms). For those investment firms, only the remuneration requirements under MiFID are applicable. Other investment firms (Class 2) apply the remuneration framework under IFD and the largest investment firms (Class 1 minus) have to apply the CRD remuneration provisions in accordance with Article 2(2) IFD, in addition to the MiFID II requirements.

282. The different scopes of application could lead to an unlevel playing field between small and non-interconnected investment firms subject to IFD and UCITS management companies that are subject to the UCITS directive or alternative asset management companies that are subject to AIFMD, while all three different types of firms are active in areas that are relatively similar in terms of business models and risk profiles. While the ESMA guidelines on remuneration policies allow for a proportionate application of the remuneration provisions for UCITS management companies and AIFMs, small or non-complex UCITS and AIFM that are subject to the UCITS Directive or AIFMD would have less legal certainty regarding the proportionate application of derogations from certain remuneration requirements compared to small and non-interconnected investment firms to which specific derogations apply under IFD, when implemented under national law. While overall a more harmonised framework would lead to more legal certainty and consistency, the supervisory community does not have any practical evidence of problems being caused by those legal differences with regard to the application of remuneration requirements in these firms.

283. Another difference exists between the IFD and CRD in the application of remuneration requirements on a consolidated basis that also includes entities located in third countries. Article 109 CRD provides that firms subject to a specific remuneration framework are not subject to the group-wide remuneration requirements, unless Article 109 (5) or (6) applies. The IFD does not contain a similar provision. Hence, firms that are subject to a specific remuneration regime, e.g. under AIFMD or UCITS directive, and that fall within the scope of consolidation of an investment firm would have to comply on a group-wide basis with the group-wide remuneration IFD requirements and policy and not just with their specific remuneration framework and policy.

Recommendation 43. Scope of application of remuneration provisions in investment firm groups

An alignment of the text of IFD with Article 109 (4 to 6) CRD is recommended regarding the treatment of subsidiaries within an investment firm group.

10.3 Remuneration policies and committees

284. All four directives (CRD, IFD, UCITS Directive, and AIFMD) include some provisions on remuneration policies for all staff and specific requirements on the variable remuneration for staff who have a material impact on the risk profile of the firm and with regard to IFD, AIFMD and the UCITS directive also the assets they manage, which aim to align the variable remuneration with the risks of the firm in the longer run and promote sound and effective risk management. All directives contain provisions that require aligning the remuneration of staff in control functions with control objectives.

285. All directives include comparable provisions on the governance arrangements for the adoption of the remuneration policy by the management body and the involvement of the remuneration committee in significant firms that exceed a certain size. Article 95 CRD applies to significant institutions (GSII, OSII and other institutions determined by the competent authorities); Article 33 IFD in combination with Article 32(4)IFD requires investment firms, where the value of its on-and off-balance-sheet assets is on average above EUR 100 million over the four-year period immediately preceding the given financial year to establish a remuneration committee at group level that is responsible for the preparation of decisions regarding remuneration. Under Article 32(5) IFD the threshold can be increased by the Member State to up to EUR 300 mn, where the requirements under points (a) to (f) of this paragraph are met, which includes under point (a) that the increase cannot be applied to the largest three investment firms in a Member State; point (b) is linked to the application of BRRD requirements, points (c) and (d) define additional thresholds for investment firms trading book business (equal or less EUR 150 mn) and derivative business (equal or less EUR 100 mn). Given the different sizes of the financial markets in Member States, the criterion in point (a)

in particular can create an unlevel playing field, while the other criteria lead to additional monitoring burdens.

286. Under AIFMD and the UCITS directive, a similar requirement is applicable to companies that are significant in terms of their size or of the size of the funds that they manage, without a specific threshold being set.

The threshold set in the IFD that requires the establishment of such committees is much lower, as under the CRD, where only significant institutions are required under Article 76(3) CRD to set up such committees (GSII, OSII and other institutions dedicated by the CA), this leads to a unlevel playing field and additional costs for investment firms, especially for firms without a supervisory board or non-executives at entity level due to their legal form, or firms with small management bodies. While the CRD requirement applies on an individual and consolidated level, the size of significant institutions and their potential impact on the stability of the financial market is much greater than the one of investment firms. In addition, the establishment of risk committees under Article 28(4) IFD is based on the same thresholds set out Article 32(4) IFD that apply to the setting up of the remuneration committee, but requires, differently to the setting up of a remuneration committee at group level, the establishment of a risk committee on an individual basis. This leads to additional costs for establishing potentially multiple committees in Class 2 investment firms, while Class 1 investment firms would only fall under the requirement if they are significant under the CRD.

Recommendation 44. Risk and remuneration committees

The requirement to have risk and remuneration committees should be amended in the IFD, as the current threshold criterion is set at a relatively low level with additional restrictions for its increase. Member States should be allowed to increase the threshold under Article 32(4) IFD to EUR 300 mn total assets without the need to meet the conditions under points (a) to (d) of Article 32(5) IFD.

To follow a more proportionate approach, it would be sufficient to apply the requirement to have a risk committee under Article 28(4) of the IFD only at the consolidated (group) level. The possibility of having a group-level risk committee would avoid the need to have a sufficient number of non-executive directors to establish such committees in each individual investment firm within the group that individually has total assets above the threshold.

Member States should continue to be able to apply, under Article 32(5)(f) of the directive, lower thresholds on a risk-based approach where this is appropriate, considering the nature and scope of the investment firm's activities, its internal organisation and, where applicable, the characteristics of the group to which it belongs require it.

287. While the IFD contains a specific requirement that the remuneration policy must be gender-neutral, such a requirement is not included in the UCITS Directive or AIFMD. However, the

general principle of 'equal pay for equal work or work of equal value' is directly included in the Treaty on the functioning of the European Union[54] and requires that 'each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied'.

288. The specific provisions under three directives (IFD, Directive on UCITS and AIFMD) apply to those categories of staff, including senior management, risk takers, control functions, and any employee receiving total remuneration that falls within the remuneration bracket of senior management and risk takers whose professional activities have a material impact on the risk profiles of those firms or of the 'assets' that they manage – those staff members are also referred to as 'identified staff'. However, under the CRD the criterion on the remuneration bracket has been removed in the past and no longer applies. The identification of risk takers under the CRD is regulated by the Commission Delegated Regulation (EU) 2021/923 of 25 March 2021 supplementing Directive 2013/36/EU of the European Parliament and of the Council with regard to regulatory technical standards setting out the criteria to define managerial responsibility, control functions, material business units and a significant impact on a material business unit's risk profile, and setting out criteria for identifying staff members or categories of staff whose professional activities have an impact on the institution's risk profile that is comparably as material as that of staff members or categories of staff referred to in Article 92(3) of that directive. The scope of identified staff is further specified for investment firms under the Commission Delegated Regulation (EU) 2021/2154 supplementing Directive (EU) 2019/2034 of the European Parliament and of the Council with regard to regulatory technical standards specifying appropriate criteria to identify categories of staff whose professional activities have a material impact on the risk profile of an investment firm or of the assets that it manages. For UCITS management companies and AIFMs, more high-level identification principles are set out in ESMA Guidelines on sound remuneration policies under the UCITS Directive and AIFMD[55].

Recommendation 45. 'Remuneration bracket criterion'

The so-called 'remuneration bracket criterion' under Article 30 (1) IFD – any employees receiving overall remuneration equal to at least the lowest remuneration received by senior management

[54] Article 157 TFEU, OJ C 202, 7.6.2016, pp. 47–360.

[55] Notably:

- Guidelines on sound remuneration policies under the UCITS directive (ESMA 2016/575)
- Guidelines on sound remuneration policies under the AIFMD (ESMA 2016/579)
- Guidelines on sound remuneration policies under the UCITS directive and AIFMD (ESMA 2016/411).

or risk takers – should be removed to limit the burden for the identification process and to align the IFD provisions with the CRD framework.

10.4 Requirements on variable remuneration

289. The IFD, the UCITS directive and AIFMD, as well as Directive 2013/36/EU (CRD) – which is applicable to Class 1 minus investment firms with respect to the requirements on governance and remuneration – include requirements regarding the link between performance and variable remuneration, risk alignment, payout in instruments and under deferral arrangements and additional retention periods as well as the application of malus and claw back. All directives require an appropriate balance between the fixed and variable elements of remuneration, where CRD limits the ratio between the variable and the fixed remuneration.

290. While the instruments that must be awarded for a part of the variable remuneration are equivalent for all firms, it is possible that competent authorities approve, for investment firms, the use of alternative arrangements for payout in instruments fulfilling the same objectives. At the same time, Member States have a derogation under the IFD to restrict the use of certain instruments for variable remuneration. Provisions that allow for alternative arrangements that could be used, rather than the instruments listed in the directives, do not exist under the UCITS directive or AIFMD. In a different way, firms subject to the CRD have to also use other instruments for the payout of variable remuneration, and these are specified by a Commission Delegated Regulation [56] . In addition, for investment firms a Commission Delegated Regulation[57] specifies the instruments and alternative arrangements that can be used for the payout of variable remuneration, while the UCITS directive and the AIFMD do not contain a mandate to develop such standards. However, some specifications have been provided in ESMA Guidelines on sound remuneration policies under the UCITS directive and AIFMD.

291. The IFD offers the possibility for Class 2 investment firms, which are in general subject to the remuneration provisions, not to apply certain remuneration rules if specific conditions are met, in particular a threshold[58] defined in the IFD. Member States can already increase the threshold from EUR 100 mn to up to EUR 300 mn, but only where the condition in Article 32(5) points (a) to (f) are met. Point (a) of Article 32(5)(a) IFD leads to a situation where the 3 largest

[56] Commission Delegated Regulation (EU) No 527/2014 of 12 March 2014 supplementing Directive (EU) No 2013/36/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the classes of instruments that adequately reflect the credit quality of an institution as a going concern and are appropriate to be used for the purposes of variable remuneration.

[57] Commission Delegated Regulation (EU) 2021/2155 of 13 August 2021 supplementing Directive (EU) 2019/2034 of the European Parliament and of the Council with regard to regulatory technical standards specifying the classes of instruments that adequately reflect the credit quality of the investment firm as a going concern and possible alternative arrangements that are appropriate to be used for the purposes of variable remuneration.

[58] Point (a) of Article 32(4) of the IFD provides an exemption where the value of an investment firm's on-and off-balance-sheet assets is on average equal to or less than EUR 100 million over the four-year period immediately preceding the financial year considered.

investment firms are not able to benefit from higher thresholds. The additional criteria in points (a) to (d) lead to an unlevel playing field between investment firms having their headquarters in different Member Stares, e.g. between the situation of branches of investment firms authorised in other EU Member States and subsidiaries in the same Member State. The application of the condition in point (a), but also the application of the conditions in points (b) to (d) leads to additional burdens, as already set out above in paragraph 285. Removing those conditions would not be detrimental to the stability of the European financial market. Where Member States would see a need to ensure locally a stronger alignment of variable remuneration and risks, it would still be possible to introduce stricter requirements, as the IFD is based on minimum harmonisation.

292. At the same time, some investment firms may be subject to the CRD, as they fall under Article 2(2) IFD, which also has a similar exemption mechanism to the IFD, but applies different thresholds[59]. The IFD and CRD frameworks were calibrated to take into account investment firms' and credit institutions' respective characteristics and therefore the different thresholds set under IFD and CRD. Such derogations apply independently of the concrete business model when the criteria are met. A different implementation by Member States could potentially have an impact on the level playing field between different investment firms, i.e. as thresholds differ between Member States or as investment firms can be either subject to the derogations to the requirements to pay out parts of the variable remuneration in instruments and under deferral arrangements under IFD or CRD. However, the creation of a specific remuneration framework for Class 1- investment firms that are subject to CRD remuneration requirements would lead to a fragmentation of the legislative framework.

293. While the IFD and CRD include explicit derogations for investment firms regarding the requirements to pay out a part of variable remuneration of identified staff in instruments and under deferral arrangements, the UCITS Directive and the AIFMD do not include such explicit derogations. While there is no hard practical evidence that there is a detrimental impact on the level playing field caused by the absence of such thresholds under AIFMD and UCITS directive, more harmonisation between directives could lead to more consistent remuneration provisions over time.

Recommendation 46. Threshold for derogations regarding deferral and pay out in instruments on a firm wide basis

[59] Point (a) of Article 94(3) of the CRD provides for an exception where an institution is not a large institution as defined in point (146) of Article4(1) of Regulation (EU) No 575/2013 and the value of the assets of which is on average and on an individual basis in accordance with this Directive and Regulation (EU) No 575/2013 equal to or less than EUR 5 bn over the four-year period immediately preceding the current financial year; the threshold can be increased by the Member States up to EUR 15 bn under certain conditions.

Member States should be allowed to increase the threshold under Article 32(4) IFD to EUR 300 mn total assets without the need to meet the conditions under points (a) to (d) of Article 32(5) IFD, to allow for a more proportionate application to all Class 2 investment firms.

Member States should remain able to apply lower thresholds under Article 32(5)(f) of the directive, on a risk-based approach where this is appropriate, considering the nature and scope of the investment firm's activities, its internal organisation and, where applicable, the characteristics of the group to which it belongs require it.

294. Moreover, the thresholds for derogations for the application of the deferral and payout in instruments requirements for individual staff members differs between the IFD and CRD. While both stipulate EUR 50 000 of variable remuneration as a baseline criterion for the derogation, the IFD specifies that the derogation is only applicable if it does not represent more than one fourth of that individual's total annual remuneration. By contrast, the CRD specifies that the derogation is only applicable if it does not represent more than one third of the staff member's total annual remuneration. ESMA Guidelines on sound remuneration policies under the UCITS directive and AIFMD do not foresee additional criteria in addition to the absolute threshold. The difference in the criteria for the application of derogations could cause an unlevel playing field for recruiting and retaining staff, and regarding the costs of applying the deferral and payout in instruments requirements.

Recommendation 47. Threshold for derogations regarding deferral and pay out in instruments based on a low level of remuneration

The threshold for staff with a low level of variable remuneration under the IFD (EUR 50 000, ratio variable/total max 1/4) should be fully aligned with the one under the CRD (EUR 50 000, ratio variable/total max 1/3).

295. Where the payout in instruments is not applied, retention periods are automatically not applied to the part of variable remuneration paid out in instruments. Where retention periods are applied, they lead to a short additional time period where implicit risk adjustments caused by price changes to instruments may take effect, while their application adds to the costs of applying remuneration requirements. Such periods often span only six months, while deferral periods already cover 3 to 5 years. In addition, the mechanism of implicit risk adjustments is unlikely to lead to a strong impact on risk-taking behaviour for most identified staff.

296. Removing the requirement to apply retention periods under the IFD would need to be paralleled with changes to the UCITS directive and AIFMD framework. While removing the retention period for investment firms would lead to a minor deviation of the level playing field towards the CRD, it needs to be considered that the derogations under the CRD are based on

an EUR 5 bn threshold, so that in fact institutions with a lower balance sheet total are already excluded from the requirement to apply retention periods.

Recommendation 48. Retention periods

For institutions that do not benefit from the derogations from the requirement to pay out parts of the variable remuneration in instruments and under deferral arrangements, the mechanism of implicit risk adjustments is unlikely to lead to a strong impact on risk-taking behaviour. A retention requirement that adds only a short additional time period to the deferral requirement of at least 3 to 5 years could therefore be removed from the IFD requirements for investment firms based on proportionality considerations, and taking into account that investment firms do not fall under the FSB principles as their administration and monitoring creates additional costs.

10.5 Oversight, Disclosure and Transparency on remuneration and remuneration policies

297. The requirements on the oversight of remuneration policies, disclosure and transparency differ between the different directives/regulations, to some extent.

298. The IFD and the UCITS directive include specific requirements for disclosures in the annual report with regard to the remuneration policy and the determination of bonuses, while the disclosures under AIFMD are more limited and concern mainly the effective amounts awarded. The granularity of the provisions within the IFD and the UCITS directive differs significantly and requires a higher level of granularity from investment firms subject to IFD regarding the single components of variable remuneration as compared to other firms subject to this review.

299. In contrast to AIFMD and the UCITS directive, the IFD specifically requires remuneration benchmarking, high earner reporting and the monitoring of the gender pay gap. Article 14b(2), second subparagraph, of the UCITS directive empowers the ESMA to request information from competent authorities on the remuneration policies and practices referred to in Article 14a of this directive in accordance with Article 35 of Regulation (EU) No 1095/2010. The AIFMD does not include such empowerment.

300. Different disclosure requirements should not per se have a material impact on the ability to attract and retain staff, but data collections, disclosures and information to be prepared for competent authorities bear costs that differ depending on the different firms, and may therefore still have an impact on the level playing field.

Recommendation 49. Review of disclosure and reporting requirements

In the context of the review of disclosure and reporting requirements aiming to reduce the burden, attention should be given to more closely aligning requirements under the UCITS

directive, AIFMD and IFD to reduce further the burden in a group context by simplifying and standardising the disclosure requirements.

11. Other elements

11.1 Extending reporting requirements to financial information

301. Article 54 of the IFR requires investment firms to report on a periodic basis information regarding: a) level and composition of own funds; b) own funds requirements; c) own funds requirement calculations; d) the level of activity in respect of the conditions set out in Article 12(1), including the balance sheet and revenue breakdown by investment service and applicable K-factor; e) concentration risk, and f) liquidity requirements.

302. Except for point d), all other points are related to the prudential requirements and do not include financial (accounting) information. Accordingly, the technical standards on the reporting requirements[60] for investment firms are limited to the mentioned items.

303. Competent authorities report that such information is of interest for supervisory purposes and, in several instances, financial reporting is therefore required based on national laws to supplement the IFR requirements. However, reporting such information is not a requirement under the IFR or the IFD. Therefore, in some Member States, it might be difficult for an authority to impose such requirements solely based on national laws because, for example, it might not be part of the IFD transposition.

304. There was therefore a case to investigate whether it would be beneficial to extend the reporting requirements to include accounting and financial information in European legislation.

305. In this sense, it is worth noting that the reporting requirements may be a source of considerable burden for small investment firms. Therefore, should the reporting requirements be extended to financial information, it is arguable that they should remain based on the applicable accounting standards, which may be local GAAP, without forcing all investment firms using local accounting standards towards double calculations.

306. The requirement may be included in Article 54 of the IFR, together with the other reporting requirements. Should that be the way forward, it should be noted that Article 54, paragraph 3, would then also apply to financial reporting, as part of the EBA's mandate for an implementing technical standard. From this point of view, it is worth noting that the CRR does not require FINREP reporting at solo level, but only at consolidated level. This was also the case in the past, when the CRR was applicable to investment firms as well.

[60] Commission Implementing Regulation (EU) 2021/2284 of 10 December 2021 laying down implementing technical standards for the application of Regulation (EU) 2019/2033 with regard to supervisory reporting and disclosures of investment firms (link).

307. Another element considered was the frequency of such reporting obligations. Quarterly reporting of financial information could be set for all investment firms, including for small and non-interconnected (Class 3) investment firms. The rationale is that quarterly reporting would enable supervisors to monitor investment firms' financial situation and how their capital develops during the year, and whether it is still sufficient to meet capital requirements higher than PMR or FOR.

308. Because of the considerations above, and considering that several Member States already require financial information for supervisory purposes, it is the opinion of the EBA and ESMA that including such requirements does not need to be included in the IFR, as this would avoid additional administrative burden for investment firms. This would be applicable for both Class 2 and Class 3 investment firms.

11.2 Firms active in the commodity markets currently not subject to prudential requirements

309. In Section 5 of the CfA, 'Specific considerations on commodity and emission allowance dealers and on energy firms', the Commission suggests investigating two aspects: (i) to provide insights on the market structure and the profile of energy firms operating in these markets; and (ii) since some of these firms active in trading commodity and energy derivatives are exempted from MiFID, the Commission seeks advice on how the current prudential regime for investment firms, in particular in the areas of liquidity and concentration risks, could be extended to energy firms trading actively on commodity and energy derivative markets.

310. As this area would require a more in-depth analysis of a specific market segment that would also encompass non-financial firms, it may be the subject of a separate response from the EBA and ESMA at a later stage, if requested by the Commission. Currently, participants in these markets perform similar activities but may be subject to different requirements; these range from banks and investment firms, subject to a large set of prudential requirements, to non-financial entities subject to much more limited requirements due to the ancillary activities exemption allowed under MiFID. However, an assessment of whether the regulation and supervision of this market, and of its participants, requires further strengthening and harmonisation, and whether the current prudential regime for investment firms provides a good fit for the risk profile of these participants and for the risk they pose to financial stability, would require a more extensive analysis; in particular as the functioning of the commodity and energy markets raises broader policy considerations, including aspects related to the supply chain or the energy price formation and volatility through the cycle, that go beyond the scope of the current report and would necessitate specific data collections and deeper analysis.

11.3 Elements of the CfA not covered by this report

311. While there is a specific request in the CfA on the role of ESG factors in the Pillar 1 prudential requirements for investment firms, the EBA advice is already included in the ESG report developed in accordance with the mandate under Article 34 of the IFR[61].

312. Concerning the request in the CfA on investment policy disclosure, this topic is considered as exhaustively covered by the dedicated EBA technical standards[62].

[61] Report on the role of environmental and social risks in the prudential framework, EBA, 12 October 2023, (link).

[62] Regulatory Technical Standards on disclosure of investment policy by investment firms (link).

12. Outcome of the data collection and quantitative analyses

12.1 Investment firms in the Union

Overview

313. This section provides a high-level overview of the population of investment firms and investment firm groups currently subject to the IFR/IFD framework or CRR/CRD framework in the EU. The section does not cover investment firms that qualify as credit institutions in accordance with Article 4(1), point (b) of the CRR or which have transitioned to a credit institution authorisation in accordance with Article 8 CRD (Class 1).

314. The data source is the European Centralised Infrastructure of Supervisory Data (EUCLID). The data sample is therefore complete to the extent that it includes the register of all MiFID investment firms and Union parents of investment firm groups subject to the prudential requirements of the IFR/IFD framework and the CRR/CRD.

12.1.2 Individual investment firms

Population

315. As of December 2023, there were 2 290 investment firms in the EU subject to IFR/IFD or CRR/CRD framework on an individual basis (Table 1). Most of the investment firms are located in Germany (31.4%), Cyprus (10.9%), the Netherlands (8.9%) and Spain (8.4%).

Table 2. Number of (individual) investment firms by Member State, as of 31 December 2023

Member State	Number of investment firms	Member State	Number of investment firms
AT	61	IE	87
BE	30	IT	59
BG	34	LT	11
CY	250	LU	83
CZ	28	LV	9
DE	719	MT	71
DK	47	NL	203
EE	9	PL	33
ES	192	PT	33
FI	43	RO	17

Member State	Number of investment firms	Member State	Number of investment firms
FR	91	SE	96
GR	44	SI	3
HR	5	SK	22
HU	10		
		Total	**2 290**

Sources: EUCLID supervisory data (2023 Q4) and EBA calculations.
Notes: The table does not cover investment firms that qualify as credit institutions in accordance with Article 4(1) point (b) CRR and transitioned to a credit institution authorisation in accordance with Article 8 CRD (Class 1).

316. More than half of the investment firms (57.6%) are categorised as Class 3 firms (small and non-interconnected), while a considerable share (42.2%) belongs to Class 2 (Table 3). On the other hand, only six investment firms belong to the Class 1 minus category and are therefore subject to the CRR/CRD capital requirements.

Table 3. Number of investment firms by Class, as of 31 December 2023

Class	Number of investment firms
Class 1 minus	6
Class 2	966
Class 3	1 318
Total	2 290

Sources: EUCLID supervisory data (2023 Q4) and EBA calculations.
Notes: The table does not cover investment firms that qualify as credit institutions in accordance with Article 4(1), point (b) CRR and transitioned to a credit institution authorisation in accordance with Article 8 CRD (Class 1).

Constraining capital requirements

317. Table 4 shows the number of investment firms by classification and 'constraining' requirement. Most of the Class 2 investment firms are constrained by FOR (48.3%), followed by PMCR (31.8%) and K-factors (19.9%). Class 3 investment firms are mostly constrained by the FOR (70.9%).

Table 4. Number of investment firms by constraining requirement and classification, as of 31 December 2023

	Class 2	Class 3
PMCR	307	383
FOR	466	933
K-factors	192	
Total	**965**	**1 316**

Sources: EUCLID supervisory data (2023 Q4) and EBA calculations.
Notes: The table only covers investment firms subject to the IFR/IFD. The table does not cover the full population of investment firms due to data unavailability.

Liquidity requirements

318. Table 5 shows the number of Class 3 investment firms exempted from liquidity requirements in accordance with Article 43(1) of IFR by Member State. The vast majority of Member States do not exempt Class 3 firms from liquidity requirements, with the exemption of two Member States; Austria which exempts all Class 3 investment firms from liquidity requirements and Portugal which exempts just one out of the 24 Class 3 investment firms located in the country.

Table 5. Number of Class 3 investment firms exempted from liquidity requirements, as of 31 December 2023

Member State	Number of Class 3 investment firms	Of which: exempted from liquidity requirements	Member State	Number of Class 3 investment firms	Of which: exempted from liquidity requirements
AT	**58**	**58**	IE	33	0
BE	18	0	IT	23	0
BG	0	0	LT	3	0
CY	26	0	LU	57	0
CZ	6	0	LV	2	0
DE	606	0	MT	31	0
DK	33	0	NL	124	0
EE	1	0	PL	12	0
ES	140	0	PT	24	**1**
FI	21	0	RO	0	0
FR	39	0	SE	44	0
GR	13	0	SI	0	0
HR	0	0	SK	3	0
HU	1	0			
			Total	**1 318**	**59**

Thresholds under Article 12 (i) and (h) IFR

319. Table 6 shows the number of investment firms for different thresholds for the metric under Article 12(h) IFR. Out of 1 809 investment firms, 1 689 are below the threshold set out in Article 12(h).

Table 6. Number of investment firms for different thresholds for the metric under Article 12(h) IFR, as of 31 December 2023

Article 12(h) threshold	Number of investment firms
< EUR 100 mn	1 689
[EUR 100 mn, EUR 150 mn]	23
[EUR 150 mn, EUR 200 mn]	9

Article 12(h) threshold	Number of investment firms
[EUR 200 mn, EUR 250 mn]	13
[EUR 250 mn, EUR 300 mn]	4
[EUR 300 mn, EUR 350 mn]	5
[EUR 350 mn, EUR 400 mn]	5
[EUR 400 mn, EUR 450 mn]	2
[EUR 450 mn, EUR 500 mn]	7
[EUR 500 mn, EUR 1 000 mn]	16
[EUR 1 000 mn, EUR 1 500 mn]	6
>=EUR 1 500 mn	30
Total	**1 809**

Sources: EUCLID supervisory data (2023 Q4) and EBA calculations.
Notes: The table only covers investment firms subject to the IFD/IFR. The table does not cover the full population of investment firms due to data unavailability.

320. Table 7 shows the number of investment firms for different thresholds for the metric under Article 12(i) IFR. Out of 2 001 investment firms, 1 847 are below the threshold set out in Article 12(i).

Table 7. Number of investment firms for different thresholds for the metric under Article 12(i) IFR, as of 31 December 2023

Article 12(i) threshold	Number of investment firms
< EUR 30 mn	1 847
[EUR 30 mn, EUR 40 mn]	29
[EUR 40 mn, EUR 50 mn]	14
[EUR 50 mn, EUR 60 mn]	20
[EUR 60 mn, EUR 70 mn]	20
[EUR 70 mn, EUR 80 mn]	7
[EUR 80 mn, EUR 90 mn]	7
[EUR 90 mn, EUR 100 mn]	6
[EUR 100 mn, EUR 150 mn]	19
[EUR 150 mn, EUR 200 mn]	6
>= EUR 200 mn	26
Total	**2 001**

Sources: EUCLID supervisory data (2023 Q4) and EBA calculations.
Notes: The table only covers investment firms subject to the IFR/IFD. The table does not cover the full population of investment firms due to data unavailability.

12.1.3 Investment firm groups

321. As of December 2023, there were 282 investment firm groups in the EU subject to IFR/IFD on consolidated basis, including those authorised to use the group capital test (Table 8). Most of the investment firm groups are located in the Netherlands (17.4%), Spain (16.3%), Cyprus

(12.8%), Germany (9.6%) and Sweden (8.5%). Many Member States (10 out of 27) do not have any investment firm groups in their jurisdiction.

Table 8. Number of investment firm groups by Member State, as of 31 December 2023

Member State	Number of investment firm groups	Member State	Number of investment firm groups
AT	15	IE	13
BE	7	IT	8
BG	4	LT	0
CY	36	LU	2
CZ	6	LV	0
DE	27	MT	5
DK	0	NL	49
EE	3	PL	0
ES	46	PT	0
FI	21	RO	0
FR	15	SE	24
GR	0	SI	1
HR	0	SK	0
HU	0		
		Total	**282**

Sources: EUCLID supervisory data (2023 Q4) and EBA calculations.
Notes: The table does not cover investment firms that qualify as credit institutions in accordance with Article 4(1) point (b) CRR and transitioned to a credit institution authorisation in accordance with Article 8 CRD (Class 1).

322. More than half of the investment firm groups subject to IFR/IFD Article 7 (58.9%) are categorised as Class 2, while a non-material share (26.6%) belongs to Class 2 (Table 9). The remaining 14.5% of investment firm groups are subject to the group capital test in accordance with Article 8 IFR/IFD.

Table 9. Number of investment firm groups by Class, as of 31 December 2023

Class	Number of investment firm groups
Class 2	166
Class 3	75
Group capital test	41
Total	**282**

Sources: EUCLID supervisory data (2023 Q4) and EBA calculations.
Notes: The table does not cover investment firms that qualify as credit institutions in accordance with Article 4(1) point (b) CRR and transitioned to a credit institution authorisation in accordance with Article 8 CRD (Class 1).

323. The next table shows the number of investment firm groups by classification and constraining requirements. Among the Class 2 investment firm groups, FOR is often the most constraining requirement (62.7%), followed by PMCR (22.9%) and K-factors (14.5%). Class 3 investment firm groups are mostly constrained by the FOR (70.7%).

Table 10. Number of investment firm groups by constraining requirement and classification, as of 31 December 2023[63]

	Class 2	Class 3
PMCR	38	22
FOR	104	53
K-factors	24	
Total	**166**	**75**

Sources: EUCLID supervisory data (2023 Q4) and EBA calculations.
Notes: The table only covers investment firm groups subject to the IFD/IFR other than those subject to the capital group test. The table does not cover the full population of investment firm groups due to data unavailability.

Thresholds under Article 12 (i) and (h) IFR

324. The next table shows the number of investment firm groups for different thresholds for the metric under Article 12(h) IFR. Out of 147 investment firm groups, 114 are below the threshold set out in Article 12(h).

Table 11. Number of investment firm groups for different thresholds for the metric under Article 12 (h) IFR, as of 31 December 2023

Article 12(h) threshold	Number of investment firm groups
< EUR 100 mn	114
[EUR 100 mn, EUR 150 mn]	13
[EUR 150 mn, EUR 200 mn]	1
[EUR 200 mn, EUR 250 mn]	2
[EUR 250 mn, EUR 300 mn]	1
[EUR 300 mn, EUR 350 mn]	2
[EUR 350 mn, EUR 400 mn]	1
[EUR 400 mn, EUR 450 mn]	0
[EUR 450 mn, EUR 500 mn]	1
[EUR 500 mn, EUR 1 000 mn]	4
[EUR 1 000 mn, EUR 1 500 mn]	2
>=EUR 1 500 mn	6
Total	**147**

Sources: EUCLID supervisory data (2023 Q4) and EBA calculations.

[63] Notes: The table does not cover the full population of investment firms due to data unavailability.

Notes: The table only covers investment firms subject to the IFD/IFR. The table does not cover the full population of investment firms due to data unavailability.

325. The next table shows the number of investment firm groups for different thresholds for the metric under Article 12(i) IFR. Out of 180 investment firm groups, 138 are below the threshold set out in Article 12(i).

Table 12. Number of investment firm groups for different thresholds for the metric under Article 12 (i) IFR, as of 31 December 2023

Article 12(i) threshold	Number of investment firm groups
< EUR 30 mn	138
[EUR 30 mn, EUR 40 mn]	6
[EUR 40 mn, EUR 50 mn]	1
[EUR 50 mn, EUR 60 mn)	7
[EUR 60 mn, EUR 70 mn]	5
[EUR 70 mn, EUR 80 mn]	3
[EUR 80 mn, EUR 90 mn]	0
[EUR 90 mn, EUR 100 mn]	3
[EUR 100 mn, EUR 150 mn]	6
[EUR 150 mn, EUR 200 mn]	5
>= EUR 200 mn	6
Total	**180**

Sources: EUCLID supervisory data (2023 Q4) and EBA calculations.
Notes: The table only covers investment firms subject to the IFD/IFR. The table does not cover the full population of investment firms due to data unavailability.

12.2 Quantitative analysis

12.2.1 Data and sample

Data sources

326. The EBA launched an ad hoc data collection exercise in June 2024 to support the response to the CfA received by the Commission for the purposes of the reports on the prudential requirements applicable to investment firms. The data collection was addressed to investment firms and investment firm groups, competent authorities, and UCITS management companies and AIFMs carrying out MiFID services. The data collected covered several areas including categorisation of investment firms, FOR, review of existing K-factors, risks not covered by existing K-factors, implications of adoption of Banking Package, prudential consolidation, interactions with other regulation and remuneration.

327. In addition, the EBA made use of supervisory data, which are available for all EU investment firms and investment firm groups.

328. The reference date used in the below analysis is 31 December 2023, unless otherwise stated.

Sample and coverage

329. The EBA has received data from 279 (individual) investment firms from 18 Member States (Table 13). The sample accounts for 12% of the total number of investment firms in the EU and 46% of the total capital requirements of EU investment firms. However, it should be noted that the coverage varies significantly across countries.

Table 13. Sample of investment firms participated in ad hoc data collection and coverage

	Number of investment firm groups		Capital requirements (EUR mn)	
Member State	**Sample**	**Coverage**	**Sample**	**Coverage**
AT	0	0%	-	0%
BE	2	7%	7.79	21%
BG	12	35%	10.72	45%
CY	1	0%	0.06	11%
CZ	25	89%	41.36	99%
DE	22	3%	94.56	8%
DK	0	0%	-	0%
EE	0	0%	-	0%
ES	0	0%	-	0%

	Number of investment firm groups		Capital requirements (EUR mn)	
FI	8	19%	21.71	26%
FR	51	56%	315.57	64%
GR	0	0%	-	0%
HR	5	100%	2.03	100%
HU	7	70%	6.98	23%
IE	25	29%	1 266.12	87%
IT	21	36%	45.59	58%
LT	9	82%	2.83	93%
LU	39	47%	91.97	55%
LV	4	44%	0.60	14%
MT	3	4%	0.41	1%
NL	24	12%	630.59	51%
PL	0	0%	-	0%
PT	15	45%	6.51	66%
RO	0	0%	-	0%
SE	0	0%	-	0%
SI	0	0%	-	0%
SK	6	27%	1.80	30%
Total	**279**	**12%**	**2 547.18**	**46%**

Sources: EUCLID supervisory data (2023 Q4), Ad hoc data collection on IFR/IFD (2023 Q4) and EBA calculations.

330. In addition, the EBA received data from 18 investment firm groups subject to prudential consolidation in accordance with Article 7 IFR from eight Member States (Table 14). The sample accounts for 8% of the total number of investment firm groups subject to prudential consolidation in accordance with Article 7 IFR in the EU and 11% of the total capital requirements. However, it should be noted that the coverage varies significantly across countries.

Table 14. Sample of investment firm groups participated in ad hoc data collection and coverage

	Number of investment firm groups		Capital requirements (EUR mn)	
Member State	**Sample**	**Coverage**	**Sample**	**Coverage**
AT	0	0%	-	0%
BE	0	0%	-	0%
BG	1	25%	1.22	47%
CY	0	0%	-	0%
CZ	3	100%	13.04	100%
DE	1	4%	6.32	1%
DK	0	n/a	-	n/a

	Number of investment firm groups		Capital requirements (EUR mn)	
EE	0	0%	-	0%
ES	0	0%	-	0%
FI	1	5%	7.93	13%
FR	5	36%	108.79	39%
GR	0	n/a	-	n/a
HR	0	n/a	-	n/a
HU	0	n/a	-	n/a
IE	0	0%	-	0%
IT	2	25%	8.41	25%
LT	0	n/a	-	n/a
LU	1	50%	9.96	100%
LV	0	n/a	-	n/a
MT	0	0%	-	0%
NL	4	9%	0.61	0%
PL	0	n/a	-	n/a
PT	0	n/a	-	n/a
RO	0	n/a	-	n/a
SE	0	0%	-	0%
SI	0	0%	-	0%
SK	0	n/a	-	n/a
Total	**18**	**8%**	**156.29**	**11%**

Sources: EUCLID supervisory data (2023 Q4), Ad hoc data collection on IFR/IFD (2023 Q4) and EBA calculations.

331. The EBA also received data from 24 competent authorities as part of the ad hoc data collection with competent authorities:

Table 15. Sample of competent authorities participated in ad hoc data collection

Member State	Number of NCAs	Member State	Number of NCA	Member State	Number of NCA
AT	1	FI	1	LV	1
BE	1	FR	1	MT	1
BG	1	GR	0	NL	1
CY	1	HR	1	PL	1
CZ	1	HU	1	PT	1
DE	1	IE	1	RO	0
DK	1	IT	1	SE	0
EE	1	LT	1	SI	1
ES	1	LU	1	SK	1
				Total	**24**

Sources: Ad hoc data collection on IFR/IFD (2023 Q4), EBA supervisory data and EBA calculations.

332. Finally, the EBA also received data from 1 197 UCITS management companies and AIFM from 22 Member States as part of the ad hoc data collection with UCITS/AIFM:

Table 16. Sample of UCITS/AIFM participated in ad hoc data collection

Member State	Number of UCITS management companies and AIFM	Member State	Number of UCITS management companies and AIFM	Member State	Number of UCITS management companies and AIFM
AT	10	FI	2	LV	4
BE	2	FR	637	MT	27
BG	30	GR	0	NL	20
CY	0	HR	3	PL	11
CZ	11	HU	0	PT	12
DE	10	IE	39	RO	3
DK	0	IT	16	SE	0
EE	4	LT	5	SI	4
ES	267	LU	71	SK	1
				Total	**1 197**

Sources: Ad hoc data collection on IFR/IFD (2023 Q4), EBA supervisory data and EBA calculations.

Data quality

333. The ad hoc data collection exercise was completed on a voluntary and best-efforts basis. The EBA has carried out a series of checks to ensure data quality, completeness and consistency of the data. In addition, the EBA worked closely with competent authorities to ensure the quality and completeness of the templates and consistency with reporting instructions. However, some data quality issues remained, resulting in the exclusion of some firms from (part or all of) the analysis due to data inconsistencies, reducing the final sample used for the analysis. The results should therefore be interpreted with caution.

12.2.2 Class 1 minus capital requirements

334. Four Class 1 minus firms provided data on their capital requirements if they were to apply the IFR/IFD instead of the CRR/CRD[64]. Three of them reported lower capital requirements under the IFR/IFD capital requirements compared to the CRR/CRD[65]. Due to the low number of Class 1 minus firms in the sample and data quality issues, the exact ratios between IFR/IFD and CRR/CRD capital requirements are not reported.

[64] Two of the Class 1 minus provided incomplete data: one provided data only for the PMCR and another one only for PMCR and FOR, i.e. no K-factor requirements were provided by these two firms. Therefore, the comparison between the capital requirements under IFR/IFD and CRR/CRD should be interpreted with caution.

[65] Only the Pillar 1 capital requirements under the CRR have been considered for the comparison, i.e. 8% of RWA.

12.2.3 Class 1 minus thresholds

335. Data on the current and revised thresholds were provided for nine investment firms in four Member States (DE, FR, IE, NL), all of which are part of a group. However, the three firms did not report the full set of data, making it impossible to assess the impact of the revised threshold definition for them; hence they are excluded from the analysis.

336. Using the current definition for the thresholds, two investment firms would be classified as Class 1 minus firms based on the solo test for the EUR 15 bn threshold and four based on the solo test for the EUR 5 bn threshold.

337. Using the revised definition for the thresholds, one investment firm would be classified as a Class 1 minus firm based on the solo test for the EUR 15 bn threshold (after excluding intragroup exposures) and three based on the group test for the EUR 15 bn threshold. Based on the solo test for the EUR 5 bn threshold (after excluding intragroup exposures), two more investment firms will be classified as Class 1 minus[66].

12.2.4 FOR – length of the wind-down period

338. The EBA requested NCAs to provide a list of investment firms that wind-down and ceased their activities over the last 10 years together with the number of months that it took to wind-down the investment firm and cease activities in an orderly manner (Table 17). The median number of months is four and the interquartile range spans between 3 and 14 months.

Table 17. Number of months that it took to wind-down the investment firm and cease activities in an orderly manner for investment firms that wind-down and ceased their operation over the last 10 years

	N	P5	P25	P50	P75	P95
FOR months	57	0	3	4	14	56

Sources: Ad hoc data collection on IFR/IFD (2023 Q4), EBA supervisory data and EBA calculations.

339. The table below presents the number of months that it took to wind-down the investment firm and cease activities in an orderly manner by MiFID service performed. For the median bank, some investment activities are associated with a slightly higher number of months, such as MiFID service (1), (3), (5) and (7) and if permitted to hold client money.

Table 18. Number of months that it took to wind-down the investment firm and cease activities in an orderly manner for investment firms that wind-down and ceased their operation over the last 10 years, by MiFID service activity

MiFiD service	Performing	N	P5	P25	P50	P75	P95

[66] If an investment firm passes the solo test (after excluding intragroup exposures), it is not counted towards the group test. Similarly, if a firm passes the EUR 15 bn threshold (solo or group), it is not counted towards the EUR 5 bn threshold.

(1) Reception and transmission of orders in relation to one or more financial instruments	Yes	40	1	2	5.5	15	54
	No	14	1	3	3	12	83
(2) Execution of orders on behalf of clients)	Yes	30	1	1	4	12	25
	No	24	1	3	4	22.5	83
(3) Dealing on own account	Yes	10	1	3	6	15	25
	No	44	1	3	4	14	56
(4) Portfolio management	Yes	38	1	2	4	12	25
	No	16	1	3	6.5	42.5	117
(5) Investment advice	Yes	38	1	2	5.5	15	56
	No	16	1	3	3.5	10.5	83
(6) Underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis	Yes	7	1	2	5	14	15
	No	47	1	3	4	17	56
(7) Placing of financial instruments without a firm commitment basis	Yes	32	1	2.5	6	19.5	83
	No	22	1	3	4	9	24
(8) Operation of an MTF	Yes						
	No	54	1	3	4	15	56
(9) Operation of an OTF	Yes	1					
	No	53	1	3	4	15	56
Permission to hold client money	Yes	30	1	2	6	15	33
	No	24	1	3	3.5	12.5	56

Sources: Ad hoc data collection on IFR/IFD (2023 Q4), EBA supervisory data and EBA calculations. No results are presented when the subsample with fewer than five investment firms.

340. The table below shows the number of months required for the wind-down of investment firms crossed against the services provided. The table suggest that there is no correlation between services provided and length of the wind-down period.

Table 19. Correlation between service provided and number of months for wind-down

Services or activity											Number of months						
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	CMH	N	Min	P5	P25	P50	P75	P95	Max
No	No	No	No	No	No	Yes	No	No	No	3	3	3	3	3	83	83	83
No	No	No	No	Yes	No	No	No	No	No	3	3	3	3	3	4	4	4
No	No	No	Yes	No	No	No	No	No	No	2	3	3	3	3.5	4	4	4
No	No	No	Yes	No	No	No	No	No	Yes	2	12	12	12	21	30	30	30
No	No	No	Yes	No	No	Yes	No	No	No	1	3	3	3	3	3	3	3

No	No	No	Yes	Yes	No	No	No	No	No	1	24	24	24	24	24	24	24
No	Yes	No	No	No	No	Yes	No	No	Yes	1	1	1	1	1	1	1	1
No	Yes	Yes	No	No	No	Yes	No	No	Yes	1	3	3	3	3	3	3	3
Yes	No	No	No	Yes	No	No	No	No	No	1	1	1	1	1	1	1	1
Yes	No	No	No	Yes	No	No	No	No	Yes	1	15	15	15	15	15	15	15
Yes	No	No	No	Yes	No	Yes	No	No	No	2	52	52	52	54	56	56	56
Yes	No	No	No	Yes	No	Yes	No	No	Yes	2	21	21	21	69	117	117	117
Yes	No	No	Yes	Yes	No	No	No	No	No	6	1	1	2	3.5	6	13	13
Yes	Yes	No	No	No	No	No	No	No	Yes	1	9	9	9	9	9	9	9
Yes	Yes	No	No	No	No	Yes	No	No	Yes	1	33	33	33	33	33	33	33
Yes	Yes	No	Yes	No	No	No	No	No	Yes	3	3	3	3	4	4	4	4
Yes	Yes	No	Yes	No	No	Yes	No	No	Yes	1	3	3	3	3	3	3	3
Yes	Yes	No	Yes	Yes	No	No	No	No	No	2	1	1	1	4.5	8	8	8
Yes	Yes	No	Yes	Yes	No	Yes	No	No	No	2	12	12	12	15	18	18	18
Yes	Yes	No	Yes	Yes	No	Yes	No	No	Yes	9	0	0	1	1	12	17	17
Yes	Yes	Yes	Yes	Yes	No	Yes	No	No	Yes	2	24	24	24	24.5	25	25	25
Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	No	1	3	3	3	3	3	3	3
Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	Yes	5	1	1	2	5	14	15	15
Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes	1	7	7	7	7	7	7	7

Notes; (1) Reception and transmission of orders in relation to one or more financial instruments (Select from drop down) (2) Execution of orders on behalf of clients (3) Dealing on own account (4) Portfolio management (5) Investment advice (6) Underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis (7) Placing of financial instruments without a firm commitment basis (8) Operation of an MTF (9) Operation of an OTF (CMH) Permission to hold client money (Select from drop down). N is the number of firms.
Sources: Ad hoc data collection on IFR/IFD (2023 Q4), EBA supervisory data and EBA calculations. No results are presented when the subsample has fewer than five investment firms.

12.2.5 Non-trading book positions

341. At EU aggregate level, 135 out of the 275 Class 2 and Class 3 investment firms in the sample have reported positive non-trading book (NTB) positions. These investment firms hold around EUR 97 925.6 mn in NTB positions (Table 20)[67]. This mostly stems from the 'Other' category (88.0% of the total NTB), followed by 'Off-balance-sheet items' (9.4% of total NTB). However, the results for all firms and non-trading firms are driven by a big investment firm in the sample. Excluding this investment firm from the analysis would make 'Off-balance-sheet items' the main component of the total NTB positions, followed by the 'Other' category for these groups

[67] Out of the 275 Class 2 and Class 3 investment firms in the sample, 191 firms reported good quality data for on and off-balance-sheet items (trading and non-trading) in supervisory reporting. For these firms, which include firms reporting zero NTB amounts, NTB represents around 10% of the total on and off-balance-sheet items (trading and non-trading). Focusing on the subset of firms which also reported positive NTB amounts (114 firms), as in Table 12, NTB represents around 45% of the total on and off-balance-sheet items (trading and non-trading).

of firms[68]. For trading firms, 'Off-balance-sheet items' is the most important category of NTB (63.0% of the total NTB), followed by the 'Other' category (21.5% of the total NTB).

Table 20. NTB amounts by type of investment firm, EU aggregate

	All firms		of which: trading firms		of which: non-trading firms	
Category	**Number of investment firms with positive NTB amount for respective category**	**Non-trading book and off-balance-sheet items (EUR mn)**	**Number of investment firms**	**NTB and off-balance-sheet items**	**Number of investment firms**	**NTB and off-balance-sheet items**
Crypto	0	-	0	-	0	-
Debt	36	668.7	21	466.6	15	202.1
Derivatives	4	12.8	4	12.8	0	-
Equity	41	1 425.0	28	1 101.9	13	323.1
Loans	20	424.2	14	183.9	6	240.3
Off-balance-sheet items	29	9 226.8	18	7 200.7	11	2026.1
Other	91	86 168.1	46	2 455.8	45	83 712.4
Total	**135**	**97 925.6**	**69**	**11 421.6**	**66**	**86 504.0**

Sources: Ad hoc data collection on IFR/IFD (2023 Q4), EBA supervisory data and EBA calculations.
Notes: The analysis considers only Class 2 and Class 3 investment firms reporting on an individual basis (275 firms). The table shows the results for 135 investment firms which reported positive amounts and good quality data for the total NTB. An investment firm is considered a trading firm if K-RtM is positive or K-RtF is positive or is authorised to carry out MiFID service (3) and/or (6).

342. Table 21 shows the distribution of the share of NTB in each category to total NTB. For the median bank, the ratio is 0% for all categories except other, which stands at 36.0%. In other words, for most firms the 'Other' category comprises most of the NTB total.

Table 21. Distribution of the share of NTB in each category to total NTB by type of investment firm, all firms

Non-trading book and off-balance-sheet items (% total)	**N**	**P5**	**P25**	**P50**	**P75**	**P95**
Crypto	135	0.0%	0.0%	0.0%	4.2%	100.0%

[68] Excluding the outlier from the sample, NTB will also represent a much lower share of the total on- and off-balance-sheet items (trading and non-trading) for the 190 Class 2 and Class 3 investment firms in the sample which reported good quality data for on and off-balance-sheet items (trading and non-trading) in supervisory reporting (around 2%). Focusing on the subset of firms which also reported positive NTB amounts (113 firms), as in Table 12, NTB represents around 12% of the total on-and off-balance-sheet items (trading and non-trading).

Non-trading book and off-balance-sheet items (% total)	N	P5	P25	P50	P75	P95
Debt	135	0.0%	0.0%	0.0%	4.8%	100.0%
Derivatives	135	0.0%	0.0%	0.0%	0.0%	0.0%
Equity	135	0.0%	0.0%	0.0%	4.2%	100.0%
Loans	135	0.0%	0.0%	0.0%	0.0%	68.9%
Off-balance-sheet	135	0.0%	0.0%	0.0%	0.0%	100.0%
Other	135	0.0%	0.0%	36.0%	100.0%	100.0%

Sources: Ad hoc data collection on IFR/IFD (2023 Q4), EBA supervisory data and EBA calculations.
Notes: The analysis considers only Class 2 and Class 3 investment firms reporting on an individual basis (275 firms). The table shows the results for 135 investment firms which reported positive amounts and good quality data for the total NTB.

343. The next figure shows a word cloud for the 'Other' category based on the description provided by the investment firms in the sample. For many firms the 'Other' category captures receivables, intangible assets, debtors, intercompany debtors/receivables, fixed assets and other assets.

Figure 1. Word cloud for NTB 'Other' category.

Sources: Ad hoc data collection on IFR/IFD (2023 Q4), EBA supervisory data and EBA calculations.
Notes: The analysis considers only Class 2 and Class 3 investment firms reporting on an individual basis (275 firms). The figure shows the results for 91 investment firms which reported positive amounts in the NTB 'Other' category.

344. Looking at the below figures as a share of the total capital held by investment firms (Table 22), NTB positions represent 956.5% of the total capital for all firms, 220.3% for trading firms and 1 711.5% for non-trading firms[69]. The results are driven by the same big non-trading firm as above. Excluding this firm ratio will be significantly lower (around 160% for all firms and 90% for non-trading firms)[70].

Table 22. NTB amounts as % of total capital by type of investment firm, EU aggregate

Type of investment firm	Number of investment firms	Total	Crypto	Debt	Derivatives	Equity	Loans	Off-balance-sheet	Other
All investment firms	230	956.5%	0.0%	6.4%	0.1%	13.9%	4.1%	90.1%	841.7%
of which: trading firms	86	220.3%	0.0%	9.0%	0.2%	21.3%	3.5%	138.9%	47.4%
of which: non-trading firms	144	1711.5%	0.0%	3.8%	0.0%	6.4%	4.8%	40.1%	1 656.5%

Sources: Ad hoc data collection on IFR/IFD (2023 Q4), EBA supervisory data and EBA calculations.
Notes: The analysis considers only Class 2 and Class 3 investment firms reporting on an individual basis (275 firms). The table shows the results for 230 investment firms which reported total NTB and capital data (i.e. NA are excluded from the results, but zero values are included). The number of investment firms differ from Table 18 because in that table only the investment firms which have positive amounts for NTB amount are considered, while in this table also investment firms with zero NTB amounts are included. An investment firm is considered as a trading firm if K-RtM is positive or K-RtF is positive or is authorised to carry out MiFID service (3) and/or (6).

345. This can also be seen by looking at the distribution of the ratio of NTB to total capital in Table 23. For the median bank, the ratio of total NTB to capital stands at 16.0% and the interquartile range spans between 0% to 111.4%[71].

Table 23. Distribution of NTB amounts as % of total capital, all investment firms

Non-trading book and off-balance-sheet items (% of capital)	N	P5	P25	P50	P75	P95
Crypto	230	0.0%	0.0%	0.0%	0.0%	85.3%
Debt	230	0.0%	0.0%	0.0%	0.0%	78.1%
Derivatives	230	0.0%	0.0%	0.0%	0.0%	0.0%

[69] Unlike Table 22, Table 23 considers all Class 2 and Class 3 individual investment firms reporting total NTB (including zero amounts) and capital data (230 firms). Focusing on the subset of investment firms that reported positive NTB amounts and capital data (134 firms), the share of NTB to total capital stands at 1637.7% for all firms, 224.5% for non-trading firms, 9 718.8% for non-trading firms.

[70] Focusing on the subset of investment firms that reported positive NTB amounts and capital data and exclude the outlier firm from the analysis (133 firms), the share of NTB to total capital stands at around 270% for all firms and 550% for non-trading firms.

[71] Focusing on the subset of firms which also reported positive NTB amounts (134 firms), the median for the ratio of total NTB to capital stands at 96.2% and the interquartile range spans between 34.8% and 285.3%.

Non-trading book and off-balance-sheet items (% of capital)	N	P5	P25	P50	P75	P95
Equity	230	0.0%	0.0%	0.0%	0.0%	85.3%
Loans	230	0.0%	0.0%	0.0%	0.0%	62.9%
Off-balance-sheet	230	0.0%	0.0%	0.0%	0.0%	1 122.8%
Other	230	0.0%	0.0%	0.0%	30.5%	319.5%
Total	230	0.0%	0.0%	16.0%	111.4%	6 648.6%

Sources: Ad hoc data collection on IFR/IFD (2023 Q4), EBA supervisory data and EBA calculations.
Notes: The analysis considers only Class 2 and Class 3 investment firms reporting on an individual basis (275 firms). The table shows the results for 230 investment firms which reported total NTB and capital data (i.e. NA are excluded from the results, but zero values are included). The number of investment firms differ from Table 20 because in that table only the investment firms which have positive amounts for NTB amount are considered, while in this table also investment firms with zero NTB amounts are included.

12.2.6 Crypto-asset services

346. Almost all Class 2 and Class 3 investment firms in the sample do not intend to apply for an authorisation as a CASPs under Article 63 MiCA nor to carry out any crypto-asset service in accordance with Article 60(3) MiCA:

Table 24. Intention of authorisation under MiCA

	Number of investment firms	Yes	No
Does the investment firm intend to obtain an authorisation as crypto-asset service provider in accordance with Article 63 of MiCA?	247	3	244
Does the investment firm intend to carry out any crypto-asset service in accordance with Article 60(3) of MiCA (i.e. using its MiFID licence and after notifying its NCA) ?	247	4	243

Sources: Ad hoc data collection on IFR/IFD (2023 Q4), EBA supervisory data and EBA calculations.
Notes: The analysis considers only Class 2 and Class 3 investment firms reporting on an individual basis (275 firms). The table only shows the results for 247 investment firms which reported the respective data (i.e. NAs are excluded from the results).

347. Currently, none of the investment firms in the sample carries out any crypto-asset service with the exception of one firm which provides portfolio management for crypto-assets (next table). As a result, none of the investment firms in the sample indicated that they would have K-factor capital requirements if those were to be extended to cover crypto-asset services.

Table 25. Crypto-asset service provided by investment firms

Does the investment firm currently carry out any of the following crypto-asset services:	Number of investment firms	Yes	No
(a) providing custody and administration of crypto-assets on behalf of clients	245	0	245
(b) operation of a trading platform for crypto-assets	246	0	246
(c) exchange of crypto-assets for funds	246	0	246

Does the investment firm currently carry out any of the following crypto-asset services:	Number of investment firms	Yes	No
(d) exchange of crypto-assets for other crypto-assets	246	0	246
(e) execution of orders for crypto-assets on behalf of clients	246	0	246
(f) placing of crypto-assets	246	0	246
(g) reception and transmission of orders for crypto-assets on behalf of clients	246	0	246
(h) providing advice on crypto-assets	246	0	246
(i) providing portfolio management for crypto-assets	246	1	245
(j) providing transfer services for crypto-assets on behalf of clients	244	0	244

Sources: Ad hoc data collection on IFR/IFD (2023 Q4), EBA supervisory data and EBA calculations.
Notes: The analysis considers only Class 2 and Class 3 investment firms reporting on an individual basis (275 firms). The table only shows the results for 246 investment firms which reported the respective data (i.e. NAs are excluded from the results).

12.2.7 K-CMG

348. To assess if K-CMG is adequate to cover the losses associated with the relevant positions, investment firms were asked to report how many days the K-CMG requirements were insufficient to cover the one-day losses for those positions (in other words, the number of daily overshootings).

349. Only five firms reported data, out of the 22 Class 2 investment firms in the population that are subject to K-CMG, representing 79.0% of the total K-CMG capital requirements. All investment firms in the sample reported zero overshootings over the period July 2021 to December 2022:

Table 26. Number of overshootings for the portfolios subject to K-CMG

Year	Number of investment firms	Average number of overshootings
2021	5	0
2022	5	0

Sources: Ad hoc data collection on IFR/IFD (2023 Q4), EBA supervisory data and EBA calculations.
Notes: The analysis considers only Class 2 investment firms reporting on an individual basis (162 firms). The table only shows the results for five investment firms that are subject to K-CMG and which reported the respective data (i.e. NAs are excluded from the results, but zero values are included).

12.2.8 K-DTF

350. Only 61 firms reported data, out of the 463 Class 2 investment firms in the population that are subject to K-DTF (cash and derivatives), representing 37.0% of total K-DTF capital requirements (cash and derivatives).[72].

351. On average, the ratio of own funds risk requirements for operational risk under the TSA (trading and sales only) to K-DTF is 7.8 (Table 27). For the median bank, the ratio stands at 6.0 and the interquartile range spans between 0.0 and 121.1.

Table 27. Ratio of own fund risk requirements for operational risk under the TSA (trading and sales only) to K-DTF

	Number of investment firms	Weighted average	P5	P25	P50	P75	P95
All banks	61	7.8	0.0	1.0	6.0	121.1	11 323.3

Sources: Ad hoc data collection on IFR/IFD (2023 Q4), EBA supervisory data and EBA calculations.
Notes: The analysis considers only Class 2 investment firms reporting on an individual basis (162 firms). The table only shows the results for 61 investment firms that are subject to K-DTF and which reported the respective data (i.e. NAs are excluded from the results, but zero values are included).

12.2.9 K-MTF/OTF

352. Out of the 275 investment firms in the sample, 17 investment firms have reported positive amounts for K-factor requirements arising from MiFID activities (8) and (9) for a total of EUR 67.6 mn in (Table 28). This represents 7.8% of the total capital held by these investment firms. Most of these K-factor requirements (71.5%) are coming from the dedicated K-factor for MTF and OTF activity.

Table 28. K-factor capital requirements arising from MiFID activities (8) and (9), including a dedicated K-factor for MTF and OTF activity, EU aggregate

Category	Number of investment firms subject to respective K-factor	Factor Amount (EUR mn)	K-factor requirement (EUR mn)	Ratio K-factor requirements to capital
COH arising from MiFID activities (8) and (9) only – Cash trades	11	2 391.3	2.4	0.3%
COH arising from MiFID activities (8) and (9) only – Derivatives Trades	6	13 950.0	1.4	0.2%
Daily trading flow arising from MiFID activities (8) and (9) only – Cash trades	9	15 473.0	15.5	1.8%
Daily trading flow arising from MiFID activities (8) and (9) only – Derivative trades	3	431.7	0.0	0.0%

[72] Out of the 61 investment firms, three reported zero values for the own fund risk requirements for operational risk under the TSA.

Category	Number of investment firms subject to respective K-factor	Factor Amount (EUR mn)	K-factor requirement (EUR mn)	Ratio K-factor requirements to capital
MTF and OTF – Cash trades	9	13 960.2	14.0	1.6%
MTF and OTF – Derivative trades	4	343 756.7	34.4	4.0%
Total	**17**	**389 962.9**	**67.6**	**7.8%**

Sources: Ad hoc data collection on IFR/IFD (2023 Q4), EBA supervisory data and EBA calculations.
Notes: The analysis considers only Class 2 and Class 3 investment firms reporting on an individual basis (275 firms). The table only shows the results for 17 investment firms which reported positive amounts for any of the K-factors K-COH, K-DTF or K-MTF/OTF arising from MiFID activities (8) and (9) and have reported good quality data for total capital. Firms that reported K-COH or K-DTF higher than those reported in the supervisory data are excluded from the analysis.

353. Table 29 shows the distribution of the K-factor capital requirements arising from MiFID activities (8) and (9). For all K-factors associated with MiFID activities (8) and (9), the K-factor requirements are EUR 0.0 mn for the median bank with the interquartile range spanning between EUR 0.0 mn to EUR 0.0 mn.

Table 29. Distribution of K-factor capital requirements arising from MiFID activities (8) and (9), including a dedicated K-factor for K-MTF and OTF activity

K-factor requirement (EUR mn)	N	P5	P25	P50	P75	P95
COH arising from MiFID activities (8) and (9) only – Cash trades	17	-	-	0.0	0.0	2.3
COH arising from MiFID activities (8) and (9) only – Derivatives Trades	17	-	-	-	0.0	0.9
Daily trading flow arising from MiFID activities (8) and (9) only – Cash trades	9	0.0	0.0	0.0	0.0	12.9
Daily trading flow arising from MiFID activities (8) and (9) only – Derivative trades	4					
MTF and OTF – Cash trades	17	-	-	0.0	0.0	12.4
MTF and OTF – Derivative trades	17	-	-	-	-	30.0

Sources: Ad hoc data collection on IFR/IFD (2023 Q4), EBA supervisory data and EBA calculations.
Notes: The analysis considers only Class 2 and Class 3 investment firms reporting on an individual basis (275 firms). The table only shows the results for 17 investment firms that are subject to any of the K-factors K-COH, K-DTF or K-MTF/OTF arising from MiFID activities (8) and (9) and have reported good quality data for total capital. Firms that reported K-COH or K-DTF higher than those reported in the supervisory data are excluded from the analysis. No results are presented when the subsample with fewer than five investment firms.

354. Looking at the below figures as a share of the total capital held by investment firms, the respective ratios are below 0.2% for the median bank across all K-factors associated with MiFID activities (8) and (9), with the interquartile range spanning from 0.0% up to 0.8% for the K-DTF (cash) (Table 28). There are also some outlier investment firms for which the K-MTF/OTF (derivatives) arising from MiFID activities (8) and (9) are above 132.5% of their capital. Similarly, there are a few outlier investment firms for which the K-COH (cash) and K-DTF (cash) arising from MiFID activities (8) and (9) are above 50% of their capital.

Table 30. Distribution of K-factor capital requirements arising from MiFID activities (8) and (9), including a dedicated K-factor for K-MTF and OTF activity (as a % of capital)

K-factor requirement (as % of capital)	N	P5	P25	P50	P75	P95
COH arising from MiFID activities (8) and (9) only – Cash trades (as % of capital)	17	0.0%	0.0%	0.0%	0.2%	54.5%
COH arising from MiFID activities (8) and (9) only – Derivatives trades (as % of capital)	17	0.0%	0.0%	0.0%	0.1%	20.0%
Daily trading flow arising from MiFID activities (8) and (9) only – Cash trades (as % of capital)	9	0.0%	0.0%	0.2%	0.8%	59.5%
Daily trading flow arising from MiFID activities (8) and (9) only – Derivative trades (as % of capital)	4					
MTF and OTF – Cash trades (as % of capital)	17	0.0%	0.0%	0.0%	0.1%	27.2%
MTF and OTF – Derivative trades (as % of capital)	17	0.0%	0.0%	0.0%	0.0%	132.5%

Sources: Ad hoc data collection on IFR/IFD (2023 Q4), EBA supervisory data and EBA calculations.
Notes: The analysis considers only Class 2 and Class 3 investment firms reporting on an individual basis (275 firms). The table only shows the results for 17 investment firms that are subject to any of the K-factors K-COH, K-DTF or K-MTF/OTF arising from MiFID activities (8) and (9) and have reported good quality data for total capital. Firms that reported K-COH or K-DTF higher than those reported in the supervisory data are excluded from the analysis. No results are presented when the subsample with fewer than five investment firms.

12.2.10 K-ASA

355. For firms with their main activity being ASA, the ratio of K-ASA to the capital requirements that they had before the introduction of IFR/IFD stands at 48% (Table 31). The ratio of total K-factor requirements to the capital requirements that they had before the introduction of IFR/IFD is slightly higher at 52%. The figures are lower for the median bank for both ratios (31% and 48%, respectively) and are lower than 100% for most banks (Sources: ad hoc data collection on IFR/IFD (2023 Q4), EBA supervisory data and EBA calculations). Notes: The table only shows the results for 96 investment firms that are subject to any of the K-ASA and the ratio of K-ASA to total K-factor requirements being more than 50%.

Table 31. Ratio of K-ASA and total K-factor requirements to the capital requirements before introduction of IFR/IFD for firms where their main activity is ASA

	Number of investment firms	K-ASA to total K-factor requirement	K-ASA to capital requirement before introduction of IFR/IFD	Total K-factor requirements to capital requirements before introduction of IFR/IFD
All firms	96	91%	48%	52%

Sources: Ad hoc data collection on IFR/IFD (2023 Q4), EBA supervisory data and EBA calculations.
Notes: The table only shows the results for 96 investment firms that are subject to any of the K-ASA and the ratio of K-ASA to total K-factor requirements being more than 50%.

Table 32. Distribution Ratio of K-ASA and total K-factor requirements to the capital requirements before introduction of IFR/IFD for firms where their main activity is ASA

	N	P5	P25	P50	P75	P95
K-ASA to total K-factor requirement	96	52%	59%	75%	94%	100%
K-ASA to capital requirement before introduction of IFR/IFD	93	2%	10%	31%	85%	336%
Total K-factor requirements to capital requirements before introduction of IFR/IFD	93	2%	15%	48%	107%	423%

Sources: Ad hoc data collection on IFR/IFD (2023 Q4), EBA supervisory data and EBA calculations.
Notes: The table only shows the results for 96 investment firms that are subject to any of the K-ASA and the ratio of K-ASA to total K-factor requirements being more than 50%.

12.2.11 Simplified SA for market risk thresholds and OEM/simplified SA-CCR thresholds

356. The size of the on- and off-balance-sheet business subject to market risk is EUR 0.9 mn for the median investment firm and the interquartile spans between EUR 0 mn to EUR 18.4 mn (Table 33)[73]. Limiting the sample only to trading firms, the size of the on- and off-balance-sheet business subject to market risk is EUR 3.1 mn for the median trading firm and the interquartile spans between EUR 0.2 mn to EUR 56.8 mn.

Table 33. Distribution of the size of the on- and off-balance-sheet business subject to market risk

Type of investment firm	N	P5	P25	P50	P75	P95
All investment firms	94	-	-	0.9	18.4	1 249.7

[73] Out of the 94 investment firms in the sample, 34 investment firms (of which 10 trading firms) reported zero values for the on- and off-balance-sheet business subject to market risk.

Type of investment firm	N	P5	P25	P50	P75	P95
of which: trading firms	68	-	0.2	3.1	56.8	3 121.8

Sources: Ad hoc data collection on IFR/IFD (2023 Q4), EBA supervisory data and EBA calculations.
Notes: The analysis considers only Class 2 investment firms reporting on an individual basis (162 firms). The table only shows the results for 94 investment firms which reported the respective data (i.e. NAs are excluded from the results, but zero values are included). An investment firm is considered as a trading firm if K-RtM is positive or K-RtF is positive or is authorised to carry out MiFID service (3) and/or (6).

357. The size of the on- and off-balance-sheet derivatives business is EUR 0.0 mn for the median bank and the interquartile spans between EUR 0.0 mn to EUR 3.5 mn (Table 34)[74]. Limiting the sample only to trading firms, the size of the on- and off-balance-sheet derivative business is EUR 0.0 mn for the median trading firm and the interquartile spans between EUR 0.0 mn to EUR 20.9 mn.

Table 34. Distribution of the size of the on- and off-balance-sheet derivatives business

Type of investment firm	N	P5	P25	P50	P75	P95
All investment firms	78	-	-	-	3.5	2 205.0
of which: trading firms	54	-	-	0.0	20.9	4 826.6

Sources: Ad hoc data collection on IFR/IFD (2023 Q4), EBA supervisory data and EBA calculations.
Notes: The analysis considers only Class 2 investment firms reporting on an individual basis (162 firms). The table only shows the results for 78 investment firms which reported the respective data (i.e. NAs are excluded from the results, but zero values are included). An investment firm is considered as a trading firm if K-RtM is positive or K-RtF is positive or is authorised to carry out MiFID service (3) and/or (6).

358. Out of 94 investment firms in the sample, seven have an on- and off-balance-sheet business subject to market risk larger than EUR 500 mn and hence do not meet the conditions for using the simplified standardised approach set out in Article 325a(1) of the CRR (Table 35). All the firms that surpass the thresholds are trading firms.

Table 35. Number of investment firms exceeding the absolute thresholds under Article 325a(2) CRR

Type of investment firm	Number of investment firms	of which: above EUR 500 mn threshold
All investment firms	94	7

[74] Out of the 78 investment firms in the sample, 47 investment firms (of which 10 trading firms) reported zero values for the on- and off-balance-sheet derivative business.

Type of investment firm	Number of investment firms	of which: above EUR 500 mn threshold
of which: trading firms	68	7

Sources: Ad hoc data collection on IFR/IFD (2023 Q4), EBA supervisory data and EBA calculations.
Notes: The analysis considers only Class 2 investment firms reporting on an individual basis (162 firms). The table only shows the results for 94 investment firms which reported the respective data (i.e. NAs are excluded from the results, but zero values are included). An investment firm is considered as a trading firm if K-RtM is positive or K-RtF is positive or is authorised to carry out MiFID service (3) and/or (6).

359. In addition, as shown in Table 34, 4 (5) Class 2 investment firms out of 78 in the sample have a size of the on- and off-balance-sheet derivative business above EUR 300 mn (EUR 100 mn) and will not meet the conditions under Article 273a(1) of the CRR (Article 273a(2) of the CRR) to use the simplified methods for calculating the exposure value simplified (SA-CCR and OEM, respectively). All of the firms that surpass the thresholds are trading firms.

Table 36. Number of investment firms exceeding the absolute thresholds under Article 273a(1) and Article 273a(2) CRR

Type of investment firm	Number of trading investment firms	of which: above EUR 300 mn threshold	of which: above EUR 100 mn threshold
All investment firms	78	4	5
of which: trading firms	54	4	5

Sources: Ad hoc data collection on IFR/IFD (2023 Q4), EBA supervisory data and EBA calculations.
Notes: The analysis considers only Class 2 investment firms reporting on an individual basis (162 firms). The table only shows the results for 78 investment firms which reported the respective data (i.e. NAs are excluded from the results, but zero values are included). An investment firm is considered as a trading firm if K-RtM is positive or K-RtF is positive or is authorised to carry out MiFID service (3) and/or (6).

12.2.12 Consolidation

360. None of the investment firm groups in the sample reported that they have any CSFPs or CASPs in their group.

12.2.13 UCITS management companies and AIF managers

361. Out of the 1 197 management companies for which standard received data, 153 are authorised under UCITSD only, 620 under AIFMD only and 424 are authorised under both licences. Among the management companies that are authorised under UCITSD only, 92.8% are authorised to carry out portfolio management, 75.1% to carry out investment advice and 25.5% to carry out safekeeping and administration. Among the management companies that

are authorised under AIFMD only, 53.9% are authorised to carry out portfolio management, 67.9% to carry out investment advice, 16.3% to carry out safekeeping and administration and 8.5% to carry out reception and transmission.

362. Among the management companies that are authorised under both UCITSD and AIFMD, 91.0% are authorised to carry out portfolio management under the UCITSD licence, 79.5% to carry out investment advice under the UCITS licence, 13.5% to carry out safekeeping and administration under the UCITSD licence, 90.3% are authorised to carry out portfolio management under the AIFMD licence, 98.2% to carry out investment advice under the AIFMD licence, 11.6% to carry out safekeeping and administration under the AIFMD licence and 29.0% to carry out reception and transmission under the AIFMD licence.

Table 37. Number of UCITS/AIFM management companies by authorisation and MiFID activities performed

Licence	UCITS Directive 2009/65/EC	AIFM Directive 2011/61/EU	Both UCITS and AIFM Directive
Number of UCITS management companies and AIFM	153	620	424
of which: authorised to carry out service (a) management of portfolio investments under UCITSD	142		386
of which: authorised to carry out service (b)(i) investment advice under UCITSD	115		337
of which: authorised to carry out service (b)(ii) safekeeping and administration under UCITSD	39		56
of which: authorised to carry out service (a) management of portfolio investments under AIFMD		334	383
of which: authorised to carry out service (b)(i) investment advice under AIFMD		421	289
of which: authorised to carry out service (b)(ii) safekeeping and administration under AIFMD		101	49
of which: authorised to carry out service (b)(iii) reception and transmission under AIFMD		53	123

Sources: Ad hoc data collection on IFR/IFD (2023 Q4), EBA supervisory data and EBA calculations.
Notes: The analysis considers only UCITS management companies and AIF managers (1 197 firms).

363. On average, the ratio of K-AUM to UCITS funds for management companies authorised under the UCITSD licence only is 33%, mostly arising from portfolio management (next table). For the median bank, the K-AUM ratio stands at 14% and the interquartile range spans between

0% to 118%. For K-ASA to UCITS funds, the weighted average ratio stands at 0%, the median at 0% and interquartile range spans between 0% and 163%. In the sample, there are a few outliers for which the above ratios are very high.

Table 38. Ratio of K-AUM and K-ASA over UCITS funds for management companies authorised under UCITS licence only

Amount (% of UCITS funds)	N	Weighted average	P5	P25	P50	P75	P95
Assets under management/advice in relation to MiFID financial instruments only	141	33%	0%	0%	14%	118%	2 008%
of which: arising from individual portfolio management in relation to MiFID financial instruments only	132	30%	0%	0%	14%	97%	1 212%
of which: arising from investment advice in relation to MiFID financial instruments only	108	3%	0%	0%	0%	1%	594%
Assets safeguarded and administered in relation to MiFID financial instruments only	35	0%	0%	0%	0%	0%	163%

Sources: Ad hoc data collection on IFR/IFD (2023 Q4), EBA supervisory data and EBA calculations.
Notes: The analysis considers only management companies authorised under the UCITS licence only (153 firms). The table only shows the results for management companies which reported the respective data (i.e. NAs are excluded from the results, but zero values are included).

364. On average, the ratio of K-AUM to AIFM funds for management companies authorised under the AIFM licence only is 0% (Table 39). For the median management company, the ratio stands at 6.0 and the interquartile range spans between 0% to 0%. For K-ASA to AIF, the weighted average ratio stands at 100%, the median at 52% and interquartile range spans between 0% and 160%. For K-COH (both cash and derivatives) to AIF, the weighted average ratio stands at 0%, the median at 0%.

Table 39. Ratio of K-AUM and K-ASA over AIFM funds for management companies authorised under AIFM licence only

Amount (% of AIFM funds)	N	Weighted average	P5	P25	P50	P75	P95
Assets under management/advice in relation to MiFID financial instruments only	259	0%	0%	0%	0%	0%	996%
of which: arising from individual portfolio management in relation to MiFID financial instruments only	229	0%	0%	0%	0%	0%	394%
of which: arising from investment advice in relation to MiFID financial instruments only	98	0%	0%	0%	0%	0%	1 073%
Assets safeguarded and administered in relation to MiFID financial instruments only	12	100%	0%	0%	52%	160%	714%
COH – Cash trades in relation to MiFID financial instruments only	26	0%	0%	0%	0%	0%	0%
COH – Derivatives Trades in relation to MiFID financial instruments only	26	0%	0%	0%	0%	0%	0%

Sources: Ad hoc data collection on IFR/IFD (2023 Q4), EBA supervisory data and EBA calculations.
Notes: The analysis considers only management companies authorised under the AIFM licence only (620 firms). The table only shows the results for management companies which reported the respective data (i.e. NAs are excluded from the results, but zero values are included).

365. On average, the ratio of K-AUM to UCITS and AIF for management companies authorised under the UCITS licence only is 24% (Table 40). For the median management company, the ratio stands at 26% and the interquartile range spans between 0% to 142%. For K-ASA to UCITS and AIF, the weighted average ratio stands at 0%, the median at 0% and interquartile range spans between 0% and 3%. For K-COH (both cash and derivatives) to UCITS and AIFM funds, the weighted average ratio stands at 0%, the median at 0%.

Table 40. Ratio of K-AUM and K-ASA over UCITS and AIFM funds for management companies authorised under both UCITS and AIFM licence

Amount (% of UCITS and AIFM funds)	N	Weighted average	P5	P25	P50	P75	P95
Assets under management/advice in relation to MiFID financial instruments only	372	24%	0%	0%	26%	142%	958%
of which: arising from individual portfolio management in relation to MiFID financial instruments only	358	24%	0%	0%	20%	125%	958%
of which: arising from investment advice in relation to MiFID financial instruments only	265	0%	0%	0%	0%	5%	133%
Assets safeguarded and administered in relation to MiFID financial instruments only	47	0%	0%	0%	0%	3%	287%
COH – Cash trades in relation to MiFID financial instruments only	66	1%	0%	0%	0%	0%	1%
COH – Derivatives Trades in relation to MiFID financial instruments only	66	0%	0%	0%	0%	0%	0%

Sources: Ad hoc data collection on IFR/IFD (2023 Q4), EBA supervisory data and EBA calculations.
Notes: The analysis considers only management companies authorised under the UCITSD and AIFMD licence (424 firms). The table only shows the results for management companies which reported the respective data (i.e. NAs are excluded from the results, but zero values are included).

12.2.14 Remuneration

366. In the context of the CfA on IFR/IFD review, the EBA has collected some data on remuneration, some additional data has been received regarding the application of waivers in the context of the regular remuneration benchmarking exercise.

367. New data for 2023 are currently under analysis and therefore no updated findings can yet be presented in this note. Analysis is therefore based on 2022 data and data collected under the CfA).

368. It is expected that all investment firms that are able to will make use of the derogations to the requirements to pay out variable remuneration in instruments and under deferral arrangements. The threshold to apply the derogation is set in the IFD at EUR 100 mn;

however, it can be implemented differently (lower or higher up to EUR 300 mn) by Member States.

369. The investment firms that have a balance sheet total above the threshold are expected to apply the derogations that exist regarding staff that receives only a low amount (EUR 50 000 and less than ¼ of the total remuneration) of variable remuneration.

370. Data collected from investment firms in the CfA has been analysed. The number of responses is limited and not all Member States are represented within the data. Hence, the data needs to be interpreted very carefully.

371. The main observations can be made:

a) Data from 145 investment firms that are subject to IFD available, representing EUR 1 919 657.79 mn total assets, thereof 100 investment firms (69%) are eligible to make use of the derogations. Those represent total assets of EUR 2 197.58 (0.1%). While the majority of firms are eligible to use the derogations on an institutional basis, the percentage of total assets of those investment firms is insignificant. Hence the risk to the financial market that could be caused by the misalignment of variable remuneration to risks is insignificant. However, for some Member States, the firms that are eligible to apply the derogations play a significant local role. At a threshold of EUR 300 mn the main findings would not change (121 IF or 83.45% eligible with EUR 6 027.14 mn total assets, representing 0.31% of the total assets).

b) Some investment firms are subject to the remuneration provisions under CRD (Class 1 minus). For them the same thresholds as for credit institutions apply (EUR 5 bn, which can be increased to up to 15 bn total assets). Data for five such investment firms show total assets of EUR 58 185.46 mn, while 2 (40%) can benefit from the derogations on an institutional level have only EUR 631.4 mn total assets, which is an insignificant part (1.08%) of the total.

c) The sample represents 10 827.5 staff, 1 534 (14.2%) of them are identified staff to which the specific requirements on remuneration apply. This percentage varies significantly between firms. The majority of the identified staff (1 199; thereof 623 IFD, 576 CRD) benefits from the application of derogations. While this represents the majority of identified staff (78.2%), it should not necessary been seen to render the remuneration framework useless as the identified staff with a high income in the biggest firms remains subject to the requirements.

d) For the Class 1 minus firms, the picture is different. They represent 333 staff with 74 identified staff (22.2%), whereby 44 (57.1%) benefit from the derogations.

e) Remuneration committees have been established by four out of five Class 1 minus firms and 52 out of 145 other investment firms, including some to which the requirement does not apply.

Table 41. Information regarding IF Class 2 that could use derogations at different thresholds

	Number investment firms (IF)	Total Assets (TA) EUR mn	Number of IF with TA up to EUR 300 mn	Aggregated TA in EUR mn of IF with up to EUR 300 mn TA	Number of IF with TA up to EUR100mn	Aggregated TA in EUR mn of IF with TA up to EUR100 mn
EU	145	1 919 659	121	6 028	100	2 107

Table 42. Number of staff and identified staff, remuneration committees in investment firms in the EU for which EBA holds data on remuneration

	Number IF	Number IF > 100 mn Total Assets (TA) or EUR 5 bn (Class 1 minus)	Number staff	Number identified staff	Number identified staff in firms with TA < EUR 100 mn	Remuneration committee exists	Thereof IF with TA >EUR 100 mn or EUR 5 bn (Class 1 minus)
Class 2	145	100	10 828	1 534	956	52	20
Class 1 minus	5	2	333	74	14	4	1

13.Feedback from public consultation

13.1 Respondents and general comments

372. Responses were received from 54 respondents, 41 of which were disclosed publicly and 13 were confidential. These came from four groups: 27 from individual companies, 24 from associations, two from authorities and one response came from an individual.

373. **Complexity and burden:** most of the respondents agree that the review of the prudential regime for investment firms is an opportunity to strike a better balance between having an adequate prudential regime and enabling market makers to play their role in the capital market ecosystem. There is therefore a push for EU policymakers to ensure that the regime is proportionate and risk-based, reflecting the type, business activity, and size of EU IFR firms. Nonetheless, a recurrent opinion seems to be that the current IFR/IFD framework for investment firms in the EU is complex and burdensome and has an equivalent only in one other major jurisdiction. It is the opinion of several respondents that the current IFR/IFD regime has introduced complexities and onerous requirements that have put a damper on the ability of EU-headquartered investment firms to sustain and expand their liquidity provision in EU markets. Furthermore, the framework was suggested as the reason why some of the largest European market makers have relocated their headquarters outside of the EU.

374. **Competitiveness:** respondents observed that the IFR/IFD should ensure a level playing field and not disadvantage EU investment firms compared to competitors in other jurisdictions. It was suggested that this was the case for EU trading firms. Therefore, it was decided that the IFR/IFD review should aim to create a regulatory regime that attracts more market participants, incentivises competition, and contributes to the development of an effective and resilient Capital Markets Union.

375. **Liquidity:** respondents noted that the relocation of certain investment firms from the EU risks undermining deep and liquid European financial markets when there is a need for efficient and liquid secondary markets to support the wider economy and meet funding needs. Whereas some respondents suggested that the IFR/IFD framework has forced market makers to restrict or reduce their liquidity provision in European markets.

13.2 Categorisation of investment firms

13.2.1 Summary of the responses to the public consultation and data collection

376. **Effectiveness of the categorisation of investment firms:** While it is understood that the categorisation of investment firms is a system that works well overall, some respondents consider the system inappropriate for their specific business model. In particular, the indicator

at the heart of the categorisation methodology, i.e. balance sheet size, is considered inadequate for determining the risk profile of an investment firm. Furthermore, these respondents see the categorisation system as overly complex, particularly as the associated outcome is an allocation to different prudential regimes. Finally, some respondents highlighted the link between the IFR/IFD framework and the CRR/CRD prudential regime, arguing that there should be less articulation between the two frameworks as they address very different business models.

377. **Consistency/harmonisation of the thresholds:** As the basis for the categorisation system for investment firms, the thresholds in the IFR/IFD framework are fundamental and discussed at large by respondents. Overall, the proposal to harmonise the three thresholds (i.e. EUR 30 bn, EUR 15 bn and EUR 5 bn) is supported, with respondents acknowledging the need for harmonisation as a means to avoid arbitrage in interpretation. However, several adjustments are envisaged by some of those replying to the Discussion paper, in particular as regards the EUR 15 bn threshold.

378. **Categorisation of Class 1 minus investment firms:** Some respondents propose the deletion of the EUR 15 bn threshold, as they consider the Class 1 minus category brings needless complexity to the prudential framework for IFs. An alternative proposal from respondents would be to replace the EUR 15 bn threshold with Article 5 of the IFD.

379. **Monitoring of the thresholds:** A few respondents are against the removal of the threshold, as they consider that the costs would outweigh the benefits. One proposal made is to use a de minimis, which could avoid additional reporting for smaller/mid-sized investment firms, by means of excluding firms below the EUR 100 mn or EUR 250 mn balance sheet (SREP category 1) thresholds. Another proposal is to enhance reporting from NCAs to ensure the EBA receives the additional data it needs to carry out its assessments.

380. **Notification requirement from the EBA to the investment firms surpassing the threshold:** No comments were received on this mechanism.

13.2.2 EBA/ESMA analysis and recommendations

381. **Effectiveness of the categorisation of investment firms:** Given the heterogeneity of the investment firms population in terms of business model, it would be overly burdensome to tailor the regulatory response to each specific type of firms, not to mention using different indicators to structure the population of investment firms. The activity-based model was retained for its easiness to implement, and the categorisation system was designed to enable the tailoring of the prudential framework to the needs of firms. While the IFR/IFD offers a new regime for investment firms, the link with the CRR/CRD remains strong via two channels: (i) the definition of 'credit institution' in Article 4(1)(1) of the CRR, and (ii) the existence of investment firm(s) being consolidated under banking groups. Both channels plead in favour of maintaining coherency between the two regulatory frameworks (i.e. IFR/IFD and CRR/CRD),

all the while providing the necessary regulatory space for the two categories to evolve in their unique environments.

382. **Consistency/harmonisation of the thresholds:** Precisely because the categorisation of investment firms is at the heart of the IFR/IFD, there is a clear need to add coherence to the framework by harmonising the scope and methodology for computing all three thresholds, as also supported by respondents. The proposed harmonisation is as follows:

a) **Basis for harmonisation – the EUR 30 bn threshold as detailed in Article 4(1)(1)(b) of the CRR3:** scope of calculation is the European level, i.e. by including all undertakings established in the EU (and all their branches and subsidiaries anywhere else) that have total assets lower than EUR 30 bn;

b) **The EUR 15 bn threshold:** use the same scope of calculation as the EUR 30 bn threshold. The current IFR text, in Article 1(2) of the IFR, explicitly excludes assets of subsidiaries in third countries belonging to EU undertakings. Maintaining two scopes of calculation is counterintuitive given that the consequences of the two thresholds are similar (i.e. both involve the application of the CRR: one through reauthorisation as credit institutions and the other by simply applying the CRR to the investment firm).

c) **The EUR 5 bn threshold:** use the same scope as for the thresholds in points a) and b) above, knowing that there are three junctions at which this particular threshold is used: (i) Article 5(1) of the IFR – where a solo threshold based on the 'total value of consolidated assets of the investment firm' is mentioned; (ii) Article 55(1) of the IFR – where a solo threshold based on the 'total value of the consolidated assets of the investment firm' is mentioned; and (ii) Article 55(2) of the IFR – where a group threshold based on the 'total value of the consolidated assets of the group' is mentioned. Similarly, as for the EUR 15 bn threshold, the harmonisation in terms of scope of calculation is underpinned by the fact that both thresholds are used with similar implications, i.e. the application of the CRR as the prudential regime for the investment firms over the respective threshold.

d) Further clarifications in terms of language used in the definitions of the thresholds would be welcome:

i) The notion of 'combined value' should be clarified in the IFR text as referring to the addition of amounts without any deductions (e.g. accounting for intragroup transactions), as it is used to identify different concepts in different phrases in the IFR text (e.g. in the definition of credit institution, as well as in Article 12(2) of the IFR).

ii) While outside the scope of an IFR/IFD amendment, it should be highlighted that Article 4(1)(1)(b)(i) of the CRR now refers, in the context of the solo test, to the 'total value of consolidated assets of the undertaking established in the Union, including any of its branches and subsidiaries established in a third country', while Article 8a(1)(a) of the CRD refers to 'the average of monthly total assets, calculated over a period of 12 consecutive months'. Given the fact that Article 8a(1) of the CRD makes a direct reference to Article 4(1)(1)(b) of the CRR, the EBA interpretation is that Article 4(1)(1)(i)

of the CRR is the one that provides the scope and methodology for the calculation of the EUR 30 bn threshold at the solo level. Nonetheless, it would be advisable for the CRR and CRD texts to align in order to provide clarity on the expectations of the law.

383. Finally, this harmonisation would also solve an interpretation issue related to Article 55 of the IFR, where in paragraph 3 of this Article the EBA needs to notify firms and CAs when either the EUR 15 bn threshold is passed or the EUR 30 bn threshold is passed, while the EBA mandate in paragraph 5 of that article only refers to the monitoring of the EUR 30 bn threshold. In this specific case, the monitoring of the information related to the EUR 15 bn threshold (based on the scope of calculation provided so far in Article 1(2) of the IFR) would not be fully feasible.

384. In addition to the analysis detailed above, it has been flagged to the EBA that there may be situations where the EUR 30 bn threshold is surpassed, but the significance threshold in the SSM Regulation is not. The EBA recognises this may be a situation conducive to a lack of certainty regarding the supervisory framework for the institutions in this very specific situation.

385. **Categorisation of Class 1 minus investment firms:** As illustrated in the table associated with paragraph 11 in the Discussion paper[75], investment firms can be classified as Class 1 minus based on different prudential requirements: Article 1(2) of the IFR or Article 1(5) of the IFR or Article 5(1) of the IFD. In line with these requirements, NCAs can decide the inclusion of an investment firm in Class 1 minus, but this can also be done at the request of the investment firm. Given the flexibility provided by the categorisation system in general, and this category in particular, it is not advisable to delete this category (i.e. Class 1 minus), as it provides solutions in a wide array of cases. Based on the responses to the qualitative questionnaire circulated launched at the same time as the Discussion paper, investment firms have been classified as Class 1 minus in line with all the requirements mentioned above.

386. **In the specific case of Article 1(2) of the IFR,** it should be discussed whether a feature similar to Article 5(1)(c) of the IFD could be introduced. For instance, should an investment firm meet the EUR 15 bn threshold, but not meet the additional metrics similar to those in Article 5(1)(c) points (i), (ii) and (iii) of the IFD, the investment firm could remain in Class 2. This potential way forward would be in line with early-stage considerations regarding the systemic relevance of IFs with more than EUR 15 bn in total assets. This would also add different dimensions to the assessment, particularly since a persistent critique of the thresholds in general, and of the EUR 15 bn threshold in particular, is that the balance sheet size does not fit all business models and risk profiles in the IFs population.

387. **Monitoring of the thresholds:** In light of the definitions provided in Article 4(1)(1)(b) of the CRR and Articles 8a(1)(a) and 8a(1)(b) of the CRD, all investment firms carrying out MiFID

[75] Discussion paper - Call for advice on the investment firms prudential framework (link).

activities (3) and (6) are relevant for the monitoring of the EUR 30 bn threshold, therefore the EUR 5 bn threshold in this case (i.e. for reporting purposes) is somewhat hindering the process of accurate monitoring, instead of facilitating it. In line with the requirements in Articles 55(1) and 55(2) of the IFR, the calculation is to be carried out monthly and the necessary information shall be shared quarterly to competent authorities using the monitoring template the EBA shall provide in line with the mandate in Article 55(5) of the IFR. The EBA shall then receive the information from the CAs. However, an exception concerning IFs not part of a group should be explored for proportionality reasons.

388. **Notification requirement from the EBA to the investment firms surpassing the threshold:** In line with our reading of the requirements in Article 55 of the IFR, this notification is not only not useful in the process, but also unnecessary. The envisaged process is circular and not useful, and should be replaced with a publication by the EBA of a list of companies surpassing the threshold upon notification from competent authorities in line with the requirements in Article 55 of the IFR, paragraphs 1 and 2.

13.3 Conditions for investment firms to qualify as small and non-interconnected

13.3.1 Discussion on the conditions for qualifying as a Class 3 investment firm

389. Many of the respondents suggested that there should not be any additional elements considered regarding the threshold for the categorisation of Class 3 firms. One respondent suggested keeping the conditions in Article 12 (1) h) and i) of the IFR, however, in the case of i), the thresholds should be increased in a staggered way.

390. Some respondents suggested increasing the amount for condition Article 12 (1) h) in the IFR, of which one suggested an increase to **EUR 1.5 bn**. Some respondents suggested deleting conditions Article 12 (1) h) and i) of the IFR completely, of which one suggested; alternatively, when deleting them, the amount of AUM and COH could be lowered instead.

13.3.2 Transition of investment firms between Class 3 and Class 2 categories

391. Several respondents support keeping the existing rules. Several respondents suggest incorporating a two-way freezing period (up and down) for **at least 12 months,** of which one suggested, additionally, a fixed calendar date for reclassification, for example, at the end of the fiscal year. One respondent remarked that an unrepeated event could lead to Class 2 with the result that for 11 months the IF were treated as disproportionate and therefore suggested a ‘grace period’ of three months after which in case the firm still fulfils the criteria, it will be Class 2. One respondent suggested enlarging the transitional period to 5–6 months.

13.3.3 EBA-ESMA analysis and recommendations

392. **Conditions for qualifying as a Class 3 investment firm:** Based on the discussion, it is the opinion of the EBA that the criteria set in Article 12 (1) of the IFR are proven to be functioning well. In accordance with that, the EBA sees no need to add any further criteria.

393. As the amounts of the criteria Article 12 (1) a) and b) IFR have proven appropriate, adequate and sufficient for distinguishing between Class 2 and Class 3 based upon the risk the firm in question imposes, there is no need to lower those amounts in exchange for deleting criteria h) and i).

394. While criteria a) to g) are based upon the risk each service imposes, criteria h) and i) follow the idea that pure size should also be considered as a risk factor. This justifies keeping both criteria, but it is worth considering increasing the amounts of both criteria. Therefore, the EBA recommends, firstly, not introducing any further criteria in Article 12 (1) IFR and secondly to increase the amounts of criteria h) to EUR 200 and the amount of i) to EUR 50 mn.

395. Tables 5 and 6 in Annex 1 to this document present the number of investment firms that would be reclassified in the context of an increase of the thresholds in Articles 12(1)(i) and 12(1)(h) respectively, while Tables 10 and 11 in Annex 1 to this document summarise the impact of an increase in these thresholds for investment firm groups.

396. **Transition of investment firms between Class 3 and Class 2 categories:** With regards to the transition of investment firms between Class 2 and Class 3, there were three potential alternatives outlined in the discussion.

397. **Option 1**: For investment firms moving from Class 3 to Class 2, allow them to remain in that Class provided they do not breach the threshold more than 'x' times within a year. This would only be for the metrics that are moving averages such as AUM and COH but they could stay the same for Class 2 to Class 3.

398. **Option 2**:

    a) One option is to introduce the possibility of having in the regulation the concept of 'exceptional events impacting revenue'. (see Recital 17 IFR).

    b) Introduce a two-way freezing point both up and down a two-way freezing period (up and down) for at least 12 months.

    c) This should be for at least 12 months with a fixed calendar date for reclassification such as at the end of the fiscal year.

399. **Option 3**: Remain the same. It is important to note that the 30 m threshold only refers to MiFID and ancillary services only.

400. It is recommended to proceed with Option 3 and not bring any changes to the current situation.

13.4 Fixed overheads requirements (FOR)

13.4.1 Length of the wind-down period [Q4 of the Discussion paper]

401. All respondents see no need for change or to consider extending the three-month period. This would also be valid for the specific cases mentioned in the discussion paper, such as providing safekeeping and administration.

402. Accordingly, the respondents claim that the FOR set a minimum to the capital requirements for an investment firm, based on the idea that that amount should be the same as the capital that might be needed for an orderly wind-down, and that such length should be assumed to be the same for all business models. Furthermore, respondents suggest that FOR is not designed to cover the special risks a firm imposes based on its activity to clients or to the markets, as the K-factor system is the adequate one for covering such risks. If more own funds might be needed for a special business model, this is already covered by SREP. Distinguishing between different business models and activities for FOR in the Pillar 1 requirements would lead to a more complex regulation and would not be as flexible, appropriate and suitable for individual cases as SREP.

403. **EBA-ESMA analysis**: The EBA collected information from the CAs on the length needed for wind-down investment firms in the past. These data are related to the services those investment firms were providing. All the results are shown in Table 2 and Table 3.

404. Therefore, the respondents' opinion that the wind-down period does not depend on the services provided is supported by the results of the data collection.

13.4.2 Deductibles specific to business models [Q5 of the Discussion paper]

405. Similar to the previous topics, respondents do not see the advantage of setting the deductibles based on the services an investment firm provides, as this would make the calculation only more complicated. Respondents also noted that such an approach would also lead to further administrative effort and additional costs.

406. **EBA-ESMA analysis:** The EBA, in agreement with the respondents, therefore recommends not introducing distinguishing between costs related to MiFID activities and those related to non-MiFID activities.

13.4.3 Expenses related to tied agents [Q6 of the Discussion paper]

407. Most respondents see no need for change. One respondent, however, proposed a strict legalistic approach for including third-party costs based on the consideration that, if there is no legally enforceable claim, these costs should not be included in the FOR. One respondent

suggests that only costs not associated with the success of the TA in the performance of their duties should be taken into account.

408. **EBA-ESMA analysis:** The EBA notices that this provision was mostly introduced to prevent avoidance of the rules by accounting for certain costs to the tied agents rather than the investment firm itself. Therefore, it is suggested that the current wording should not be changed.

409. Furthermore, the suggestion that only costs not associated with the success of the tied agent in the performance of their duties should be taken into account seems to unnecessarily increase complexity and is therefore not recommended.

13.4.4 Expenses related to non-MiFID activities [Q7 of the Discussion paper]

410. All respondents see no need for change. They suggest that the purpose of the FOR is to provide the firm with sufficient own funds to properly wind-down the business in the interests of the clients. Protecting the client from that risk, a proper wind-down of the firm as such has to be achieved. Furthermore, it could be difficult to distinguish between MiFID-related expenses and other expenses.

411. **EBA-ESMA analysis:** In agreement with the respondents, it is recommended not to introduce a distinction between costs related to MiFID activities and those unrelated, as the clients should be protected from the risk that services will no longer be carried out properly due to disorderly processing in a wind-down period.

13.4.5 Distribution of profits

412. One respondent suggests changing Article 1(1) RTS FOR so as not to give rise to different interpretations regarding the reference time period; the problem was caused by the wording ‘after distribution of profit’, which would lead to the use of the annual statement of the year before the last year.

413. **EBA-ESMA analysis:** On the issue with the Article 1(1) of the Delegated Regulation (EU) 2022/1455 (RTS on FOR) on how to interpret the wording therein ‘after distribution of profits’, it is the opinion of the EBA that the current wording is clear and does not refer to the time component.

414. In other words, as the requirement is to have the calculation of the FOR based on the latest audited financial statements, it is clear that the calculation in year ‘n’ after the audited financial statements are available will be based on those statements and the profits distributed in year ‘n’ after the audited financial statements are published should not be included in the calculation of the FOR (similar to any other deduction). Should those technical standards be revised, this can be clarified in a recital or in related QnA.

13.4.6 Expenses related to foreign exchange differences [Q8 of the Discussion paper]

415. Only one respondent commented suggesting that negative exchange differences associated with customers' positions should be considered as a non-eligible expenses, irrespective of whether the recording is individualised or not. Otherwise, none of the respondents were against the proposal, but suggested equal treatment in the two cases in the asset protection regulation.

416. **EBA-ESMA analysis:** A deduction item should be added to the regulation. This can be done in the Delegated Regulation (EU) 2022/1455 (RTS on FOR) without the need to change the IFR.

13.5 Review of existing K-factors

13.5.1 Client Orders Handled (COH): Placing of financial instruments without firm commitment

417. One respondent suggested generally clarifying the scope and definition of K-COH that is considered unclear. In particular, since investments firms are not sure about the agency activities that fall within the scope of K-COH and K-DTF, it was recommended that some examples should be provided on what activities are in scope of K-COH. The comment, however, lacks specific examples. Therefore, the definition cannot be clarified further than what was already suggested in the discussion paper.

13.5.2 Client Orders Handled (COH): Name give-up operations

418. Respondents confirmed that no further clarification is needed. Therefore, EBA/ESMA recommend keeping the recommendation to mention the treatment of such cases explicitly in the regulations. Nonetheless, there is no need to modify the IFR itself, as this can be done as part of the review of the relevant technical standards[76].

13.5.3 Client Orders Handled (COH): contract related to market-making activities

419. This section received no comments. It is therefore suggested that the proposal in the discussion paper should be followed.

13.5.4 Assets under management and ongoing advice (K-AUM): definition of ongoing advice

420. The majority of the respondents highlighted the importance of further specifying the concept of 'ongoing advice' for the purpose of calculating the K-AUM. Different proposals were made on the elements to be taken into account when distinguishing a recurring provision from a

[76] Commission Delegated Regulation (EU) 2022/25 of 22 September 2021 with regard to regulatory technical standards specifying the methods for measuring the K-factors (link).

one-off. One respondent suggested to specifying the following areas to draw the difference between the two (frequency, duration and continuity, scope of services, client relationship management, documentation and record keeping, regulatory and compliance considerations), while another suggested to taking into account other elements (nature of the asset, previous existence of a recommendation on the asset, frequency of recommendations on that asset or others to the same client).

421. Other respondents suggested having a narrow scope including only assets where the decision-making about the management of the assets was replaced by the advising activity, or explicitly excluding asset allocation and monitoring activities when they are based on general models providing inputs in terms of asset classes without including any personal recommendation to the client. Similarly, another respondent suggested having a definition that goes beyond mere data aggregation and that requires an element of implicit or explicit suggestions on portfolio or investment decisions.

422. Some other respondents suggested that there is no need to further specify the concept that should be aligned to MiFID and ESMA guidance or to point out the difficulties of developing this differentiation that it is easier to carry out in daily business. Another respondent suggested changing the logic behind AUM, moving from this figure to NaV (which is more consistent with the market practice).

423. **EBA/ESMA analysis**: Following the comments above, three alternatives were considered:

a) Option 1: Assuming all the additional functions after 'as well as' are not wanted, then the part 'as well as the continuous or periodic assessment and monitoring or review of a client portfolio of financial instruments' could be removed from the definition of Article 4.1(21);

b) Option 2: In the alternative, it would be possible to simply substitute 'as well as' with either 'including' or 'on the basis of', as the services described after this point ('the continuous or periodic assessment and monitoring or review of a client portfolio of financial instruments') describe the provision of advice.

c) Option 3: Leave the text(s) L1 and L2 as they are and accept a "less harmonised" regulation, assuming such clarification is not essential.

424. One possible conclusion would be to change the definition to: '"investment advice of an ongoing nature" means the provision of investment advice on the basis of the continuous or periodic assessment and monitoring or review of a client portfolio of financial instruments resulting from a contractual arrangement'.

13.5.5 Assets under management and ongoing advice (K-AUM): delegation

425. In accordance with Article 17(2) of the IFR 'Where another financial entity has formally delegated the management of assets to the investment firm, those assets shall be excluded from the total amount of assets under management measured in accordance with paragraph

1'. This clearly limits these exclusions to the management of assets and does not include any other service (such as advice). This is also reflected in the relevant technical standards.

426. The discussion paper discussed the possibility of amending the IFR in this regard, including 'providing advice' on the exemption of Article 17(2), subparagraph 2 of the IFR, which would avoid double counting of assets, as the delegated assets under advice are already covered by the own funds requirement of the financial institution that asked for advice from the investment firm.

427. However, the capital requirements for the asset management company cover the management of the assets in the fund, they do not necessarily cover any other service that an investment firms may provide to the asset management company. Based on this consideration, one may conclude that the text of the IFR correctly limits the exclusion for the investment firm to discretionary portfolio management and does not extend to other services (e.g. advice or execution) on purpose (for which the investment firm should still hold own funds).

428. There are therefore two options to consider as way forward:

a) **Option 1**: (as suggested in the DP) Article 17(2) of the IFR could be updated in including advice to portfolio management. In this case, also Article 2 (2) of the Delegated Regulation (EU) 2022/25 should be deleted accordingly.

b) **Option 2**: leave the IFR and the Delegated Regulation (EU) 2022/25 as they currently are, because the asset manager's own funds requirements cover asset management but do not cover other services for which the investment firm should still hold their own funds.

13.5.6 Daily Trading Flow (K-DTF)

429. The feedback received highlights that there are different views on whether K-DTF should be calibrated differently or whether an entirely different regulatory approach is required. The option of adding the FOR to the capital requirements under RtM is not viewed favourably, due to the difference between the FOR (covering the investment firm from a gone concern perspective) and the K-factors (covering the investment from a going concern perspective). Some respondents do not see a need for changing K-DTF at all, or the added benefit thereof.

430. Furthermore, some argue that operational risks not covered by K-DTF are covered in Pillar 2, also based on discussions with NCAs, and that this generally works well. One respondent argues that the exposure of investment firms to operational risk differs depending on elements, such as the business model, hedging and the duration of holding assets.

431. One respondent suggests several approaches for changing the K-DTF, including a threshold-based approach, granular risk assessment, proportional capital charges, enhanced risk management requirements, integration with existing K-factors, and scenario analysis and stress testing. Another respondent sees potential for targeted amendments, such as

introducing adjustments to K-DTF coefficients in times of stressed market conditions, distinguishing the K-DTF for trading on own account and the execution of orders, changing the notional amount of derivative transactions to market value or the amount paid or received for the trade, and clarifying which transactions are included in K-DTF.

432. It was also noted that the current formula works for transactions with a high value but not for those transactions with a low value. From a supervisory perspective, the operational risks of the transactions with a low value are not necessarily lower than transactions with a high value. To consider in this regard the fact that there are investment firms that execute a high amount of transactions with a very low nominal value per transaction (as is the case with certain market makers or high frequency traders). A single high value transaction has an operational risk due to the high value (probability times impact with a high value resulting in a 'high' outcome). However, even with low nominal values, a high number of transactions can still amount to a significant operational risk (probability times impact times number of transactions). If, for instance, the trading software malfunctions for several minutes, certain market makers can already have processed several thousand or even millions of transactions.

433. To accommodate the number of transactions into the K-factor, the volume threshold could therefore be added. This way, the current set-up of K-DTF can remain. However, those investment firms that are exposed to the risk K-DTF is meant to address can still be captured because they are faced with a realistic capital requirement despite the low notional values of their trades. In this regard, a possible avenue to explore is whether an RTS could set fixed percentages as add-ons on top of the IFR K-DTF calibration and that apply above certain volume thresholds. This could make K-DTF more risk-sensitive.

434. **EBA/ESMA analysis:** the possible amendments don't seem to strike the right balance between risk sensitivity and simplicity of the framework. Thus, it is proposed to leave the calibration of K-DTF unchanged.

13.5.7 Assets under safekeeping and administration (K-ASA)

435. Considering the appropriateness of the K-factor calibration, most of the respondents highlighted that the methodology for the calculation of K-ASA is too rigid and it does not reflect the real riskiness of the activity. Different proposals were made on how to overcome this issue. Several respondents underlined the possibility of distinguishing according to the severity of the national legal system (suggesting a reduction from 0.04% to 0.01%).

436. Other suggestions highlighted additional factors to take into account, such as a differentiation between structural (separate entity) and statutory separation (i.e. legal). It was noted that this would be similar to the treatment of CMH on different accounts. Another respondent suggested the possibility of giving the competent authority the possibility to reduce the coefficient on the basis of the business model of the investment firm and on its national

safeguarding regime. Similarly, another respondent suggested including the assessment of the national regime in the Pillar 2 framework.

437. Another respondent suggested considering the fact that the investment firm is part of a credit institution. Finally, a respondent suggested clarifying whether 'technical asset deposits' associated with settlement phases should be included in the ASA calculations.

438. Few other respondents did not highlight any issues in the current framework that are considered appropriate.

439. **EBA/ESMA analysis:** Concerning the calibration of the K-ASA, A data collection was conducted in parallel with the public consultation on the discussion paper. Investment firms having more than 50% of the capital requirements stemming from K-ASA were asked to report the capital requirements they had before the introduction of the IFDR. The results are reported in Table 31 and Table 32 of Section 12.

440. For this particular sample (96 firms in total participated in the data collection), the data show that the K-factor requirements would be in average 52% of the capital requirements before the introduction of the IFR (thus a reduction of almost half of the requirements). However, for 23 of these firms, the capital requirements would remain the same with no reduction and, for the same number of firms, there would be an increase of the requirements, with five firms showing an increase up to around four times the requirements under the previous framework.

441. Concerning the other elements, introducing any distinction based on national implementations or opening to a calibration under the discretion of the competent authority would not be compatible with the overarching objective of introducing harmonised rules at Union level.

442. Concerning the suggestion of having different treatments between structural (separate entity) and statutory separation (i.e. legal) could, in theory, be an option to consider. However, this approach would considerably complexify the methodology. Considering the quantitative data (mentioned above), it is difficult to recommend such a change given the limited expected benefits.

443. Concerning the suggestion of a different treatment for investment firms part of a banking group, it is not clear why an investment firm part of a banking group would be treated differently from another one. Concerning whether 'technical asset deposits' associated with settlement phases should be included in the ASA calculations, the case proposed is just a specific case and should be treated like other assets under the ASA definition..

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

444. The design of K-CON currently explicitly ignores significant concentration risks that are not part of the trading book. These can be very significant for certain investment firms providing individual portfolio management, which might not be exposed to concentration risks via the trading book, but might be via the non-trading book (NTB), relatively to their balance sheet.

445. The respondents to the public consultation do not support the possibility to extend the scope of K-CON to exposure not in the trading book leveraging on the fact that this inclusion would defeat the purpose of having an investment firm's specific framework and adding that the limited concentration risk outside the trading book should be addressed in Pillar 2.

446. A respondent suggested to specify the precise nature of NTB book exposures and/or financial instruments that are subject to K-CON, while another respondent suggested, in case the scope was extended, that it would not apply to intragroup exposures or cash holdings with third party banks since they do not carry out the same risk.

447. Finally, another comment pointed out to the fact that the inclusion of broker margin in the K-CON calculations is not proportionate because it does not reflect an actual risk of loss to the investment firm, as these margins are usually highly liquid and easily retrievable, further reducing any potential risk.

448. **EBA/ESMA analysis:** concentration risk in the NTB can be material for some trading investment firms and increase its overall risk. It appears prudent and proportionate to introduce a hard limit similar to the one applied to credit institutions, without increasing Pillar 1 capital requirements. Furthermore, currently investment firms trading on own account must report the top 5 exposures regardless of their inclusion in the trading book or the NTB, thus the introduction of a hard limit will not result in increased complexity. In order to take into account the peculiarity of the business of the investment firms, money deposited at credit institutions, either in the name of the investment firm or on behalf of clients, should be exempted from the limit on large exposures in the non-trading book.

13.5.9 Concentration risk in the trading book (K-CON): notion of 'client'

449. Respondents to the public consultation agree that the notion of 'client' should be consistent across the framework.

13.5.10 Clearing Member Guarantee (K-CMG)

450. Respondents to the public consultation in general are of the view that the calibration of K-CMG is too strict and not risk sensitive. In particular, the multiplication factor and the high watermark are the main areas of concern. Different suggestions were provided to overcome these issues, such as calculating K-CMG as an average, reducing the multiplier, or using the previous day margin requirement. Some respondents also suggested eliminating the restriction currently in place that limits the use of K-CMG only to positions held with EU clearing members or recognised third party CCPs.

451. **EBA/ESMA analysis:** the limits imposed on K-CMG (watermark, multiplier and limit to exposures held with EU clearing members operating with EU CCPs) appear to be proportionate if assessed on a stand-alone basis but represent a burden when implemented together. Thus, it would be more proportionate and risk sensitive to modify the functioning of the watermark and to allow the use of K-CMG also for positions held with non-EU clearing members.

13.6 Risks not covered by existing K-factors

13.6.1 Non-trading book positions

452. The IFR/IFD framework does not envisage a Pillar 1 framework for credit risk and for items not in the trading book in general (except for items subject to exchange and commodity risk for trading firms). For instance, loans to customers, exposures to credit institutions, illiquid financial assets, financial instruments held for purposes other than trading, or off-balance-sheet commitments (e.g. capital or performance guarantees) are accounted for only in the Pillar 2 framework, although their size may be material for certain investment firms.

453. The feedback received points to the excessive burden and lack of proportionality if a dedicated K-factor for NTB exposures were to be introduced, adding that this issue should continue to be addressed in the Pillar 2 context.

454. Supervisors reported that most investment firms have little or no holding in the NTB, but that usually the few investment firms that have instruments in the NTB have material exposure to credit risk. They have undertaken a wide array of measures to mitigate the risk in the NTB, ranging from continuous monitoring of the positions to the calculation of the capital requirements for credit risk envisaged in the CRR.

455. **EBA/ESMA analysis:** exposures in the NTB are not usually the main business of investment firms, though such exposures might be material for some firms. To strike the right balance between prudence and burden for investment firms, it is more proportionate to continue to assess the materiality of the NTB exposures in the Pillar 2 context.

13.6.2 Non-trading book positions in crypto-assets

456. Crypto-asset exposures held in the NTB are not capitalised in the Pillar 1 framework of the IFR-IFD, leaving the risk of potential loss of value resulting from the volatility of crypto-assets uncovered by capital requirements.

457. Respondents to the public consultation have differing views whether exposures to crypto-assets in the NTB should be covered in the existing K-factors or whether a separate K-factor for these exposures should be created.

458. Several respondents argue that these exposures should not be capitalised in the Pillar 1 framework of the IFR and one argues that it is already covered in K-AUM or K-ASA. Others argue that MiCAR itself provides an adequate framework for regulating investment firms when they are CASPs and that inclusion in the K-factors of the IFR could lead to double counting or an unlevel playing field between investment firms and other CASPs.

459. Other respondents reject drawing inspiration from the BCBS Prudential Treatment of Crypto-assets proposals, since they were drafted for banks and not for investment firms. Conversely, some respondents do consider it important to align with international standards and guidelines, such as those of the BCBS. Another respondent proposes a narrow exemption from the proposed 1% cap proposed in the BCBS paper for positions in market makers or proprietary trading firms' trading books.

460. Some respondents argue that crypto-asset exposures could be covered by the K-NPR through inclusion in the trading book with clear criteria when this inclusion has to be done and with appropriate risk weighting criteria. In this regard, one respondent suggests adopting an equity or commodity-style set of risk weightings with similar 'look-through' and netting treatment.

461. One other respondent argues that a dedicated K-factor for crypto-asset exposures could be based on the market value or volume of crypto-assets held, adjusted for their volatility and liquidity risks. Another respondent argues that the inclusion in the K-factors regime is only required when a crypto-asset qualifies as a financial instrument, while another respondent considers that K-CMH and K-COH do not apply to crypto-asset services.

462. Besides that, some respondents argue that further analysis is necessary before conclusions regarding the inclusion of crypto-assets exposures in new or existing K-factors is warranted.

463. **EBA/ESMA analysis:** exposures in crypto-assets might entail a significant amount of risk for investment firms, thus their holdings should be subject to Pillar 1 capital requirements. In order to uphold the principle of proportionality, a different methodology to calculate capital requirements should be envisaged for trading and non-trading firms.

13.6.3 Operational risk for firms calculating the K-DTF

464. From the consultation, several respondents do not favour the idea of reverting to the CRR operational risk approaches, since it would counter the notion of the IFR/IFD framework being distinct from the CRR/CRD framework, and they deem unclear how the CRR approaches would appropriately cover operational risks of investment firms.

465. **EBA/ESMA analysis:** the introduction of a capital requirements linked to the operational risk in the CRR is deemed as overly burdensome for investment firms. When the K-DTF is deemed by competent authority as insufficient to cover the operational risk stemming from trading activities of the investment firm, that deficiency should be addressed in the context of Pillar 2.

13.6.4 Investment firms operating trading venues

466. The majority of the respondents argue there is no need for a dedicated K-factor for operating a trading venue and the introduction or that such a requirement would require further analysis to maintain the intended objective of keeping the IFR framework as simple as possible. Furthermore, some respondents argue that not having capital requirements for operating an MTF or OTF was a conscious policy choice. In this regard, some respondents argue that trading venues do not face RtM and/or RtF and that it is not clear from the Discussion Paper which risks would be addressed by introducing a dedicated K-factor.

467. One respondent argues that the primary risk posed by trading venues to market participants is when they cease to operate but claims that there is not a good proxy in Pillar 2 to address such a risk. It therefore also rejects the idea of basing a metric on trading volumes, but it does suggest subjecting MTF and OTF operators to the SREP so that supervisors can assess whether there are risks for an orderly wind-down also in light of liquidity pools in a trading venue. Alternatively, it suggests that a resolution regime could be appropriate for trading venues.

468. Opinions among respondents differ whether investment firms operating trading venues should be excluded from Class 3. One respondent expressing concern that it would lead to a blanket classification as Class 2, which would make the regime inappropriate for these investment firms.

469. One respondent does concur that all trading venues could be excluded from the definition of small and non-interconnected firms and it supports the approach in point 133 that either K-COH or K-DTF should be calculated regardless of the specific design of the venue. However, it does point to the risk of a duplication of prudential requirements when operational risks of transactions are already covered by either K-COH or K-DTF of the investment firms that are party to the transaction.

470. **EBA-ESMA analysis:** EBA and ESMA have collected data on the levels of activities of MTF and OTF asking to calculate three quantities: the level of activities that match 1) the K-COH definition, 2) the K-DTF definition and 3) all other activities, calculated in the same way as the K-COH and K-DTF. Table 6 of the Annex summarises the key statistics. Based on those data, it appears that the average increment in capital requirements from the introduction of a K-factor for MTF and OTF would have a limited impact if compared to the available capital (an average increment of around 8.5%). Only in few specific cases, the impact would be materially larger than the requirements under the previous regime.

13.6.5 Investment firms providing other prudentially regulated or non-regulated services

471. Summary of the responses: several respondents are against expanding the K-factor regime to other activities of investment firms.

472. Several individual responses noted that such activities (e.g. crowdfunding services) (i) should be covered by Pillar 2 (ii) that robust internal risk management is more effective than introducing new K-factors (iii) that when considering bringing activities under the K-factor regime, it should be considered whether this would result in discriminatory treatment versus entities that provide the same services without having an own funds requirements for that purpose.

473. However, one respondent generally advocates that all relevant regulated and, especially, non-regulated activities should be covered by a specific K-factor.

474. One respondent proposes that, when an investment firm is subject to the FOR, it should only be subject to Article 1 of Delegated Regulation (EU) 2023/1668[77] to avoid double counting. Additionally, a respondent suggests clarifying whether, in the context of Pillar 2, material risk (and associated capital) should be considered by adding this to the K-factor capital calculations, or by increasing the FOR with such an amount.

475. **EBA-ESMA analysis:** The comments did not provide additional elements concerning the provision of services (such as crowdfunding and services related to crypto-assets) and how these should be treated in the context of the own funds requirements.

476. It is worth noting that the provision of CSFPs would only be limited to those in Article 2(a) of the CSP regulation. Of the two services therein, the ones under (i), 'facilitation of granting of loans' would not be relevant for an investment firm, whereas those under point **(ii) should already be covered by the K-factors (where applicable).** Therefore, a clarification on the inclusion of the services under point (ii) would be sufficient for the purposes of the IFR review.

477. Concerning the provision of services related to crypto-assets, Section 9 elaborates on the interaction of the two regulations and the recommendations therein are applicable to this section as well.

13.7 Implications of the adoption of the Banking Package

13.7.1 Adoption of the fundamental review of the trading book (FRTB) and application of the simplified standardised approach to investment firms

478. Several respondents believe that the FRTB is not suitable for investment firms and should be available only on a voluntary basis. They are also of the view that the multiplication factors introduced in the CRR3 for the simplified standardised approach for market risk would lead to a disproportionate increase in capital requirements for investment firms.

[77] Commission Delegated Regulation (EU) 2023/1668 of 25 May 2023 with regard to regulatory technical standards specifying the measurement of risks or elements of risks not covered or not sufficiently covered by the own funds requirements and the indicative qualitative metrics for the amounts of additional own funds (link).

479. **EBA/ESMA analysis:** the current framework envisages the optionality for investment firms to use the FRTB, and it appears proportionate to keep the framework unchanged.

13.7.2 Credit valuation adjustment (CVA) for investment firms

480. Several respondents are of the view that the mandatory application of CRR3 CVA would be disproportionate and that it should be on a voluntary basis, or mandatory only for firms that opt for the FRTB. One respondent suggested that the CVA multiplier of the IFR could be increased from 1.5 to 2 as a compromise.

481. **EBA/ESMA analysis:** it appears proportionate to introduce the optionality for investment firms to apply the CVA approaches envisaged in the CRR3.

13.7.3 Definition of trading book

482. From the public consultation, a few respondents commented that the trading book boundary of the CRR3 may increase the complexity of the framework, and that a better alignment between IFR and CRR3 should not be a goal. Investment firms have very small room for regulatory arbitrage between the trading and the banking book, thus applying the CRR3 boundary may be disproportionate. Conversely, some respondents are of the view that the alignment between IFR and CRR3 on this issue may provide clarity.

483. Investment firms that do not hold an authorisation pursuant to points (3) or (6) of the MiFID are not authorised to invest in financial instruments that, under the IFR, should be booked in the trading book.

484. From the public consultation, stakeholders are supportive of introducing a waiver in order to allow non-trading investment firms to invest their own funds in financial instruments. Some respondents are of the view that there should be no quantitative or qualitative limits to investments of own funds by non-trading firms, while other respondents suggest that non-trading investment firms should be allowed to invest the equivalent of their own funds in liquid assets (as per Article 43 IFR) without those assets being placed in the trading book. The appreciation of these assets should also be excluded from the trading book, and a buffer of 25% should be granted.

485. **EBA/ESMA analysis:** the introduction of the boundary of the trading book envisaged in the CRR3 would increase the clarity and predictability of the framework, without increasing its complexity. It is also proportionate to allow no -trading firm to invest their own funds in liquid, low risk assets.

13.8 Liquidity requirements

13.8.1 General remarks

486. In general terms, respondents noted the following elements:

a) the importance of avoiding putting additional barriers to liquidity or capital circulation; or

b) pointing out to the fact that there is no market failure that would justify changes to the framework; or

c) the possibility of addressing this topic in the SREP framework.

13.8.2 Level of the liquidity requirements [Q18 of the discussion paper]

487. Most of the respondents highlighted that there is no need to include additional liquidity requirements for investment firms performing activities 3 and 6. Among the reasons put forward by the respondents, the majority highlighted the fact that this would be overly complicated and that this perspective can be adequately captured in the SREP assessment.

488. Furthermore, it was highlighted that investment firms performing these activities already have a liquidity risk management framework in place. Suggestions were received by few respondents to measure liquidity needs based on the specificity of the investment firms' business and the main sources of liquidity risks. These measures should include, among others, 'best estimate' cash forecasts (based on current market level), 'cash at risk' measures (maximum level of cash need based on market move scenarios for a given level of confidence) and stress tests (extreme scenarios of market moves) in line with the recommendations made in the Financial Stability Board (FSB)[78] consultation report on liquidity preparedness for margin and collateral call.

489. **EBA-ESMA analysis:** Based on the comments received, there is no obvious way forward on the treatment of liquidity requirements for the considered cases.

490. At least three options were considered:

a) **Option 1**: the EBA could include a recommendation suggesting increasing the level of liquidity requirements for firms trading on own account. This would be done by setting the liquidity requirements to 'n' months of fixed overheads, instead of one, only for firms trading on own account. This would require a change to the IFR.

b) **Option 2**: Recommend including a mandate in the IFR text for the EBA to set the liquidity requirements for investment firms trading on own account. The advice in response to the CfA would not specify how this would be done.

c) **Option 3**: Do nothing: leave the liquidity requirements as they are for all types of investment justified by the need to preserve the simplicity of the framework.

491. It is recommended not to amend the current framework (Option 3 above).

[78] Liquidity preparedness for margin and collateral calls: Consultation report, issued by the FSB on 17 April 2024 (link).

492. Concerning the recommendations related to the FSB publication, it is EBA-ESMA opinion that those are more suitable to address more the internal liquidity risk management of the firms than an ongoing liquidity requirement and they would be hard to transpose in this context (as the respondents also recognised).

13.8.3 Liquidity risk due to loans or provision of credit [Q19 of the discussion paper]

493. Most of the respondents suggested having no additional liquidity measure related to the activities of providing loans and credit to clients mainly because the activity is considered to be residual and as such it can be better captured in the SREP framework.

494. Few respondents, however, provided suggestions on how to possibly measure such risks, such as (i) calibrating the measure on the volume of loans; or (ii) calibrating the measure on a highly simplified liquidity mismatch;

495. **EBA-ESMA analysis**: Relying on SREP may be valid for this case under the assumption that the investment firms having such exposures are in limited number and subject to a frequent enough supervisory review. To note that one suggestion (calibrating the measure on the volume of loans) is not different from the treatment of guarantees provided to clients (which is set to 1.6% under the current IFR[79]).

13.8.4 Liquidity risk due to foreign exchange exposures [Q20 of the discussion paper]

496. Several respondents suggested that this type of risk could be addressed under the existing Pillar 2 framework. Some other respondents proposed different solutions to address this risk, for instance:

a) taking into account a certain percentage over the average variation of the exchange rate;

b) leveraging on the provisions included in the CRR;

c) having specific requirements for Euro and non-EUR.

497. **EBA-ESMA analysis**: As for the previous issue (provision of credit), relying on SREP may be valid for this case under the assumption that the investment firms having such exposures are subject to a review frequently enough.

13.8.5 Third country service and liquidity providers [Q21 Q22 of the discussion paper]

498. Only few respondents provided relevant examples, which include the potential disruptions related to the interruption of clearing services/credit lines from clearing firms or the different standard settlement cycles or different time zones. At the same time, it was highlighted that these risks are already addressed by risk management that identifies fallback solutions.

[79] See Article 45 of the IFR.

499. Other comments relate to the fact the issue is already covered in the SREP framework or by DORA for what concerns ICT aspects.

500. For this particular aspect, respondents did not provide examples that would be relevant for a broad set of investment firm. They also noted that, in accordance with the existing regulations, competent authorities already have the possibility of increasing the liquidity requirements for investment firms based on Regulation (EU) 2023/1651.

501. **EBA-ESMA analysis**: these aspects are indeed more difficult to capture via a liquidity requirement and should be left to specific regulations (e.g. DORA) or to the SREP.

502. It is recommended not to amend the current framework, as these aspects are more difficult to capture via a liquidity requirement and should be left to specific regulations or to the SREP.

13.8.6 List of high-quality liquid assets

503. Respondents provided different comments on how to amend the list of high-quality and liquid assets. In particular it has been suggested to:

a) remove the limit for certain CIUs, in particular money market funds, or raising the limit for CIUs in the IFR in general;

b) include the more principle-based requirements of Article 9(8) AIFMD to the IFD, according to which own funds, including any additional own funds, shall be invested in liquid assets or assets readily convertible to cash in the short term and shall not include speculative positions;

c) clarify if the excess of the net equity over the margin requirement can be used to meet the liquidity requirements under IFR;

d) include a portion of trade receivables as liquid assets (subject to a haircut) if receivable within 30 days for broker dealers;

e) include crypto-assets;

504. **EBA-ESMA analysis**: Point a) on CIU refers to positions that are already subject to a privileged treatment in favour of smaller investment firms. In general terms, it is not possible to conclude that this asset Class would be, in all cases, of high quality and liquid. Point b) is 'principle-based' and it does not seem to be an improvement in clarity with respect to the current provisions.

505. Point c), on clarifying that the excess of the net equity over the margin requirement can be used to meet the liquidity requirements, under IFR may be a valid one. This would require an amendment of the IFR. Concerning points d) on receivables as well as e) on crypto currencies, these cannot be guaranteed to be HQLA at all times.

506. In addition, there was one recommendation on improving the readability of the liquidity requirements of IFR by deleting the link to the Delegated Regulation (EU) 2015/61 in Article 43 paragraph 1, subparagraph 3 of IFR and to either include a full list of eligible liquid assets in Part V of IFR or, as an alternative, create a dedicated RTS under IFR, which explicitly spells out the assets which qualify as liquid assets under Article 43 of IFR.

507. **EBA-ESMA analysis**: There is no suggestion of substantially deviating from the list of HQLA in the Delegated Regulation (EU) 2015/61; therefore, producing an additional technical standard is not justifiable. Furthermore, including Delegated Regulation (EU) 2015/61 in the IFR would hardly improve the readability of that section.

13.8.7 Exemption under Article 43 of the IFR for small and non-interconnected investment firms [Q23 of the discussion paper]

508. Most of the respondents suggested keeping the exemption foreseen in Article 43 of the IFR, mainly leveraging the role of the competent authority in carrying out the assessment. A respondent asked the EBA to clarify that the exemption should not be limited to cases where there is a transfer, as already specified in the EBA guideline determining which services of investment firms can lead to a liquidity risk; another suggested to also allow MTF/OTF to be exempted. Only one respondent suggested removing the exemption, leveraging the fact that also small firms cover their monthly operational expenses and should be capable of being wound down in an orderly manner.

509. **EBA-ESMA analysis**: The current data show a limited application of the derogation. However, there is one Member State that is an outlier. This is shown in Table 4 of the Annex.

510. Therefore, it is better to keep the possibility of an exemption. Nonetheless, it should be noted that such an exemption should be granted by a competent authority on a case-by-case basis, as envisaged in the relevant guidelines. No case was made for investment firms operating an MTF and OTF; therefore, they should be treated as per the current framework.

13.8.8 Other potential amendments

511. In terms of other potential amendments, respondents also asked to: a) provide further guidance on the Pillar 2 framework as well as the interaction with stress testing and Pillar 2 requirements; b) specify that it is possible to use the liquidity buffer after a notification and so remove the approval of the competent authority; c) the treatment of encumbered assets for the purpose of calculating liquidity requirements; d) to recognise at 100% cash held in a foreign bank account in a country where they also have a branch.

512. **EBA-ESMA analysis: On point** a) it is not fully clear what further guidance should be provided; on point b) this aspect was already discussed in the past; it is suggested keeping as it is. On

point c), a clarification can be introduced in alignment with the CRR; and on point d) there is already a clarification in a QnA[80] on third countries' banks.

13.9 Prudential consolidation

13.9.1 Fine-tuning of definitions in the IFR

513. In this section, the feedback from the public consultation focused on the definition of UPIF, where the current definition results in a situation where a firm without any investment firms or financial institutions as subsidiaries is not required to consolidate. Some respondents consider that any risks associated with such a firm are already addressed by individual requirements, and any residual risks are not significant enough to necessitate consolidated supervision.

514. **EBA/ESMA analysis:** There are two potential ways forward: either amend the definition to include, as a minimum, ASU in the scope of the UPIF and then require prudential consolidation in these cases, or keep the current definition as it is, which would imply no consolidation for those partial cases. However, risks associated with ASUs and tied agents are likely insufficient to necessitate consolidated supervision on their own. Risks posed by tied agents are managed by the firm and ASUs do not generally contribute material risks that need to be capitalised.

515. One of the elements in the context of prudential consolidation that was mentioned in the context of the public consultation was the interaction between Article 7 of the IFR and Article 22 of the CRR. Respondents consider that applying both consolidation regimes within one group creates confusion and imposes double requirements.

516. **EBA/ESMA analysis:** As stated in the Discussion paper, it is considered that the IFR prudential consolidation rules are intentional with regards to the consolidation of IF-related activities under a 'specialised' parent undertaking. Should there be a change made and should banking supervisors consider it appropriate, this fine-tuning needed to avoid duplication of requirements should be done in the CRR.

13.9.2 Alignment between the IFR and the CRR in terms of scope and methods for prudential consolidation

517. In the context of the public consultation, respondents spanned the whole spectrum between approval of, and disagreement with, aligning the IFR requirements on prudential consolidation with those in the CRR, despite the clear call for alignment in the context of the development of the RTS on prudential consolidation for investment firms[81]. For those in favour of the alignment, extending the scope and methods for prudential consolidation of IFs

[80] QnA 2021 6299 Inclusion of short-term deposits in third country credit institutions as liquid assets (link).

[81] EBA-CP-2020-06 CP on draft RTS on prudential requirements for Investment Firms.docx

to those available for credit institutions was welcomed, while for those opposing this alignment, there were concerns that the extension of the options will lead to further excessive reporting obligations for investment firm groups, which, in addition to increasing operating costs, will also lead to excessive capital requirements that are not necessary.

518. **EBA/ESMA analysis:** As also stated in the discussion paper, it is considered that the limitations to the scope and methods available to IFs to carry out prudential consolidation are not warranted and ultimately result in considering these limitations as part of Pillar 2 requirements, as the risks related to jointly controlled investment firms, for instance, still need to be addressed. Furthermore, it remains unclear why there should be different prudential consolidation regimes for investment firms as opposed to credit institutions. This difference does create an unlevel playing field and may also result in difficulties for those investment firms (groups) part of banking groups.

519. As a specific case, comments were received during the public consultation with regards to the application of the prudential consolidation requirements to those fund managers whose principal business is mainly fund management activities rather than MiFID business. Furthermore, respondents suggest quantitative thresholds for identifying the principal activity (e.g. fund management business covers more than 50% of the activities).

520. **EBA/ESMA analysis**: The fund managers have their own prudential requirements, i.e. minimum own funds, governance and remuneration requirements, under the UCITSD and AIFMD; however, in practice, the same governance and remuneration requirements are applied cross the group and the employees are servicing all the group entities, e.g. an internal outsourcing of a risk management. Therefore, the consolidation of fund managers in the investment firm groups is in line with the operational structure of groups, and it takes into account the total fixed overheads of a group.

521. One point made during the public consultation refers to the recognition for the adequacy of the own funds requirements a firm's non-EU subsidiaries comply within sophisticated jurisdictions (from a prudential policy perspective, such as the United States, Australia, Singapore, the United Kingdom, etc.). The respondent considers that NCAs should be able to determine the adequacy of the prudential standards in the non-EU jurisdictions that the investment firm's subsidiaries are active in not based on whether those standards result in exactly the same absolute level of requirements as expected under the IFR in the EU, but on the basis of whether the prudential rules in that non-EU jurisdiction achieve a similar outcome.

522. **EBA/ESMA analysis:** With regards to the broad establishment of an equivalence regime, the responsibility for this process lies with the Commission and is outside the scope of this document. However, some clarification can be found in paragraph 20 of the EBA Guidelines on the application of the Group Capital Test: if there is an EC equivalence assessment, the capital requirements calculated according to that third country prudential regime should be

considered as having a satisfactory level of prudence and if there is no equivalence assessment, the notional own funds held by the first EU parent in respect of its third country subsidiary should at least equal the IFR capital requirements (Part Three) and capital held against concentration risk (Part Four).

13.9.3 Application of the group capital test

523. Respondents from the public consultation have contrasting views. Some respondents argue that the consolidation approaches in the IFR should be reverted, with the GCT as the baseline consolidation methodology, and the prudential consolidation (i.e. Article 7 of the IFR) as an optionality. Other respondents point to the extraterritoriality of the IFR/IFD regime under Article 7 of the IFR, which would significantly undercut the competitive nature of EU headquartered investment firms and the level playing field with similar firms that are not EU headquartered. Some respondents elaborated that having the GCT available to EU headquarters investment firm groups allows them to compete on a level playing field with their peers headquartered in non-EU jurisdictions by allowing them to forego the requirements and application of IFD governance and remuneration requirements to their non-EU subsidiaries: this is particularly important, as the EU is the only major global financial services jurisdiction that has chosen to apply governance, remuneration, and capital requirements derived from the Basel Framework to investment firms.

524. **EBA/ESMA analysis:** when performing the cost-benefit analysis of the guidelines on GCT, the EBA observed that the GCT is used by two different kinds of investment firm groups: (i) simple groups of relatively small investment firms, and (ii) large groups with subsidiaries in third countries. While the former groups use the GCT to reduce the burden of the prudential consolidation, the latter groups use the GCT to avoid the governance and remuneration requirements for their subsidiaries outside the EU.

13.9.4 Consolidation of Crowdfunding services providers

525. EBA/ESMA analysis: With the ECSPR already being in force since November 2021, the IFR/IFD framework should clearly define how CSFPs are taken into account as part of an investment firm group. It is recommended that the definition of ‘consolidated situation’ be amended to include CSFPs.

13.10 Interactions of IFD and IFR with other regulations

13.10.1 MiFID services provided by AIF management companies and UCITS managers

526. Most respondents question EBA’s mandate for the two proposals. Three respondents see the need for ‘same risk – same rule’. Two of them suggest aligning with the CBA approach, i.e. additional K-factor requirements based on provision of service to be included in the firm’s overall capital requirement. One respondent suggests a ‘two-fold approach’ (like currently in the NL): Fund managers authorised for MiFID service should be subject to the highest of the

capital requirements as calculated under AIFMD/UCITSD or IFR, although it might burden fund managers providing MiFID service as top up.

527. Many respondents disagree with the option to introduce requirements limiting the amount of provided MiFID services by UCITS management companies and AIFMs. While only very few respondents see a higher risk for fund managers when provided MiFID services on top, most respondents deny such risks.

528. **EBA-ESMA analysis:** The EBA collected data on the volume of additional services provided by UCITS managers and AIF management companies. The results are summarised in Table 37 to Table 40. The two tables show the ratio of the volume of MiFID services provided under the UCITSD and AIFMD exemptions and the size of the underlying funds.

529. For UCITS managers, 25% of the respondents reported that they offer additional MiFID services almost of the same size as the mutual funds (81%). 5% of the respondents such ratio is much bigger (ancillary services are 10 times larger than the size of the mutual funds). Furthermore, it is worth noting that the service that is provided is mostly discretionary portfolio management related to tradeable financial instruments.

530. The same data provided by AIF management companies different substantially, as similar ratios are reported only by less than 5% of the respondents (where the MiFID services are 4 times larger than the size of the fund itself). It should be noted that managers can have at the same time UCITS and AIFM authorisations and that some jurisdictions have flagged similar situations as for UCITS managers.

531. Therefore, should those figures be representative of the whole population, there is quantitative evidence to raise concerns about the provision of these additional services by UCITS managers, might not be covered by adequate own funds in comparison to what is required for MiFID investment firms by using the K-factor requirements. This seems to be more a UCITSD issue than an AIFMD issue.

13.10.2 Interaction of MiCA and IFD/ IFR [Q24 and Q25 of the discussion paper]

Services related to crypto-assets provided by investment firms

532. Most respondents have not expressed concerns regarding a level playing field between CASPs and investment firms providing crypto-asset related services. One respondent sees a risk of double counting when introducing overlapping categories for the purposes of K-factor application. Another respondent considers that there are no substantiated concerns for converging prudential rules for CASPs and investment firms and argues that their risk profiles differ fundamentally. One respondent expressed concern that there could be discriminatory treatment for investment firms versus other CASPs, since the latter have a lower level of capital and are not subject to K-factors.

533. Several respondents identify areas for further analysis regarding the influence of crypto-assets (exposures and services) on the IFR/IFD. One respondent opines that European institutions must first make a thorough analysis of the effects of the Basel Framework developed for banks for the crypto-asset market in the EU. One other respondent argues that a prerequisite for a discussion on how crypto-assets could possibly influence the IFR/IFD in the future would be a sufficiently detailed empirical analysis presented by EBA and ESMA why and to which extent exposures of investment firms to crypto-assets raise regulatory concerns. Another respondent argues that clarity is needed on the inclusion of crypto-assets within K-factors and how to address the prudential treatment of these assets. Furthermore, they argued that a distinction between proprietary trading positions is crucial, and that options should be explored for more granular capital requirements based on activity types to better reflect the risk profile associated with crypto-asset exposures.

Capital requirements under IFR/IFD

534. On this aspect, please see Recommendation 22: Prudential treatment of crypto-asset in the NTB.

Requirements under MiCA that are applicable to an investment firm [Q26 of the discussion paper]

535. One respondent opines that activities considered equivalent to MiFID activities should have the same prudential requirements. Another respondent recognises the importance of aligning the prudential regimes of IFR/IFD, MiCA and EMD, but stresses that this should happen simultaneously to preserve the level playing field of three different types of entities.

536. **EBA-ESMA analysis**: The EBA SREP guidelines for investment firms may be upgraded to include the possibility of investment firms providing services outside the MiCA authorisation. In this sense, Article 45(2) of the IFD does not need to be amended, as it is general enough to cover all services provided by an investment firm.

537. Nonetheless, a simultaneous review of all regulations, as suggested by one of the respondents, may be difficult to implement in practice.

13.11 Remuneration and its governance

13.11.1 Scope of application – Question 27

538. The discussion paper raised the question if the different scope of application of remuneration requirements is a concern for firms regarding the level playing field between different investment firms (Class 1 minus and Class 2), UCITS management companies and AIFMs.

Scope of allocation of remuneration requirements – respondents views

539. Respondents questioned the merit of aligning the remuneration requirements for investment firms and UCITS management companies and AIFMs. The coexistence of different scopes for financial institutions, i.e. Class 1 minus subject to CRD, investment firms subject to IFD or management companies subject to AIFMD or UCITSD does not raise any concern.

540. Respondents added that sectoral adaptations are preferred compared to uniform rules. Sector-specific regulations ensure remuneration practices align with the risk and business profiles of different entities. Uniform regulation may not address unique risks and business models of each sector. Respondents are not aware of any practical implications of existing differences for the ability to recruit and retain talent. One respondent does not see evidence of systemic macroprudential risks at AIFMs and UCITS management companies justifying enhanced remuneration requirements.

541. Respondents would appreciate the introduction under the IFD of a provision that would allow the subsidiaries of an investment firm not to apply the remuneration requirements on a consolidated basis. In other words, it should be possible to apply other specific remuneration provisions to subsidiaries if they are subject to sector-specific rules in accordance with other EU legislation (e.g. AIFM/UCITS Directives) similar to Article 109 CRD.

542. Respondents found that ESMA guidelines on certain aspects of the MiFID II remuneration requirements for Class 3 investment firms are too strict. Small and non-interconnected investment firms should be exempt from those rules.

EBA/ESMA analysis:

543. The remuneration provisions of all directives are based on the same principles. While there is no general need to fully align all provisions between different directives, the aspect of applying policies on a group-wide level could be aligned in IFD to parallel the approach under Article 109 CRD, i.e. excluding firms that are subject to a specific remuneration framework from the application of remuneration requirements on a consolidated basis. This would reduce the cost for complying with potentially overlapping remuneration requirements under different directives. This alignment would also be consistent with the situation of investment firms that pass the group capital test (see also section on prudential consolidation).

544. The MiFID II remuneration requirements aim to deal with conflicts of interest that may arise due to the remuneration policies and practices of staff providing investment services. Such conflicts of interest may arise no matter the size of the firm. The ESMA MiFID II Guidelines on certain aspects of the MiFID II remuneration requirements aim to provide guidance on such requirements, including on how to better align the interests of the firm and relevant staff with that of clients in the middle to longer term through *ex post* adjustment mechanisms, depending on the nature, scale and complexity of their activities. The MiFID II guidelines give some examples of *ex post* adjustment mechanisms but do not prescribe any specific form. Such *ex post* adjustments do not relate to any requirements included in the IFR/IFD. A change

of MiFID or ESMA Guidelines to exclude Class 3 firms is not deemed appropriate for this reason.

13.11.2 Governance requirements on remuneration provisions – Question 28

545. **The discussion paper raised the question** of whether the different provisions on remuneration policies, related to governance requirements, and the different approaches to identifying the staff to whom they apply, are 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.

Identification of risk takers – respondents' views

546. **Respondents** did not identify significant issues regarding different provisions on remuneration policies, governance requirements, or staff identification. While some differences exist, no major concerns regarding the level playing field among different types of firms have been identified. Overall, respondents appreciate the balance between consistent principles and sector-specific frameworks. In particular, AIFMD/UCITS provides greater flexibility in identifying Material Risk Takers (identified staff) and involving regulators in this process.

547. Other respondents still point to the fact that greater alignment on criteria for the identification of risk takers could increase consistency between different investment firms. Respondents feel that the principle of proportionality is not adequately implemented in the Commission Delegated Regulation (EU) 2021/2154[82] (CDR), in particular in the qualitative criteria for identifying staff members that are stricter for investment firms than for banks. Respondents criticise that the Commission Delegated Regulation (EU) 2021/2154 on identified staff for investment firms mirrors rules imposed on relevant staff from the CRD framework[83] rather than addressing the specificities of investment firms that are subject to the IFD framework.

548. Regarding the identification of staff, respondents added that the current thresholds for classifying employees as 'identified staff' are set at EUR 500 000. Article 30(1) IFD includes the group of identified staff that is subject to the requirements on variable remuneration; also any employees receiving overall remuneration equal to at least the lowest remuneration

[82] Commission Delegated Regulation (EU) 2021/2154 of 13 August 2021 supplementing Directive (EU) 2019/2034 of the European Parliament and of the Council with regard to regulatory technical standards specifying appropriate criteria to identify categories of staff whose professional activities have a material impact on the risk profile of an investment firm or of the assets that it manages.

[83] Commission Delegated Regulation (EU) 2021/923 of 25 March 2021 supplementing Directive 2013/36/EU of the European Parliament and of the Council with regard to regulatory technical standards setting out the criteria to define managerial responsibility, control functions, material business units and a significant impact on a material business unit's risk profile, and setting out criteria for identifying staff members or categories of staff whose professional activities have an impact on the institution's risk profile that is comparably as material as that of staff members or categories of staff referred to in Article 92(3) of that Directive

received by senior management or risk takers whose professional activities have a material impact on the risk profile of the investment firm or of the assets that it manages. Some respondents suggest aligning the framework with the AIFMD and UCITS Directive that do not set quantitative criteria. Moreover, it is suggested by other respondents to remove the requirement for the regulatory approval to exclude staff earning above EUR 750 000 from identified staff, as this creates an additional burden.

EBA/ESMA analysis:

549. While overall the requirements on the identification of staff do not cause significant issues, it would be appropriate to align the quantitative criteria in IFD with the ones under CRD, i.e. while the so-called 'remuneration bracket criterion' exists under IFD it does not exist any longer under the current CRD framework. The criterion had been removed as it led to the identification of staff that afterwards is again excluded following further detailed risk assessments. This approach was causing additional burden.

550. Commission Delegated Regulation (EU) 2021/2154 on identified staff for investment firms has been construed based on the Commission Delegated Regulation for banks as investment firms also have been subject to those requirements and as for larger investment firms the organisational structures are similar. For smaller firms some of the criteria will not lead to the identification of staff, e.g. as they do not have managerial responsibility below the level of senior management, which is in line with a proportionate approach.

551. Quantitative criteria provide an initial assumption that can be rebutted that staff has a material impact on the risk profile. Remuneration levels correspond to a large extent to the competencies and responsibilities of staff and therefore their potential impact on the risk profile and should therefore be maintained. The thresholds set in Commission Delegated Regulation (EU) 2021/2154 for identifying staff mirror the thresholds set in CRD. In particular, the requirement that staff identified under the criteria at EUR 750 000 can only be excluded from the group of identified staff subject to supervisory approval ensures close supervision of the correct identification of staff.

Specific suggestions regarding the requirements on variable remuneration – respondents' views

552. Respondents suggest simplifying the remuneration framework and to remove the minimum retention period for vested deferred remuneration.

553. Respondents would find it appropriate to allow dividends to accrue during deferral periods and to remove the limits on the fixed to variable pay ratio, ensuring an appropriate balance instead.

EBA/ESMA analysis:

554. A simplification of some provisions, and, in particular, the requirements to apply a retention period, might be possible but would lead to a situation where the requirements are not any longer fully aligned with the FSB remuneration principles. However, since those principles apply only to large credit institutions. While the IFD framework has so far remained consistent with them, changes to the IFD framework would not lead to an issue of non-compliance with the FSB principles.

555. While retention periods lead to administrative burden, they are still meaningful to ensure some risk alignment if the deferral requirement is not applied. However, in such cases also the requirement to pay out variable remuneration is, in most cases, disapplied and with it the need to apply retention periods.

556. Where instruments are awarded as part of the variable remuneration, the retention period is usually short (6 months to one year) compared to the deferral period (three to five years). In addition, the mechanism of implicit risk adjustments is unlikely to lead to a strong impact on risk-taking behaviour for most identified staff. The price of the share or value of the IF's equity is driven by many factors (e.g. market trends, valuation rules) that cannot be influenced by the identified staff, unless they are at the highest hierarchical levels[84]. Considering this and the principle of proportionality, the retention requirement could be removed to reduce the burden for IF. However, such a change would lead to a small inconsistency towards CRD requirements.

557. The accrual of dividends during deferral periods would contradict the fact that the instruments are not yet owned by staff. Allowing dividends to accrue might also lead to complex administrative systems, considering that the firms often do not hold the instruments during deferral periods, i.e. there is no effective payment of dividends. Dividends would have to be accounted for when the remuneration vests and on a pro rata basis, causing challenges for the application of malus and claw back.

558. Such an approach on dividends would also require setting an additional requirement for calculating the ratio between variable and fixed remuneration under the remuneration policy for investment firms. If implemented for consistency within CRD, this would affect the calculation of the so-called bonus cap. The limitation of the ratio of variable and fixed remuneration in CRD (bonus cap) and within remuneration policies of investment firms is thought to limit incentives for risk. Therefore, the EBA does not plan to change its guidelines on the approach on accrual of dividends.

Gender-neutral remuneration policies – Respondents' views

559. Respondents, regarding the aspect of gender neutrality, point to the Pay Transparency Directive, to be implemented EU-wide by June 2026 and which will address gender neutrality

[84] See also BCBS Range of methodologies for risk and performance alignment of remuneration, May 2011, paragraph 163.

comprehensively across sectors. Respondents encourage avoiding regulatory layering and ensuring the financial sector does not have stricter requirements than other sectors regarding equal pay. It would be favourable to adopt an approach aimed at harmonising European regulations concerning diversity, equity and inclusion in corporate governance. Specific adjustments to UCITS Directive and AIFMD are therefore in their view not needed.

EBA/ESMA analysis:

560. The future requirements under the Pay Transparency Directive will not apply to all investment firms or managers. While the requirements on gender neutrality have been made more explicit in some sectoral regulations, gender-neutral remuneration is a principle that applies to all firms in any case, as the principle of equal pay for equal work forms part of the TFEU.

561. Considering that the requirements apply and that the financial sector in the EU shows the highest gender pay gap[85], requirements to have gender-neutral remuneration policies are not disproportionate. The approach under IFD should be retained.

Setting up of risk and remuneration committees – respondents views

562. Respondents raised some concerns regarding the requirement on investment firms to establish a risk and a remuneration committee, which has to be instigated at the level of the licensed entity in the cases where the criteria in point (a) of Article 32(4) IFD are not met (i.e. the investment firm has total assets of above EUR 100 mn).

563. Respondents also question the requirement under the EBA GL that the majority of Committee Members must be independent and find this approach disproportionate, especially for smaller/medium-sized investment firms.

564. Respondents point to the fact that the new IFR/IFD regime introduces stricter governance for investment firms compared to banks and Class 1 minus investment firms, as investment firms above the EUR 100 mn threshold must establish risk and remuneration committees, even if they are small or mid-sized, while under CRD this applies only to significant credit institutions.

565. Respondents commented that the requirement to set up committees triggers significant costs and efforts, especially for firms without a supervisory board or non-executives at the entity level due to their legal form. For some firms it is necessary to recruit the needed number of non-executive directors and to perform their suitability assessment. The application of the requirement for the risk committee on an individual basis can create an additional burden as compared to the remuneration committee that can be formed at group level.

EBA/ESMA analysis:

[85] Eurostat, Gender pay gap statistics, data from November 2021 and March 2024 (link).

566. The difference between the approach to committees in IFD and CRD is obvious. Class 1 investment firms are subject to the CRD requirements. The threshold set in IFD that requires the establishment of such committees is much lower as under CRD, and leads to a unlevel playing field and additional costs for investment firms.

567. For smaller Class 2 firms, a hard requirement to establish risk and remuneration committees can indeed be burdensome. This is particularly true considering that many such firms, while exceeding the threshold, have small boards or no supervisory boards or non-executive directors at all. Having to form committees implicitly requires having a sufficient number of non-executive directors in the management body, which can trigger additional costs if they have to be recruited in addition to the existing members of the management body.

568. Whereas the IFD allows for the remuneration committees to be established at group level, the risk committee, differently from the remuneration committee, has to also be established at the individual level, not only at the consolidated level, leading to additional burden.

569. Where committees are established, they benefit from the presence of independent members, the respective EBA Guidelines allow for a proportionate application and should be retained.

13.11.3 Proportionality and derogations in the area of remuneration provisions (Question 29)

570. The discussion paper raised the question if the different provisions, criteria and thresholds regarding the application of derogations to the provisions on variable remuneration, which apply to all investment firms equally without consideration of their specific business model, pose 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.

Thresholds for the application of derogations – respondents views

571. Respondents do not advocate for an alignment of UCITS and AIFMD with IFD rules. However, in some Member States the absence of a specific derogation for identified staff with low variable remuneration seems to be an issue for such firms.

572. Respondents stressed that between CRD and IFD, a significant gap exists between the 'de minimis' thresholds (CRD: EUR 5bn increasing to EUR 15 bn under certain conditions) compared to the IFD threshold (EUR 100 m). Other respondents find the thresholds set for Class 2 investment firms very low, especially as they include off-balance-sheet assets. (see also question 27).

573. Article 32(5) sets conditions for increasing the threshold up to EUR 300 mn of assets to benefit from the derogation foreseen by Article 32(4)(a) and to certain other requirements. Condition (a) requires that 'the investment firm is not, in the Member State in which it is established, one of the three largest investment firms in terms of total value of assets'.

Respondents comment that this additional condition would lead to an unlevel playing field at Union level.

574. Different types of investment firm business model have different balance sheet sizes. Respondents comment that the balance sheet threshold that triggers the 'enhanced' remuneration and governance rules has been calibrated for all investment firms, regardless of the business model. The current calibration of the threshold is seen as disproportionately impacting EU market makers.

EBA/ESMA analysis (see also Annex II section on remuneration):

575. While the business models of investment firms differ and have a significant impact on the total assets, business models that require the holding of client assets pose more risks to clients and markets than other business models. Business models differ significantly. i.e. there are no standardised business models, and therefore it is not possible to calibrate different thresholds that are suitable for all possible different business models.

576. While thresholds for Class 1 minus investment firms are higher, they are subject to the CRD framework, and some of them cannot apply the institution-wide derogation regarding the requirement to pay out variable remuneration partly in instruments and under deferral arrangements, as their total assets exceed even the CRD thresholds.

577. At the same time, it needs to be considered that large investment firms are subject to the requirement to limit the ratio between variable and fixed remuneration to 100% (200% with shareholder approval), also leading to an unlevel playing field with Class 2 investment firms.

578. If the higher CRD threshold were applied to all Class 2 investment firms, it would be similar to removing the deferral and pay out in instruments requirements totally, which would not be appropriate.

579. A certain increase of the threshold for Class 2 investment firms seems to be possible, as it would ease the burden for additional investment firms, while still most of the assets would be managed by firms that continue to apply all the remuneration requirements, e.g. the maximum threshold could be set at EUR 500 mn total assets, also considering the nominal growth of managed assets over time. Based on a representative sample available to EBA of 145 investment firms, 121 (83.45%) have total assets of up to EUR 300 mn (the possible highest threshold for the application of derogations under Article 32(5) IFD), which represents only 0.31% of the total assets represented by the sample[86]. 100 (68.97%) investments have total assets up to EUR 100 mn, which represents 0.11% of the total assets of the sample. In

[86] Data are collected in line with EBA GL available under: https://www.eba.europa.eu/activities/single-rulebook/regulatory-activities/remuneration/guidelines-remuneration-and-gender-pay-gap-benchmarking-exercises-under-ifd and cover at least 50% of the total assets of investment firms in each Member State, including, in any case, the three largest Class 2 investment firms,

other words, most assets are held by a limited number of investment firms with total assets that exceed those thresholds. At the same time, based on the data collected, the number of staff affected by remuneration requirements is low; therefore, the ongoing administrative costs are seen as proportionate. However, costs for establishing the deferral arrangements and for the creation of instruments are triggered independently of the number of staff that are subject to such requirements. Class 3 investment firms are not subject to those requirements and are therefore not included in the sample.

580. Member States can already increase the threshold up to EUR 300 mn, but the condition in Article 32(5) points (a) to (d) lead to a situation where the three largest investment firms are not able to benefit from higher thresholds in line with the provisions in Article 32(5)(a) IFD, leading to an unlevel playing field, e.g. between the situation of branches of investment firms authorised in other EU Member States and subsidiaries in the same Member State. Also, the application of the conditions in points (b) to (d) lead to additional burden. Considering the stability of the European financial market, it would not be harmful to remove those conditions. Where Member States would see the need to ensure locally a stronger alignment of variable remuneration and risks, it would still be possible to introduce stricter requirements, as the IFD is based on minimum harmonisation.

581. At the same time, for staff with a low level of remuneration (EUR 50 000), different additional criteria need to be met for applying the derogations based on the ratio between variable and total remuneration. Under CRD, the derogation is available to staff with a low level of variable remuneration as long as the ratio does not exceed 1/3, while under IFD, a lower level of the ratio of 1/4 has been set.

13.11.4 Flexibility of the remuneration framework – Respondents' views

582. **Single respondents** suggest that the remuneration provisions should be more individual and proportionate to the size, nature, scope, and complexity of investment firms or that firms should have more flexibility in implementing requirements, considering their unique structures and risk profiles. One respondent suggested that under IFD a more flexible catalogue for the use of instruments could be added.

583. EBA's/ESMA's analysis: IFD and EBA Guidelines on sound remuneration policies under IFD already foresee proportionality and a relatively wide catalogue of instruments is available to investment firms for the payout of variable remuneration. Giving more freedom to firms to regulate themselves in this area would not lead to a level playing field or even create the risk that incentives for short term-oriented risk-taking reappear.

13.11.5 Disclosure and transparency – Question 30

584. **The discussion paper raised the question if** the different provisions regarding oversight on remuneration policies, disclosure and transparency are a concern for firms regarding the level

playing field between different investment firms, UCITS management companies and AIFMs (Question 30).

Disclosure and transparency – respondents' views

585. Respondents agree that differences in disclosure and transparency requirements do not prevent a level playing field or create unfair costs. They appreciate the balance between consistent principles and sector-specific frameworks under CRD and IFD.

586. Other respondents think that some alignments between the requirements for different types of investment firms (IFD, UCITS and AIFMD) could be beneficial, in particular, if such firms are within the same group.

587. Respondents raise concerns regarding the detailed granularity of disclosures required under IFD and CRD and suggest reducing them, taking into account their usefulness to stakeholders and the impact on the competitiveness of EU financial institutions compared to non-EU players.

EBA/ESMA analysis:

588. Reducing the regulatory burden for disclosures and reporting is part of the regulatory agenda already agreed.

589. Where different requirements exist in parallel, e.g. within groups, IF's systems needed to reflect different reporting and disclosure requirements within the IT implementation, which could cause additional costs. However, those one-off costs should already be absorbed by investment firms.

590. In general, a closer alignment of remuneration requirements between investment firms and other investment management firms could lead to a better level playing field and more transparency.

13.12 Other elements

13.12.1 Extending reporting requirements to financial information

591. It was noted that, in several Member States, competent authorities already require this information based on national laws or powers. This, however, is not harmonised at Union level and therefore results in additional burden for investment firms operating in different Member States.

592. Some respondents noted that a harmonisation may be useful, as long as this does not lead to duplication of reporting requirements, which seems to be difficult to ensure under the scenario proposed in the discussion paper.

593. Most of the other respondents opposed the idea of extending the reporting requirements to financial information and provided several reasons:

a) Additional burden and costs: This proposal could diverge from the IFR and IFD's intent to create a regulatory framework proportionate to a firm's risk profile. This requirement would increase financial burdens for data conversion and amplify operational demands.

b) Class 3 investment firms: Class 3 Investment Firms are deemed to be small and non-interconnected and, therefore, do not pose systemic risk when compared to other classes of Investment Firms. Specifically, the imposition of quarterly reporting aligns Class 3 firms with larger entities, escalating their costs due to the lack of a standardised and free XBRL conversion tool across Member States.

c) Barriers to entry: these reporting requirements would increase barriers to entry for start-up investment firms that could meet the definitions of small and non-interconnected under Article 12(1) of the IFR.

594. As an alternative proposal, one respondent noted that redirecting national competent authority resources to monitor lower-risk Class 3 firms may detract from overseeing higher-risk entities, thus undermining the national competent authorities' overarching goal of financial stability within the EU.

595. Finally, most of the respondents recommend avoiding additional burden, especially for smaller investment firms.

EBA/ESMA analysis

596. In general terms, it is worth noting the usefulness of requiring this info on a periodic basis. It is also useful to recall that, relying on the requirements based national laws or powers of the competent authorities would be detrimental to the harmonisation of the supervisory practices in the Union.

597. Concerning the additional burden of reporting financial information via standardised templates, it could be noted that the current reporting requirements already envisage the use of the EBA templates. Specifically on the respondents noting the use of the EBA standards based on CSV-based XBRL, it is worth noting that these formats are already applicable today and requested only as secondary reporting.

598. Two options were considered:

a) **Option 1:** one option would be to leave things as they are.

b) **Option 2:** an alternative option would be to extend reporting requirements to financial information, which would require a change to the IFR in Article 54.

599. It is worth nothing that:

a) At the level of the subgroup, several CAs expressed concern about the additional costs of these requirements. Nonetheless, different views were expressed on the advantages of introducing these requirements.

b) Several CAs confirmed that financial information is already collected and used for supervisory purposes, although this is done via different channels and formats (including pdf).

c) Some CA commented that some countries need to have an EU legal basis to collect financial information, the proper way would be to introduce such requirements into the IFD leaving implementation on the national law and not specifying any content or format requirements at the EU level.

d) Different opinions were reported by the CAs on the frequency of the reporting (also for Class 3 firms) with some CA supporting the quarterly frequency, also for Class 3 firms. The rationale is that quarterly reporting enables supervisors to monitor investment firms' financial situation and how their capital develops during the year and whether it is still sufficient to meet the capital requirement higher than PMR or FOR, so that annual reporting would not be sufficient.

e) Finally, several CAs supported taking into account local accounting standards to minimise the costs for the investment firms.

13.12.2 Firms active in the commodity markets currently not subject to prudential requirements

600. Concerning the request of preliminary views concerning the potential introduction of a prudential treatment of large commodity firms, most of the respondents focused on the following elements:

a) Differences with respect to financial institutions;

b) Market failures;

c) Different roles of commodity firms;

d) Liquidity, market volatility and impact;

e) Competitiveness vis-à-vis third country firms;

f) Other elements for consideration.

601. **Differences with respect to financial institutions:** overall, respondents do not believe that prudential requirements designed for financial markets should be extended to commodity firms. This was justified by: (1) EU commodity firms have unique characteristics given they are tied to physical markets and are already subject to substantial regulation. (2) Commodity trading firms are typically involved in physical activities requiring different risk management strategies compared to financial firms. (3) The liquid capital needs in commodities markets and of commodity firms are very specific and differ from the needs of financial institutions.

(4) The core activities of most commodity firms involve the supply, refining, transport, processing, and storage of energy, agricultural commodities, or metals. Finally, there is a need for a calibrated approach and differentiation of the different sectors of the commodity physical markets.

602. **Market failures:** respondents also stressed that the introduction of prudential requirements for energy market participants as investment firms would not address the root causes of the energy crisis. In addition, respondents stated that the investment firm status of energy market participants and loss of the ancillary activity exemption would not address the root causes or issues that arose during the recent energy crisis.

603. **Different role of commodity firms:** Accordingly, respondents suggested that any proposal to introduce prudential requirements for firms in commodity markets should be based on clear evidence of specific systemic risk or significant market failures. Furthermore, European commodity firms need to use their funds to invest in the means of ensuring the supply of their underlying commodities to Europe and that commodity markets have performed well under stress, and introducing more barriers to hedging through increased costs and complexity would destabilise the mechanisms that commodity firms use to support these markets. Respondents therefore claim that maintaining liquidity is crucial for the commodity derivatives markets, and reduced liquidity can lead to increased volatility and less certainty in hedging.

604. **Liquidity, market volatility and impact:** Technically, respondents also suggest that the imposition of additional prudential requirements on commodities firms could exacerbate the demand for liquidity caused by spikes in margin calls. Furthermore, reduced liquidity due to increased costs and increased volatility impacting the real economy are immediate risks of imposing additional prudential regulation on commodity firms. Imposing prudential requirements could reduce market liquidity by increasing the cost of capital for these firms.

605. **Competitiveness vis-à-vis third country firms:** respondents claim that imposing prudential regulation on commodity firms that are not currently subject to such requirements would impair their ability to hedge by adding costs and restrictions. There are significant concerns around the impact of introducing a prudential regime for commodities firms, particularly due to its potential impact on the competitiveness of the EU. They therefore conclude that additional prudential regulation will disproportionately harm European commodity firms, leading to a significant competitive disadvantage against global counterparts. As a consequence, imposing additional costs and operational burdens could lead to commodity firms potentially exiting the market, impacting EU commodity market liquidity and energy end consumers.

606. **Other elements for consideration:**Increasing the costs of hedging risks inflationary consequences and reduction of firms' ability to invest in production assets and the energy transition.

EBA/ESMA analysis

607. The analysis and proposal concerning the possibility of introducing prudential requirements to (large) firms active in the commodity and energy markets are currently left outside the scope of this report. A separate report dedicated to this topic can be developed if requested by the Commission.