Frankfurt,
8 October 2024

**BVI[1] response to the consultation paper on Guidelines on Liquidity Management Tools of UCITS and open-ended AIFs**

We would like to take this opportunity to respond to ESMA's consultation paper on guidelines on liquidity management tools (LMTs) of UCITS and open-ended AIFs.

It is of utmost importance that the draft RTS and ESMA guidelines meet the objective of the AIFMD review that LMTs are effective and efficient in stressed market conditions. We therefore see a need for extensive adjustments to the draft guidelines, in particular to take better account of existing practices in the use of LMTs (such as redemption gates), to replace the high level of detail with more principle-based rules and to better consider the processes and structures of open-ended funds that mainly invest in illiquid assets.

## General Principles

**Q1: Do you agree with the list of elements included under paragraph 17 of Section 6.5.1 of the draft guidelines that the manager should consider in the selection of LMTs? Are there any other elements that should be considered?**

First of all, we disagree with the detailed approach which comes with an exhaustive and cumulative list of criteria and call for a more principle-based approach. In general, we agree with ESMA that the investment strategy, the liquidity profile and the redemption policy of a fund should be decisive for the selection of LMTs because these criteria are expressly required by the AIFMD review for the selection (cf. Article 16(2b) AIFMD and Article 18a(2) UCITS Directive). In addition, these criteria must be consistent as part of the liquidity management of a fund manager. The individual criteria for the liquidity profile are set out, for example, in Article 47(1)(b) of Delegated Regulation (EU) No. 231/2013. These criteria are based on the principle of proportionality, which is completely disregarded in the draft guidelines.

In this context, we do not find it practicable to first define general selection criteria and then define additional and specific selection criteria for each individual LMT in the subsequent sections of the draft guidelines. This approach is not consistent because it results in the discretion for fund managers regarding different LMTs being extremely limited by making recommendations for which funds these should be used in the specific selection criteria for the individual LMTs.

In addition, not all of the factors listed in paragraph 17 of the draft guidelines are necessarily relevant in order to select a particular LMT. This can already be recognised by the fact that the last letter e) of the list in particular is apparently only relevant for the LMT anti-dilution levy (in this context, we refer to our answer to Q2). Hence, we see the list as an unnecessary administrative burden because it forces the

[1] BVI represents the interests of the German fund industry at national and international level. The association promotes sensible regulation of the fund business as well as fair competition vis-à-vis policy makers and regulators. Asset managers act as trustees in the sole interest of the investor and are subject to strict regulation. Funds match funding investors and the capital demands of companies and governments, thus fulfilling an important macro-economic function. BVI's 116 members manage assets of some EUR 4 trillion for retail investors, insurance companies, pension and retirement schemes, banks, churches and foundations. With a share of 27%, Germany represents the largest fund market in the EU. BVI's ID number in the EU Transparency Register is 96816064173-47. For more information, please visit www.bvi.de/en

management company to document why it has decided in favour of or against a particular LMT on the basis of all of the criteria listed.

Irrespective of this, we object to an obligation to use the results of the **liquidity stress tests (LSTs)** in any way for selecting LMTs. It is not necessary to do a detailed LST on position level (which is a burdensome effort) as the manager considers the liquidity of the specific asset categories and other risks anyway. Please be aware that selecting an LMT takes place before having detailed position data information as the fund does not yet exist by that time. Therefore, the results of LSTs can at best (where appropriate) be relevant for the question of the activation of individual LMTs, but not for the general question of the selection of LMTs when the funds are launched.

Moreover, the criterion "**characteristics of its investor base**" is too broad and unspecific. Such characteristics are regularly unknown to the management company due to the distribution structures – particularly in the retail sector. The management company can only obtain information such as the number/volume of units/shares sold, possibly also generic investor characteristics (retail/institutional), geographical distribution via a distribution partner or directly. We therefore suggest that **letter d) of paragraph 17** of the draft guidelines be deleted (because the profile of the investor base is already reflected in the liquidity profile of the fund) or at least reduced to a concentrated investor base.

According to **paragraph 21 of the draft guidelines**, managers shall be able to demonstrate (on request of the NCA) that the activation of the selected LMTs is in the best interests of 'all' investors. The word 'all' should be deleted. Otherwise, the manager will never be able to comply with this requirement as the interests of the investors wishing to redeem are contrary to those of the investors remaining in the fund. It may be more a matter of wording, but elsewhere the draft refers to the 'remaining investors' or 'remaining holders' and therefore makes a distinction between the investors.

The statement in **paragraph 23 of the draft guidelines** that managers should ensure that the level of subscription and redemption orders received is treated with the strictest confidentiality in order to avoid that some investors can benefit from information on the probability that LMTs may be activated should be deleted. Obviously, providing such information to some investors only would already be in breach of the principle of fair treatment of investors. However, if the level of redemption orders is communicated to all investors and the investors cooperate with the manager, it might for instance be a very effective way of avoiding fire sales or liquidity shortage that the remaining investors subscribe to fund units in an amount equal to those of existing redemption orders. By keeping the statement such a possibility would be prevented.

Moreover, with regard to **paragraph 23 of the draft guidelines**, orders that have been placed but not executed before the fund manager suspends shall not be executed until the suspension is lifted. Still, in the case a shareholder or unitholder requests the cancellation of the non-executed part of his redemption order, this request should be subject to the consent of the manager, such consent not unreasonably being withheld.

**Q2: Should the distribution policy of the fund be considered in the selection of the LMTs? What are the current practices in relation to the application of anti-dilution levies by third party distributors (e.g.: whether the third party corrects the price by adding the anti-dilution levy to the fund NAV)?**

The distribution policy of the fund should not be considered in the selections of the LMTs. First of all, according to the AIFMD and the UCITS Directive, there is no need to establish a distribution policy. If the use of such a policy would be mandatory to select LMTs, every management company would be obliged to draw one up, even if this might not be necessary due to the given investor structure and distribution channels. Moreover, the distribution policy or channels are not part of a liquidity management system required under the AIFMD or the UCITS Directive.

Even though we have no practical experience with anti-dilution levies as an LMT in Germany, we believe that the possibilities to adjust the share price by adding a fee by a distribution partner is the wrong approach to the question of whether this LMT should be selected. In our view, this is solely a question of downstream processing and has nothing to do with actual liquidity management.

**Q3: Do you agree that among the two minimum LMTs managers should consider the merit of selecting of at least one quantitative LMT and at least one ADT, in light of the investment strategy, redemption policy and liquidity profile of the fund?**

**We strongly disagree with the proposed approach that among the two minimum LMTs, managers should consider the merit of selecting of at least one quantitative LMT and at least one anti-dilution tool (ADT).** Such an approach goes against the rationale of the AIFMD review, which expressly leaves the selection of the two LMTs to the manager. In addition, this approach would mean that the LMT ‘redemption in kind’ could only ever be used as a third LMT because, according to ESMA and FSB logic, it is neither a quantitative LMT nor an ADT.

The European legislator has recently decided that managers can select the two LMTs from a list of LMTs, consisting of four ADTs (namely ‘redemption fees’, ‘swing pricing’, ‘dual pricing’ and ‘anti-dilution levy’), two quantities based LMTs (such as ‘redemption gates’ and ‘extension of notice periods’) and the remaining LMT ‘redemption in kind’. By expressly stating that swing pricing and dual pricing may not be combined in order to fulfil the two LMTs requirement, the EU legislator has also made clear that the requirement can be met by any other combination of LMTs without further ado. This means, for example, that two ADTs such as redemption fees and swing pricing or two quantitative LMTs or a mix of one quantitative LMT (or ADT) and other LMTs can also be selected.

Irrespective of this, we disagree with ESMA's interpretation that this approach is derived from the FSB recommendations. Obviously the FSB has corrected its original approach to use at least one ADT for all open-ended funds, as stated in the consultation paper, in the final Report. The FSB therefore recognises that ADTs would only remain appropriate for funds that mainly invest in “less liquid” assets, whereby this decision should still lie with the manager. We understand the statement in the final FSB report with reference to a balance between ADTs and quantity based LMTs and in line with FSB’s recommendation 5 only to mean that the supervisory authorities should make a balanced number of different types of LMTs available from which the managers can then select.

At this point, we support FSB’s and IOSCO’s final view that ADTs are not suitable as the LMT of first choice for all open-ended funds. In our opinion, this affects the following open-ended funds:

- Funds that mainly invest in liquid assets because dilution would be expected to be *de minimis*.

- Funds that mainly invest in illiquid assets (such as real estate funds and private equity funds). According to the IOSCO report on anti-dilution liquidity management tools (cf. footnote 29), ADTs are not suitable for these funds because an estimation of the transaction cost is not possible. In these cases, a long notice period and/or a pre-determined discount of the NAV unit price (similar to a fixed redemption fee) to be received by redeeming investors could be envisaged to protect remaining investors and reduce the risk of fire sales and first mover advantage.

- Funds that have a balanced investor structure because ADTs only make sense if individual investors hold large shares in the fund and investors are not willing to liaise with the fund manager.

- For funds with a limited number of (professional) investors which are well known by the management company any ADT does not make any sense.

Moreover, ADTs are not intended to offer investor protection in liquidity crises in any case. In this context, we are aware of the latest discussion paper issued by Deutsche Bundesbank '*Financial fragility in open-ended mutual funds: the role of liquidity management tools*' with focus on the Irish fund market. Contrary to what the name of the discussion paper suggests, it only analyses a specific type of open-ended fund that mainly invests in corporate bonds, i.e. in less illiquid assets in the meaning of the FSB categorisation of funds. The outcome of the discussion paper shows that funds with more sensitive flows to past returns experienced lower net outflows and higher returns in March 2020 if they also had price-based LMTs available. These funds engaged in less portfolio rebalancing and sold off fewer illiquid bonds during the crisis. As a consequence, bonds held relatively more by Irish-domiciled funds with price-based (as opposed to Irish funds with only quantity-based) LMTs experienced a lower price drop during the crisis. The study merely shows that ADTs can have particularly positive effects for these fund types.

However, this study is no proof that all other LMTs could not also be appropriate in individual cases. We therefore refute the popular argument that exclusive reliance on 'quantity' LMTs targeting the impact of 'excessive' redemptions and 'excessive' sales of assets could result in unintended consequences (e.g., 'excessive' investor redemptions in times of stress). It is a quantity LMT (**redemption gates**) that can effectively reduce such effects. This is because this LMT can offer effective investor protection in liquidity crises. Compared to other LMTs in terms of market acceptance and cost/benefit ratio, redemption gating is 'relatively easy' to implement for all stakeholders. It is suitable to both stabilise the individual open-ended fund in extraordinary situations and to make a significant contribution to financial market stability.

ADTs, on the other hand, will not prevent the investor from redeeming the units/shares, so that the entire fund would still have to be closed in the worst case. And that can then lead to further undesirable effects. In this context, the fundamental question arises: What do ADTs intend to achieve? ADTs only make sense if individual investors hold large shares in the fund and investors are not willing to liaise with the fund manager. But that does not have to be the case in an average retail fund. This requirement would punish those funds that have a balanced investor structure and thus would have to set up extensive processes to hedge a non-existent risk. For this reason alone, it makes no sense to make at least one ADT mandatory. In times of crisis, investors who want to redeem their units/shares will leave the fund anyway, and even higher costs will not deter them. Hence, the manager should decide which of the LMTs is the most appropriate given the investment/risk strategy and investor structure.

Moreover, the implementation of **swing pricing and anti-dilution levies** is very complex and will not only lead to an administrative burden with very limited benefits during financial crises. The practical challenges vary depending on the number of funds for which swing pricing is to be introduced, how often unit prices are published, how order acceptance deadlines are regulated, which accounting software is used, which form of swing pricing is chosen and through which channels the manager obtains knowledge about buy and sell orders (flow of information about movements of funds). In general, swing pricing would have to be built into the valuation routines as a regular, automatic process. The implementation effort is therefore evident, in particular, in the technical or accounting area. The more often unit prices are calculated and the closer the order processing is to the order acceptance deadline (e.g., daily issue and redemption with order processing t+1), the narrower the time window in which the new and additional procedural steps have to be completed. For this purpose, corresponding resources must be made available at the management company.

Moreover, using these ADTs will cause disproportionately high costs. For example, one of our members has just spent a year and a half to implement swing pricing for a fund as a pilot project in the company for the first time. In particular, this also involves extensive cost controlling. For this purpose, the company needs an overview of the development of market prices in the respective asset classes in order to be able to derive comparisons (e.g. bid-ask spreads). This data must largely be purchased externally from expensive market data providers, which will lead to a large cost factor in view of the current licencing and price structure. It is therefore likely that smaller companies will no longer be able to afford the implementation of such tools.

ESMA should also be aware that the mandatory implementation of ADTs will lead to a further thinning-out of asset managers which would also increase concentration risk among asset managers, thereby also increasing systemic risks instead of reducing them. **Moreover, competition will then no longer be possible in the long run.** Undesirable side effects can then occur: The investor is overprotected against risks that he is aware of and takes deliberately but has to pay a lot of money for this protection and has no longer a choice between products and managers.

**Furthermore, ESMA’s proposal ignores that ADTs make no sense at all for certain open-ended funds which mainly invest in illiquid assets (such as real estate or private equity funds)** since due to the special features of illiquid assets, a causation-based distribution of transaction costs caused by unit redemptions and unit issues would in principle not be possible when calculating the NAV. If an illiquid asset (such as real estate) has to be sold due to a surplus of redemptions and insufficient liquidity in the fund, then this sale is usually intended to cover the redemption requests of a certain longer period. In addition, such transactions of illiquid assets are a costly procedure that can extend over a long period of time. However, the transaction costs would actually be incurred on certain days and, in the case of a daily calculation of the net asset value, would only affect individual and not all originators of the transaction arbitrarily and disproportionately. **We therefore welcome the clarification in footnote 29 of the IOSCO recommendation that other LMTs such as a long notice period could be envisaged to protect remaining investors and reduce the risk of fire sales and first mover advantage. Such an approach should be explicitly included in the ESMA guidelines.**

**Regardless, we believe that an approach of establishing detailed exceptions for each individual use case is too far-reaching. We therefore call for a principle-based approach guided by the proportionality principle and the investment/redemption strategy as well as the investor structure.** In particular, it cannot be ignored that an open-ended funds with a limited number of investors who co-operate with the manager concerning intentions to subscribe and redeem units or shares of the OEF must be treated differently from those where the investor structure is more comprehensive and not known down to the last link (such as funds offered to a wide range of retail investors). The same applies, for example, to funds with a restricted group of investors and a long-term investment horizon, in which an early exit has an economically disadvantageous effect on the investor and thus a sudden increased return demand, which the manager is confronted with, is not to be expected. However, fragmentation by fund type and asset categorisation should be avoided. Therefore, it must be the task and decision of an asset manager to examine whether there are special circumstances in the individual case that could make the possibility of certain LMTs useful. Otherwise, we need a broader range of exemptions where the use of certain LMTs can regularly have no added value for liquidity management. However, such a case-by-case exemption list and bucketing approach will lead to a very static set of rules that does not allow for flexibility in times of crisis.

**Q4: Do you see merit in developing further specific guidance on the depositaries' duties, including on verification procedures, with regards to LMTs?**

No, we do not see merit in developing further specific guidance on the depositaries' duties.

## Governance Principles

**Q5: Do you agree with the list of elements included under paragraph 28 of Section 6.5.2 of the draft guidelines to be included in the LMT policy? Are there any other elements that, in your view, should be included in the LMT policy?**

We agree that the selected LMTs, the methodology for their calibration, as well as the conditions for their activation, should be properly integrated and embedded in the fund's liquidity risk management framework, being also part of the broader fund liquidity risk management process policy document. However, we consider the proposal to prescribe a special LMT policy for this, which must contain certain formal aspects, to be too far-reaching and no longer in line with the principle of proportionality. Therefore, we request ESMA to shorten the list to very basic and principle-based elements.

In particular, the list of elements included under **paragraph 28 of Section 6.5.2 of the draft guidelines** is very extensive und burdensome. The more detailed it is, the less flexibility the manager has to react in a situation of liquidity shortage. This inherits the risk of a suboptimal decision. Please be also aware that in the case of a liquidity shortage decisions have to be met within a short period of time. Any increase of complexity by applying more and more rules imply the risk of a less optimal decision which is not in the best interests of all investors.

As one example we want to mention **paragraph 28 letter o) of the draft guidelines**: what is the aim of record keeping of '*relevant data concerning the funds, investors, historical flows, results of LSTs and market data'* which suggests 'more data than already recorded'? The requirement to record the results of LSTs would also imply that an LST must be carried out in every crisis before an LMT can be activated. Why do you need data on LST results – which is a result of a model – if the manager realises that there is no liquidity in the market just in this moment and the liquidity is not sufficient to cover the investors redemptions requests? Such formal aspects hinder rapid intervention in phases of liquidity crises.

Moreover, we do not agree with the proposal under **paragraph 29 of the draft guidelines** to review the LMT policy of ADTs at least every six months. The manager should be left to decide on the frequency of the review process for the individual ADTs. This would also be in line with the recommendations of IOSCO (cf. page 20 of the IOSCO final report on Anti-dilution Liquidity Management Tools) which only recommend that the risk management procedures should set a minimum frequency at which arrangements will be reviewed. Furthermore, allows the manager to adapt these review processes to individual circumstances and to embed them in the general review processes of the risk management policy.

**Q6: In your view, what are the elements of the LMT policy that should be disclosed to investors and what are the ones that should not be disclosed? Please provide reasons for your answer.**

First of all, ESMA has no mandate to set disclosure requirements via guidelines or an RTS. We therefore request ESMA not to specify any requirements here that would cause additional effort. In this context, we refer to our answer to Q 44-46.

However, we agree that the managers should deal with the issue of disclosure (also as part of its internal liquidity risk management policy), but no additional requirements should be specified as to how additional disclosure must be made.

We also refer to our answer to Q5. The more details are disclosed to the investor the less flexibility the manager has. In any case, we refuse to disclose parts of the internal policy for investors. It slows the process of adaption of the LMT policy. In particular, it would be unclear whether and how quickly the manager can adjust the LMT policy if it has to be disclosed to the investor.

## Quantitative-based LMTs

### Suspension of subscriptions, repurchases and redemptions

**Q7: Do you agree with the above definition of “exceptional circumstances”? Can you provide examples of additional exceptional circumstances, not included under paragraph 30 of Section 6.5.3.1 of the draft guidelines, that would require the manager to consider the activation of suspension of subscriptions, repurchases and redemptions, having regard to the interests of the fund’s investors?**

A narrow definition of ‘exceptional circumstances’ should be avoided. In practice, a list of examples has proven useful as guidance to when such exceptional circumstances might exist. These examples should not be exhaustive and should also take into account that future circumstances could also include other events that are not yet being considered.

In our sample prospectus, which we provide to our members, we have described extraordinary circumstances as follows: *‘Extraordinary circumstances may include, for example, economic or political crises, extraordinary redemption requests, the closure of exchanges or markets, trading restrictions or other factors that affect the determination of the unit value. In addition, BaFin can order the management company to suspend the redemption of units if this is necessary in the interests of investors or the public.’*

In this context, we also refer to **paragraph 144 of the Vandamme Report** ‘Towards a European market for the undertakings for collective investment in transferable securities’ (Commentary on the provisions of Council Directive 85/611/EEC of 20 December 1985). When establishing the UCITS Directive, the EU legislators formulated examples for exceptional circumstances that are still valid. For instance:

- the units' surrender value cannot be established because one or more stock exchanges, on which a substantial proportion of the transferable assets of the UCITS are quoted, are closed, or
- foreign-exchange markets are closed while major monetary fluctuations are in progress, or
- the UCITS is faced with requests to repurchase units which it cannot meet until it has realized assets.

However, it should be noted that these examples were established primarily for UCITS. For AIFs that mainly invest in illiquid assets and that also have different and longer valuation frequencies, other circumstances may be significantly more relevant.

**Q8: Do you agree with the elements of the LMT plan included under paragraph 32 of Section 6.5.3.1 of the draft guidelines to be included in the LMT plan? Is there any other element that should be considered?**

We consider the proposal to formalise a detailed LMT plan prior to or immediately after the activation of suspension of subscription, repurchases and redemptions, which must contain certain formal elements, to be too far-reaching. We prefer an illustrative list or a general reference to ‘where appropriate’. Such an approach would enable managers to act more flexibly in times of crisis and take into account the specific characteristics of each fund. This applies in particular to the following obligations which might be difficult to comply with in advance in a precise way:

- to simulate the liquidity profile (letter (d) of paragraph 32 of the draft guidelines),
- to assess the impact on investors (letter (e) of paragraph 32 of the draft guidelines) and
- to assess the legal and compliance risks associated with the suspension, including potential legal challenges or increased regulatory scrutiny (letter (i) of paragraph 32 of the draft guidelines).

**Q9: Do you agree with the above list of elements to calibrate the suspensions of subscriptions, repurchases and redemptions? Is there any other element that should be considered?**

As the suspension should only be used in exceptional circumstances, we reject the obligation to determine additional activation thresholds for a suspension, also considering legal and regulatory requirements (cf. **letter a) of paragraph 33 of the draft guidelines**). Such a detailed approach is not very helpful because this would lead to a mix of different reasons for the activation of this LMT. Activation of suspension of subscriptions, repurchases and redemptions should be based solely on the existence of exceptional circumstances. Moreover, less detailed guidelines would give more flexibility to the manager which can lead to better results for the investors.

## Redemption gates

**Q10: Do you agree with the proposed criteria for the selection of redemption gates? Is there any other criteria that should be considered?**

We refer to our general comment under **Q1**. We do not find it practicable to first define general selection criteria and then define additional and specific selection criteria for each individual LMT in the subsequent sections of the guidelines. This approach is not consistent because it also results in the general discretionary scope for the selection of individual LMTs being extremely limited by making recommendations for which funds these should be used in the specific selection criteria for the individual LMTs. Therefore, at least **paragraph 35 of the draft guidelines** should be deleted.

We also disagree with the example under **letter a) (iii) of paragraph 35 of the draft guidelines**, according to which redemption gates should be considered in particular for AIFs with illiquid assets (such as real estate (RE) and/or private equity (PE) funds. Redemption gates are only intended as a temporary restriction. This means that, also in distinction to the suspension of redemption, the tool can only take effect in phases of short-term liquidity crises when the manager could be able to process the remaining open orders or new orders in full and within a short period of time. However, it must then be possible to sell the assets held by the fund within a short period of time at reasonably appropriate prices. This will generally not be the case with real assets. In any case, dealing with the remaining order (like postponing to the next trading day, as is currently laid out in ESMA's draft RTS) would be feasible for funds which mainly invest in liquid or less liquid assets, is not expedient for RE or PE funds; a quarterly postponement would possibly be an option, as it is not possible to procure liquidity for real asset investments in the short term. The process of always considering the remaining order or new orders on the next trading day cannot be postponed for months which are needed to sell the real assets and thus generate additional liquidity. Otherwise, this would be a mere delay of the suspension of redemption without giving the investor an advantage by using the redemption gate. We would therefore see this as a clear violation of the principle of always acting in the best interests of investors.

**Q11: What methodology should be used and which elements should be taken into account when setting the activation threshold of redemption gates?**

In general, we are not in favour of imposing a unique methodology to all market participants. In particular, existing market practices should be taken into account or should continue to be permitted. We therefore expressly refer to the solutions we have found for redemption gates in Germany. Together with the German banking associations, we have published a guideline on the practical implementation of redemption restrictions (gating) for open-ended securities funds (especially UCITS). The guidelines take into account the entire process chain – from the asset management company to the depositary and the custodians. The 'pro rata solution with expiry of the residual order' developed for the German market is also permitted in France (see AMF Instruction, DOC-2017-05). In an intensive exchange with all parties involved, we have succeeded in setting up a pragmatic and, for the first time in the EU, automated process for the mass business of mutual funds.

The methods in the guidelines should therefore be more principle-oriented in order to allow fund managers a certain degree of flexibility in adapting to specific market conditions.

We also find the wording in **paragraph 37 of the draft guidelines** unfortunate, according to which redemption gates should not be systematically activated in the case of funds marketed to retail investors in order to manage the liquidity of the fund on a daily basis. This could be interpreted as meaning that systematic activation is assumed for funds marketed to institutional investors. We consider this to be an excessive step. It should always be at the discretion of the manager whether it activates gating when the threshold is exceeded (based on the individual situation). This applies even more to funds with professional investors who are in constant contact with the management company. An automatic process is out of the question here.

We also refuse to publish a specific activation threshold in the fund's sales documents as recommended under **paragraph 38 of the draft guidelines**. In Germany, for example, we have agreed to include a minimum threshold (though without specifying a specific level) in the prospectus, above which the manager can decide whether gating should be activated.

**Q12: Do you agree that the use of redemption gates should not be restricted in terms of the maximum period over which they can be used? Do you think that any differentiation should be made for funds marketed to retail investors? Please provide concrete cases and examples in your response.**

We support the approach in **paragraph 40 of the draft guidelines** that the use of redemption gates should not be restricted in terms of the maximum period over which they can be used (maximum duration of redemption gates), or the maximum number of times that redemption gates can be activated (maximum use of redemption gates), as long as it remains temporary in nature.

However, if redemption gates are now also to be used for AIFs with rather illiquid or even illiquid assets and longer redemption options, a correspondingly flexible design is required here. Therefore, the period over which redemption gates can be used should be determined by the manager on a case-by-case basis.

**Q13: What is the methodology that managers should use to calibrate the activation threshold of redemption gates to ensure that the calibration is effective so that the gate can be activated when it is needed? Do you think that activation thresholds should be calibrated based on historical redemption requests and the results of LSTs?**

We disagree with any approach in using historical data as well as LST results (on the 'real' portfolio) to calibrate the activation threshold of redemption gates. These figures will not be available at launch of the fund and may change over time. Moreover calibration (according to **paragraph 56 of the consultation paper**) cannot ensure 'redemption under normal market conditions' because redemption of 'concentrated investors' can also happen in normal situations. These examples show that there should be more discretion to the manager for calibration of the LMT, e.g. using forecasts instead of historical data or using any other information the manager has. Instead of using LST results there could be used any other form of liquidity estimation.

**Q14: In order to ensure more harmonisation on the use of redemption gates, a fixed minimum activation threshold, above which managers could have the option to activate the redemption gate, could be recommended. Do you think that a fixed minimum threshold would be appropriate, or do you think that this choice should be left to the manager?**

The decision as to whether and in which situations the redemption of units is restricted should be at the discretion of the respective management company. The point in time for the restriction of the redemption of units in the respective funds should not be determined by law, as this is not a legal but rather a technical question. The existing general principles should be sufficient to resolve this (e.g. acting exclusively in the interest of the investor and the fund). Should ESMA decide to set fixed values, this should then only relate to the duration of redemption gates, in order to draw a clear distinction from the suspension of unit redemption.

However, the level of the threshold should always be at the discretion of the manager in order to allow flexibility and capacity of funds' managers to adapt to market's circumstances.

**Q15: If you think that a fixed minimum threshold should be recommended, do you agree that for daily dealing funds (except ETFs and MMFs) it should be set as follows:**
**a) at 5% for daily net redemptions; and**
**b) at 10% for cumulative net redemptions received during a week?**

We refer to our answers to Q13 and Q14. As we are against the idea of setting a fixed minimum threshold, we do not support those propositions. In any case, we disagree with a cumulative approach based on net redemptions received during a week. This requires a complex procedure for which we cannot see any added value.

We consider these proposals to be particularly problematic for funds that mainly invest in illiquid assets because the proposed thresholds are linked to the individual trading days. However, these fund types regularly have longer redemption options and regularly require longer periods of selling of assets to generate additional liquidity.

### Extension of notice period

**Q16: Do you agree with the proposed criteria for the selection of the extension of notice period? Are there any other criteria that should be considered?**

We refer to our general comment under Q1. We do not find it practicable to first define general selection criteria and then define additional and specific selection criteria for each individual LMT in the subsequent sections of the guidelines. We also suggest avoiding wording in **paragraph 41 of the draft guidelines** that suggests the LMT should be available to all funds, because with the Annexes in the AIFMD and UCITS Directive, these LMTs are already available to all open-ended funds. Instead, the ESMA statements should be limited to which funds the LMT may be particularly suitable for.

**Q17: According to the revised AIFMD and UCITS Directive, the extension of notice periods means extending the period of notice that unit-holders or shareholders must give to fund managers, beyond a minimum period which is appropriate to the fund. In your view, for RE and PE funds: i) what would be an appropriate minimum notice period; and ii) would the extension of notice period be an appropriate LMT to select?**

The ‘minimum period that is appropriate for the fund’, as referenced in No. 3) of the relevant Annex to the revised UCITS and AIFM Directives, can obviously range from zero to more than a year, depending on the specificities of the fund in question. There is no indication whatsoever that the revised Directives have any kind of “absolute” minimum period in mind. In this context, the history of the definition of the extension of the notice period in the Annexes of the AIFMD Review should be considered. Originally, the Commission had proposed that a notice period refers to the period of advance notice that investors must give to fund managers when redeeming their shares. The Council then added a sentence to this: ‘*The use of notice periods as a liquidity management tool entails extending the period of advance notice to provide the fund manager with the possibility of addressing redemption requests within a longer time frame.*’ The new sentence was only a clarification in the Council that a long notice period is sufficient to allow the fund manager to process redemption requests within a longer time frame. The shortening of this definition that then took place in the trilogue should therefore not change this assessment.

Here, too, it might be helpful to distinguish between funds that invest in liquid assets and those that invest in rather illiquid or illiquid assets.

**Therefore, the starting point should be that units/shares in an open-ended fund can in principle be redeemed daily. However, should the asset manager decide to set a longer notice period, this should then also be recognised in the ESMA guidelines as an extension of the notice period. Otherwise, it could lead to significant valuation inconsistencies in practice if open-ended funds that have already agreed long notice periods (such as twelfth months) then had to agree additional (long) notice periods on top of that. In this context, we refer to the clarification in footnote**

**29 of the IOSCO recommendation that a long notice period could be envisaged to protect remaining investors and reduce the risk of fire sales and first mover advantage.**

However, there are no regulatory requirements for the duration of the extension of the notice period. Theoretically, it would therefore be possible to extend the already agreed long redemption period (such as twelfth months) by one day. However, in the event of liquidity bottlenecks, such an extension would be a mere formality and would not be sufficient to create more liquidity for an RE funds. However, this would come very close to or even constitute a suspension of redemptions, and the question arises as to how it would be distinguished from a 'real' suspension of redemptions. It is furthermore questionable if such an instrument could be considered as 'suitable' in the sense of the revised Directives.

In Germany, the usual notice period for open-ended real estate funds with exclusively institutional investors is five months. This is for historical reasons, to be compatible with an earlier requirement in Germany for insurers investing in funds. For some time now, we have perceived the German insurance regulator to be demanding an 11-month notice period for investments by insurers in funds (here: AIFs with professional investors). We therefore agree with ESMA's assessment in **paragraph 61 of the consultation paper** that according to the Delegated Regulation on the AIFMD, the NAV for AIFs is to be calculated once a year. It is therefore questionable whether an extension of an existing (long) notice period of 11 months, for example by a further long period (such as 5-11 months), would be compatible with the AIFMD. In this context, we would like to point out that real estate sales in the current difficult market phase have taken an average of about a year, provided that the specific property can be sold at all.

With reference to part (ii) of the question, we are definitely of the opinion that an extension of notice periods can be an appropriate LMT to select for RE and PE funds under certain conditions (see above).

**Q18: Do you think the length of the extension of notice periods should be proportionate to the length of the notice period of the fund? Do you think a standard/ maximum extended notice period should be set for UCITS?**

We refer to our answer to Q17. We do not think the length should be proportionate as it depends on the situation. Just like an absolute minimum 'regular' notice period, a standard/maximum extended notice period should be avoided. It should depend – inter alia – on the investment strategy, liquidity under normal conditions and market situation. This ensures that the assets in the fund can be sold in the best interests of investors.

Should the manager make use of this LMT, the notice period must apply to each redemption request by the investor. This means that the notice period must be integrated into the manager's liquidity management system as a permanent measure. The notice period must be specified in the fund rules so that investors are aware of the period. The determination of the period is at the discretion of the manger. In exercising its discretion, particular account must be taken of investor interests and investment strategy as well as the liquidity of the assets of the investment fund. However, in order to exclude unreasonably long periods, a statutory maximum period of one month is introduced in Germany for open-ended funds which invest in securities such as UCITS, whereas real estate investment funds, for example, are subject to a one-year time limit. Moreover, the maximum period does not apply to special AIFs for institutional investors, as such a stipulation is not necessary for them because professional and semi-professional investors can decide for themselves whether they want to enter into longer redemption periods.

**Q19: Do you agree with the above criteria for the activation of the extension of notice period? Are there any other criteria that should be considered?**

We agree with the proposed criteria that the activation of extension of notice periods should be considered under both normal and stressed market conditions and it may be useful in specific circumstances, for instance in case of redemption pressures and/or temporary valuation uncertainty.

**Q20: Do you have any comments on the guidance on the calibration of the extension of notice periods?**

In general, we agree with the proposed approach.

However, we would like to ask to delete the words '*to announce*' in **paragraph 45 of the draft guidelines**. We do not see a mandate given to ESMA to establish guidelines on when the extension of notice periods should be announced. Rather, it should be made clear that this LMT can already be activated when the fund is issued (for example, by explicitly agreeing a long notice period with the investor). In this context, we refer to our remarks to Q17.

### Redemption in kind

**Q21: Do you agree with the above criteria for the selection of redemptions in kind? Are there any other criteria that should be considered?**

According to Article 16(2b) subparagraph 4 AIFMD and Article 18a(2) subparagraph 4 UCITS Directive, the restrictions on redemption in kind with regard to retail investors shall only apply if the in-kind redemption is used as a mandatory LMT within the meaning of Annex V No. 8 AIFMD or Annex IIA No. 8 UCITS Directive. In practice, a large number of AIFs that also have 'semi-professional investors (investors that are not considered professional but conform to certain standards of professionality) currently use the LMT of the redemption in kind, which is a very effective LMT in these areas. We therefore request clarification that it may also be permissible in the interests of investors to continue to use this LMT as an additional LMT (in addition to the two mandatory LMTs). The AIFMD review explicitly leaves room for manoeuvre here, according to which fund management companies may voluntarily use further LMTs in addition to the two mandatory LMTs.

**Q22: Do you agree with the above criteria for the activation of redemptions in kind? Are there any other criteria that should be considered?**

We strongly disagree with the proposal that in case of the activation of redemption in kind, an independent third party (e.g. the fund auditor, depositary) should perform the valuation of the assets. There is no need for such a restrictive measure, neither is it enshrined in the Level 1 texts. The manager has to calculate a fair price at each valuation (and redemption) date anyway. The auditor of the fund reviews the valuation methods and processes to ensure they comply with legal and regulatory requirements. Moreover, an independent valuation within a short time period seems challenging and will lead to further costs. In particular, the question arises as to who should bear the costs of this additional independent valuation: should they be charged to the fund and thus to the remaining investors, or should the investor who benefits from the in-kind redemption bear the costs? In our view, this is an unnecessary process since professional investors in particular usually agree on the fair price here and no additional investor protection is required. We therefore request ESMA deleting **paragraph 48 of the draft guidelines**.

**Q23: Do you think that redemptions in kind should only be activated on the NAV calculation dates?**

No, as we want to keep a certain flexibility for the activation of the redemptions in kind in order for funds' managers to be able to adapt to market's circumstances.

**Q24: What are the criteria to be followed by the managers for the selection of the assets to be redeemed in kind in order to ensure fair treatment of investors?**

This depends on the assets and on the investors. If e.g. all investors would agree on the selected assets there would even be no necessity do set any criteria.

**Q25: How should redemptions in kind be calibrated?**

In Germany, redemptions in kind - if made available - are part of the agreements in the fund rules which provide for the following:

> *'All investors may demand, with a simultaneous redemption of units, that assets of the investment fund be paid out to them in kind in the corresponding equivalent value. This also applies if the right of disposal over the investment fund has been transferred to the depositary.'*

## Anti-Dilution Tools (ADT)

**Q26: Do you agree that managers should consider the merit of avoiding the simultaneous activation of certain ADTs (e.g.: swing pricing and anti-dilution levies)? Please provide examples when illustrating your answer.**

We do not agree that managers should consider the merit of avoiding the simultaneous activation of certain ADTs. **We refer to our answer to Q3.**

**Q27: Do you agree with the list of elements provided under paragraph 56 of Section 6.5.4 of the draft guidelines? Is there any other element that should be included in the estimated cost of liquidity?**

We disagree with the detailed guidance on the calibration of liquidity costs. In particular, the detailed approach, including the significant market impact as part of the implicit costs, is far too broad. At present, we do not have any information on the effort that such significant market impact entail in practical implementation. In any case, IOSCO's and ESMA's proposals do not appear practicable, firstly with regard to the procurement of (external) data and the associated costs, and secondly with regard to the effect on the amount of the liquidity costs. In general, a rather generic approach should be used here without any claim to 100 per cent accuracy.

In Germany, for instance, we have implemented a more general approach: the swing factor takes into account the transaction costs caused by an excess of redemption or issue requests. The swing factor is determined by the management company depending on various parameters (e.g. taking into account transaction costs, bid/offer spreads, market price impact).

**Q28: Do you have any other comments on the proposed general guidance on ADTs?**

We refer to our comments on Q3.

ADTs are not intended to offer investor protection in liquidity crises. We disagree with the FSB's finding that exclusive reliance on ‘quantity’ LMTs targeting the impact of ‘excessive’ redemptions and ‘excessive’ sales of assets could result in unintended consequences (e.g. ‘excessive’ investor redemptions in times of stress). It is a quantity LMT (redemption gates) that can effectively reduce such effects. This is because this LMT can offer effective investor protection in liquidity crises. Compared to other LMTs in terms of market acceptance and cost/benefit ratio, redemption gating is ‘relatively easy’ to implement for all stakeholders. It is suitable to both stabilise the individual open-ended fund in extraordinary situations and to make a significant contribution to financial market stability. Moreover, in the German fund market, large institutional investors in open-ended funds are often known to the management companies and coordinate the market-friendly execution of their intended unit redemptions with the portfolio managers in advance.

ADTs, on the other hand, will not prevent the investor from redeeming the units/shares, so that the entire fund would still have to be closed in the worst case. And that can then lead to further undesirable effects. In this context, the fundamental question arises: What do ADTs intend to achieve? ADTs only make sense if individual investors hold large shares in the fund. But that does not have to be the case in an average retail fund. This requirement would punish those funds that have a balanced investor structure and thus would have to set up extensive processes to hedge a non-existent risk. For this reason alone, it makes no sense to focus on ADTs mainly. In times of crisis, investors who want to redeem their units/shares will leave the fund anyway, and even higher costs will not deter them. Hence, the manager should decide which of the LMTs is the most appropriate given the investment/risk strategy and investor structure. However, ADTs such as redemption fees could be used in extraordinary situations as a supporting tool for gating.

Moreover, the implementation of ADTs such as swing pricing and anti-dilution levies are very complex and will not only lead to an administrative burden with very limited benefits during financial crises. Using these tools will cause disproportionately high costs. For example, one of our members has just spent a year and a half to implement swing pricing for a fund as a pilot project in the company for the first time. In particular, this also involves extensive transaction cost controlling. For this purpose, the company needs an overview of the development of market prices in the respective asset classes in order to be able to derive comparisons (e.g., bid-ask spreads). This data must largely be purchased externally from expensive market data providers, which will lead to a large cost factor in view of the current licensing and price structure. It is therefore likely that smaller companies will no longer be able to afford the implementation of such tools. FSB and IOSCO should also be aware that the mandatory implementation of such instruments will lead to a further thinning out of asset managers which would also increase concentration risk among asset managers thereby also increasing systemic risks instead of reducing them. Moreover, competition will then be limited in the long run. Undesirable side effects can then occur here: The investor is overprotected against risks that he is aware of and takes deliberately but has to pay a lot of money for this protection and has no longer a choice between products and managers.

## Redemption fee

**Q29: Do you agree with the above criteria for the selection of redemption fees? Is there any other criteria that should be considered?**

We disagree with the approach taken regarding AIFs that invest in illiquid assets (such as real estate) in **paragraph 61 of the draft guidelines**. In principle, this statement is, of course, correct insofar as the sale price that can be achieved on the market for individual properties is not readily available. However, the market value of real estate is regularly appraised by external valuers and this appraisal plays a decisive role in determining both the NAV of the share/unit price and the sale price at which a property may be sold.

**Q30: Do you have any views on how to set the activation thresholds for redemption fees?**

We suggest that thresholds for the fee be designed flexibly (e.g. through maximum amounts up to which the fee can be charged, but which the manager does not necessarily have to exhaust depending on the respective market circumstances).

**Q31: Do you have any comments the calibration of redemption fees?**

As already mentioned in our remarks on the draft RTS on LMTs, a distinction should be made between funds which mainly invest in (less) liquid and illiquid assets. As IOSCO already states in its ADTs recommendations (footnote 29), there are cases were using a pro-rata approach to estimate the transaction cost is not possible: for example, for open-ended funds that allocate a significant proportion of their AUM in inherently illiquid assets, such as RE and PE funds. In these cases, a long notice period and/or a pre-determined discount of the NAV unit price (similar to a fixed redemption fee) to be received by redeeming investors could be envisaged to protect remaining investors and reduce the risk of fire sales and first mover advantage. It should therefore at least be recognised that the discount solution mentioned here by IOSCO is also considered a redemption fee.

## Swing pricing

**Q32: Do you agree with the above criteria for the selection of swing pricing? Is there any other criteria that should be considered?**

In principle, we agree that managers should consider the selection of swing pricing for funds whose underlying assets are actively traded and information on trading costs (bid/ask) is available and frequently updated. This makes it very clear that the criteria for the selection stated here in this section contradicts the general guidelines, according to which at least one ADT (which also includes swing pricing) should be assessed and selected for all funds.

In particular, swing pricing makes no sense at all for certain funds (such as RE or PE funds). While we welcome the clarification in footnote 29 of the IOSCO recommendations that other LMTs such as a long notice period could be envisaged to protect remaining investors and reduce the risk of fire sales and first mover advantage, such an approach should nevertheless be explicitly included in the guidelines. For example:

- **Swing pricing** is not feasible for RE funds because the explicit/implicit transaction costs for real estate transactions cannot be estimated. This entails the risk of an incorrect NAV calculation, resulting in a liability risk for the asset manager. As we understand it, ESMA would like to give the explicit and implicit costs of sales made to service redemption requests an even greater role in swing pricing when determining the swing factor. In the case of RE funds, however, this link is not necessarily as direct. It may be, for example, that the smallest property of the RE fund with a value of around EUR 15 million has to be sold in order to be able to service a redemption declaration in the amount of EUR 5 million. The question here would be whether the total ancillary costs of the sale would be taken into account or only the percentage share.

  Furthermore, in difficult market phases, the sales price that can be obtained for a property on the market can also be significantly less than the market value determined by the expert, so that the property may not be sold at the offered sales price. It is unclear how the swing factor would be determined in this case.

  Ultimately, in the event of an RE fund experiencing a liquidity squeeze, the options for raising liquidity essentially involve selling real estate, taking on debt capital or raising new equity. However, if the NAV is increased by the swing factor, subscriptions from new investors are less attractive and, in the event of liquidity squeezes, the increased, swung NAV is rather counterproductive.

**Q33: Under which circumstances should the manager consider the activation of swing pricing?**

Activating of LMTs is firstly a question of the individual risk situation of each investment fund. The activating mechanism of a LMT depends on the type of the LMT. Therefore, there is a need to distinguish between LMTs which need to be activated and those which don't. For instance, (full and partial) swing pricing applies by agreement in the fund rules or prospectus with investors on an ongoing basis without additional activating mechanism during periods of market stressed situations. In Germany, however, a higher swing factor may be set in exceptional market conditions (such as when assets of the open-ended fund cannot be valued or when, due to political, economic, or other events, trading of financial instruments in the markets is significantly impaired or of other circumstances). In our assessment, therefore, the activation of swing pricing as such is not a question of whether exceptional circumstances exist. Rather, once swing pricing is agreed with investors, thresholds for the swing factor, thresholds for applying partial swing pricing (if the excess of redemptions and issues of units/shares on the relevant valuation day exceeds a threshold determined by the management company) based on several criteria (such as market conditions, market liquidity, risk analyses), and procedures must also be established for this purpose.

**Q34: Do you agree with the above principles that a manager should follow in order to recalibrate the swing factor? Is there any other criteria that should be considered?**

We refer to our answer to Q33. We support the flexibility to recalibrate the swing factor in stressed market conditions, and beyond the maximum factor.

**Q35: Do you have any comments on the proposed guidance on the calibration of swing pricing?**

We would like to refer to our answer to Q27. The calculation of implicit costs, including any significant market impact, can pose significant challenges. Therefore, the wording of **paragraph 68 of the draft**

**guidelines** should recognise these problems and, following the approach taken by IOSCO, require these costs to be included only where relevant.

We also request ESMA to delete **paragraph 71 of the draft guidelines** which deals with investor communication. We refer to our answer to Q44.

### Dual pricing

**Q36: As dual pricing is a LMT which is not particularly used in most Member States, stakeholders' feedback on the selection, activation and calibration of this LMT is especially sought from those jurisdictions where this is used.**

In Germany, we currently do not have any practical experience with the LMT dual pricing. Due to the comparability of that tool with swing pricing, please refer to our comments on swing pricing.

### Anti-Dilution Levy (ADL)

**Q37: Do you agree with the above criteria for the selection of ADL? Is there any other criteria that should be considered?**
**Q38: Do you agree with the above criteria for the activation of ADL? Is there any other criteria that should be considered?**
**Q39: Do you agree that ADL should be calibrated based on the same factor used to calibrate swing factors?**
**Q40: Do you have any comments on the selection, activation and calibration of ADL?**

In Germany, we currently have little practical experience with the LMT ADL. We see ADL as a complicated variant of swing pricing, so that the other variants of swing pricing (such as full or partial) would be preferable in practice. Due to the complexity of the procedure for ADL, it does not make sense to use only ADL, but not the other (more common) variants of swing pricing. Regarding the comparability of the two tools, please refer to our comments on swing pricing.

### Side pockets

**Q41: Do you agree with the above definition of "exceptional circumstances"? Can you provide examples of additional exceptional circumstances, not included under the above paragraph?**

We refer to our answer to Q7. The requirements for the definition of extraordinary circumstances when suspending redemptions also apply here to the same extent.

**Q42: In your view, how the different types of side pockets (physical segregation vs. accounting segregation) should be calibrated and in which circumstances one should be chosen over the other? Please provide examples including on whether the guidance should be different for UCITS and AIFs.**

The calibration of the different types of side pockets and the choice between the various options, depending on the circumstances, should be left to the discretion of the governing body of the fund.
We do not think that the guidance should be different for UCITS and AIFs.

**Q43: Do you have any comments on the calibration of side pockets?**

We do not have further comments on the calibration of side pockets.

## Disclosure to investors

**Q44: Do you have any comment on the proposed guidance on disclosure to investors?**

First and foremost, as mentioned in our answer to Q6 above, it must be clarified that the disclosure requirements for funds are already set out at Level 1 in the AIFM/UCITS Directives and that ESMA is therefore overreaching and going beyond its given mandate with the proposed disclosure requirements. As a consequence, ESMA cannot determine that certain legal documents must contain information of the selection, calibration and conditions for activation and deactivation of the selected and available LMTs, including the reasons for their activation, their objectives, the impact of the various mechanisms and the governance structures around this process. Irrespective of this major circumstance, ESMA's line of argument is not compelling, as no information gap relating to the investor, or the supervisory authorities can be identified that needs to be filled.

First, Art. 18a, Annex I UCITSD and Art. 16, 23 AIFMD set out that the investor must be informed of the possibility and conditions of the use of LMTs in the rules or instruments of incorporation and in the prospectus of the respective funds. Hence, it cannot be claimed that the management company does not provide for an appropriate level of information. Rather, reading this information will help the investor to better understand and incorporate the conditions, impact and costs of these LMTs into their investment decision. Since the aforementioned documents must be submitted or notified to the competent authorities and since the investment company must report the relevant information on LMTs to the competent authority (Art. 20a UCITSD, Art. 16 AIFMD), the supervisory authorities will also (regularly) receive adequate information about the LMTs in an appropriate quality.

Further, the minimum requirements for the annual reports are set out on Level 1 in the AIFM/UCITS Directives. Pursuant to these provisions, the management company must, *inter alia*, regularly describe the business activities of the previous year. Consequently, the actual use of an LMT must always be reported in the respective annual report. Having said this, we would like to emphasise that ESMA cannot require annual reports to contain historical data on LMTs. As mentioned above, ESMA does not have the mandate to require the incorporation of a long-term-information in a report that is intended to provide information for a one-year period. In addition, the consolidation of the previous use of LMTs would lead to a stigmatisation effect of the individual funds, as the compilation of the historical data would give less experienced investors a misleading overall impression of the fund at first glance. Nevertheless, we would like to add that, in general, the information on LMTs used for a funds remain public, as previous annual financial reports continue to be published on the websites of the management companies or will be made available to investor on request.

**Against this background and in the interest of legal certainty, we propose deleting the section on disclosure from the guidelines.**

In the alternative, we would like to point out the following: Any guidelines on disclosure should be principle-based and only explain how the tool works, without giving specific guidance on the individual measures. In particular, a distinction must be made between the information that should be available to investors in advance (e.g., in the investment terms and conditions or the prospectus) and the information that should be available afterwards (e.g., in the annual report). In the first case, the information should contain which LMTs are already implemented in the fund, how they work and what impact they have on the investors. The annual report could then inform the investors, whether and to what extent the LMTs were activated or used.

However, in any case at least **paragraph 93 of the draft guidelines** should be deleted. We strongly disagree with the suggested periodic ex-post disclosures of a funds historical use of LMTs. We see no added value in this, neither for the investor nor for the supervisors.

- In particular, the NCAs already receive specific information via the activation of the LMTs and via regular fund reporting as well as with the approval of the UCITS or submission of the fund documents for AIFs. This puts the NCAs in a sufficient position to track and monitor the use of LMTs. Other stakeholders such as auditors or the depositary also have sufficient information to assess the use of LMTs due to the direct contractual relationship with the manager.

- We also fail to see how a mere ex-post disclosure of the history of the use of LMTs in an individual fund should lead to a better understanding by investors of the potential cost implications of redemptions and subscriptions to an investment fund at different points in time and the situations in which they cannot access their capital. This would mean that the manager would not only have to publish the history but would also have to describe in detail the impact of the potential cost implications for investors on a case-by-case basis. This is far too far-reaching and contradicts the requirements at Level 1. In particular, we see a great danger here that this type of publication could lead to funds that have activated an LMT no longer being marketed by distributors and that this publication would therefore be a kind of branding.

- Moreover, the requirements for the information in the annual report with regard to the LMTs of the funds are also conclusively laid down in Delegated Regulation (EU) No 231/2013, without ESMA having a further mandate to provide additional information in this regard.

**Q45: Do you agree that investors should be informed of the fact that the manager can activate selected and available LMTs and that this information should be included in the fund's rules and instruments of incorporation?**

Yes. The selected LMTs should be included in the fund's rules and instruments of incorporation.

However, we want to keep flexibility for funds' managers by having the possibility for the managers to activate suspension of subscriptions, repurchases and redemptions and side pockets even where those are not specified in the offering documents.

**Q46: Which parts of the LMT policy, if any, should be disclosed to investors?**

We refer to our answers to Q5, Q6 and Q 44. However, in any case, the disclosure should concern qualitative information of the LMTs and not quantitative information. There are a couple of reasons underlying this position:

- We consider that information on the quantitative details of the LMTs is of no practical value for the investor;

- Disclosing quantitative information will also make them available to competing market participants who could exploit those data to harm the management of the fund and which, in the end, would harm the investors of the fund.

## Application of the guidelines

**Q47: In your view, how much time would managers need for adaptation before they apply the guidelines, in particular for existing funds?**

Based on previous experience with the implementation of certain LMTs (e.g. redemption gates, swing pricing), we propose a transitional period of at least two years starting from the application of the AIFMD review (16 April 2026). In any case, synchronisation with the application of the RTS on LMTs, in particular for existing funds, should take place here.

Such a transitional provision, not only for existing funds, is important for the following reasons:

- **Contract design**: In addition to amending existing or establishing new documents (like terms and conditions of the fund rules or prospectus) and to implementing new disclosure rules by the management company, other aspects in connection with the distribution of the investment funds must also be taken into account. This requires the corresponding involvement of distribution offices, custodians, depositaries and investment advisors. For example, they must ensure that they take the new LMTs into account in their documentation required under MiFID and Article 59 Delegated Regulation (EU) 2017/565. Other agreements (such as depositary, advisory or custody agreements) must also be reviewed and, if necessary, adapted to meet the new requirements of the LMTs.

- **Automation of processes**: Due to the large number of investors, the retail fund sector in particular requires the automation of processes in the value chain from the management company to the depositary, to the custodian, and to the sales offices. The processes must be designed in such a way that the respective units can act automatically and without a long-time delay when the LMTs are activated. This requires not only communication support, but in particular technical support, in which other service providers (e.g. WM data service, DESSUG, SWIFT, etc.) must also be integrated.

- **Distribution/Communication**: Existing investors must be informed about the introduction of new LMTs. New investors must be informed about the use and functionality of the LMTs. Moreover, investors who acquire their units or shares through an investment advisory service must be informed accordingly about the LMTs by investment advisors. This requires special training for advisors. In addition, special communication channels must be created for interaction between the fund management company, custodian or distribution agent and the investors when the LMTs are activated. This also includes technical solutions such as for dealing with cancellations.

To give just one example, one of our larger members, which is part of a banking group and was able to involve all relevant contacts/units and the depositary in the project purely within the group, spent two years to complete a pilot project to introduce swing pricing. Due to the size and expertise in-house, no external consultants were required here. For smaller management companies, this may well take longer due to more extensive coordination processes.

The coordination between management companies, sales agents, and custodians for a standardised solution for the introduction of redemption gates in Germany alone also took two years. The solutions found then had to be subsequently implemented in terms of IT and communication.

## Cost-Benefit Analysis (CBA)

**Q48. Do you agree with the above-mentioned reasoning in relation to the possible costs and benefits of the technical proposal develop by ESMA as regards the policy objecting of achieving a set of minimum standards by which all managers across Member States should select, activate and calibrate LMTs? Which other types of costs or benefits would you consider in that context?**

We disagree with the reasoning in relation to the possible costs. As the draft guidelines (and their complexities) will have implications for the implementation and operation process there will be significant costs. The real costs are in no way specified by the term 'these guidelines may not add significant costs to managers, other than compliance costs linked to the update' as it hides that all the costs are exclusively stemming from being compliant in the future.

**Q49. Do you agree with the above-mentioned reasoning in relation to the possible costs and benefits of the technical proposal develop by ESMA as regards the policy objecting of achieving a set of minimum standards by which all managers across Member States should provide disclosure to investors on the selection, activation and calibration of LMTs? Which other types of costs or benefits would you consider in that context?**

As the mandatory disclosure requirements result from the implementation of the amended AIFMD/UCITSD, the guidelines will not tie any additional resources (see Q44).

**Q50. Do you agree with the above-mentioned reasoning in relation to the possible costs and benefits of the technical proposal develop by ESMA as regards the policy objecting of achieving a set of minimum standards by which all managers across Member States arrange their governance for the selection, activation and calibration of LMTs? Which other types of costs or benefits would you consider in that context?**

We refer to our previous comments. The detailed proposals will make many adjustments necessary to the already existent processes which will make the fund manager less flexible in times of market tension and which will cost more effort.

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