Reply form for the Draft regulatory technical standards under the ELTIF Regulation

31 July 2015

Responding to this paper

The European Securities and Markets Authority (ESMA) invites responses to the specific questions listed in the ESMA Consultation Paper on Draft regulatory technical standards under the ELTIF Regulation, published on the ESMA website.

Instructions

Please note that, in order to facilitate the analysis of the large number of responses expected, you are requested to use this file to send your response to ESMA so as to allow us to process it properly. Therefore, ESMA will only be able to consider responses which follow the instructions described below:

- use this form and send your responses in Word format (pdf documents will not be considered except for annexes);
- do not remove the tags of type <ESMA_ QUESTION_ELTIF_RTS_1> - i.e. the response to one question has to be framed by the 2 tags corresponding to the question; and
- if you do not have a response to a question, do not delete it and leave the text “TYPE YOUR TEXT HERE” between the tags.

Responses are most helpful:

- if they respond to the question stated;
- contain a clear rationale, including on any related costs and benefits; and
- describe any alternatives that ESMA should consider

Naming protocol

In order to facilitate the handling of stakeholders responses please save your document using the following format:

ESMA_ELTIF_RTS_NAMEOFCOMPANY_NAMEOFDOCUMENT.

E.g. if the respondent were ESMA, the name of the reply form would be:

ESMA_ELTIF_RTS_ESMA_REPLYFORM or

ESMA_ELTIF_RTS_ESMA_ANNEX1

To help you navigate this document more easily, bookmarks are available in “Navigation Pane” for Word 2010 and in “Document Map” for Word 2007.

Deadline

Responses must reach us by **14 October 2015.**

All contributions should be submitted online at www.esma.europa.eu under the heading ‘Your input/Consultations’.

Publication of responses

All contributions received will be published following the end of the consultation period, unless otherwise requested. **Please clearly indicate by ticking the appropriate checkbox in the website submission form if you do not wish your contribution to be publicly disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure.** Note also that a confidential response may be requested from us in accordance with ESMA's rules on access to documents. We may consult you if we receive such a request. Any decision we make is reviewable by ESMA's Board of Appeal and the European Ombudsman.

Data protection

Information on data protection can be found at www.esma.europa.eu under the headings 'Legal notice' and 'Data protection'.

General information about respondent

Name of the company / organisation	ALFI
Confidential[1]	☐
Activity	Investment Services
Are you representing an association?	☒
Country/Region	Luxembourg

Introduction

Please make your introductory comments below, if any:

<ESMA_COMMENT_ELTIF_RTS_1>

The Association of the Luxembourg Fund Industry (ALFI) is the representative body of the Luxembourg investment fund community. Created in 1988, the Association today represents over 1300 Luxembourg domiciled investment funds, asset management companies and a wide range of service providers such as custodian banks, fund administrators, transfer agents, distributors, legal firms, consultants, tax experts, auditors and accountants, specialist IT providers and communication companies. The Luxembourg Fund Industry is the largest fund domicile in Europe and a worldwide leader in cross-border distribution of funds. Luxembourg-domiciled investment structures are distributed on a global basis in more than 70 countries with a particular focus on Europe, Asia, Latin America and the Middle East.

We thank the ESMA for the opportunity to participate in the consultation on draft regulatory standards under the ELTIF Regulation.

We support the submission of the European Fund and Asset Management Association (EFAMA).

<ESMA_COMMENT_ELTIF_RTS_1>

[1] The field will used for consistency checks. If its value is different from the value indicated during submission on the website form, the latest one will be taken into account.

Q1 Do you agree that the abovementioned pieces of legislation and associated regulatory framework are relevant for the purpose of the present advice on Article 9(3) of the ELTIFs Regulation? Which other pieces of legislation and associated regulatory framework do you identify for that purpose?

<ESMA_QUESTION_ELTIF_RTS_1>
ALFI appreciates ESMA's attempt to analyse and take inspiration from existing legal frameworks in the present content. ALFI agrees that – to the extent possible - it would be preferable to rely on existing standards and definitions rather than to create another definition for the specific purpose of the ELTIF Regulation.

This being said, ALFI takes the view that relying on accounting standards such as IFRS 9 does not seem to us as being the appropriate approach. Indeed, IFRS are accounting standards that pursue a different (i.e., accounting) purpose than the regulatory objectives pursued by the ELTIF Regulation and the present consultation. Also, the hedge accounting rules under IFRS 9 are not mandatory but are an optional accounting method. Derivatives may actually be used for hedging purposes without applying these hedging rules. We are concerned that Alternative Investment Fund (AIF) managers, in particular ELTIF managers, may not be familiar with the sophisticated IFRS hedge accounting rules even when their companies are applying IFRS.

Another concern we have is that IFRS standards are elaborated by an accounting organisation that is independent from the EU legislators. As a consequence, they may change over time, which, if the ELTIF Level II standards would refer to IFRS, would be beyond the EU legislator's control.

Finally, not all ELTIFs may elect to use IFRS as their accounting standards. The reference to the IFRS hedging definition would in such event be confusing and add unnecessary complexity.
<ESMA_QUESTION_ELTIF_RTS_1>

Q2 Do you think that the main risks that are necessary to be covered at the level of the ELTIF are currency, inflation and interest rate risks? If no, which types of risk would the manager of an ELTIF potentially have to cover in your view?

<ESMA_QUESTION_ELTIF_RTS_2>
ALFI shares the view that currency, inflation and interest rate risks form certainly part of the risks that will be most relevant to ELTIFs.

This being said, ALFI is of the view that – depending on the focus, investment strategy and concrete assets held by an ELTIF - various other risks may be relevant for a specific ELTIF. It is in our view impossible to define and predict ex ante all risks that may be (or become) relevant for all ELTIFs over time. From the legislative process of the ELTIF Regulation and the various draft versions of the Regulation it appears to us that this had actually been recognised by the European legislators. Indeed, unlike certain of the previous drafts, the final wording of the Regulation allows the hedging of all (undefined and hence, unlimited) types of risks inherent to the investments of an ELTIF.

For example, when considering infrastructure investments, beside interest rate and currency risk there may also be commodity risks (e.g. hedging the price of building materials). Further, there may exist counterparty risks when investing via debt instruments, or a risk of project delays when investing in assets which are in the building phase. Various other risks may exist and be identified by the ELTIF as being "relevant" to the particular ELTIF at hand.

As a consequence, ALFI strong supports the idea to take a flexible approach to defining relevant risks. In our view the power to define the risks that are relevant to each ELTIF (and which may be hedged) should be given to the ELTIF manger.

<ESMA_QUESTION_ELTIF_RTS_2>

Q3 Do you think that the approach to hedging should not limit ex ante the scope of risks that ought to be covered by the manager of the ELTIF?

<ESMA_QUESTION_ELTIF_RTS_3>
Please see our answer to Q2 above
<ESMA_QUESTION_ELTIF_RTS_3>

Q4 On the contrary, do you think that the approach to hedging should be tailored to the specific case of ELTIFs, and their possible eligible investments? Do you think that in this case the risks that might have to be covered by the manager of the ELTIF should be limited to the types of risk that were mentioned in question 2?

<ESMA_QUESTION_ELTIF_RTS_4>
Please see our answer to Q2 above
<ESMA_QUESTION_ELTIF_RTS_4>

Q5 Do you identify any consequences in terms of costs or scope of the eligible investments of the ELTIF if the risks that might be covered at the level of the ELTIF are limited to those that were mentioned in the impact assessment of the Commission?

<ESMA_QUESTION_ELTIF_RTS_5>
Please see our answer to Q2 above
<ESMA_QUESTION_ELTIF_RTS_5>

Q6 Do you agree with the proposed approach? Should you disagree, please provide reasons and propose an alternative approach and justify it.

<ESMA_QUESTION_ELTIF_RTS_6>
We agree with ESMA's proposal that the life-cycle of the ELTIF should be determined with reference to the life-cycle of the assets in which the ELTIF intends to invest, it comes with some constraints and may need some nuances. For instance, certain eligible assets (such as SME equities) may not have a defined maturity. In such events, ALFI suggests that the end of life be determined in view of the anticipated (regular or irregular) exit possibilities for such assets.

In the event that an ELTIF manager would wish to select certain eligible investments that would mismatch in their life-cycles with the ELTIF end of life initially set, or if the life-cycles of the assets held by an ELTIF change in the course of its life, adjustments to the end of life of the ELTIF should be possible in a sufficiently flexible manner. In particular, a reduction or extension of the end of life should not be subject to high administrative or regulatory hurdles that would, de facto, make any adjustment impossible.
<ESMA_QUESTION_ELTIF_RTS_6>

Q7 Do you agree with the risks identified and the related proposed criteria? Would you suggest the introduction of any additional/alternative risks/criteria? Please provide details and explain your position.

<ESMA_QUESTION_ELTIF_RTS_7>
ALFI agrees with the approach taken by ESMA.
<ESMA_QUESTION_ELTIF_RTS_7>

Q8 Do you agree with the proposed valuation criteria? Would you suggest the introduction of any additional/alternative criteria? Please provide details and explain your position.

<ESMA_QUESTION_ELTIF_RTS_8>
Out of the options considered by ESMSA, we prefer the baseline approach i.e. following the AIFMD valuation rules due to the reasons developed below.

- Consistency in legislative requirements provides further clarity to both investors and asset managers. Introducing different valuation rules might lead to confusion on the market.
- ELTIF regulation foresees a rather wide scope of types of assets as eligible investments (funds, loans, equity…). We therefore believes that the one fits all approach might not appropriate. The AIFMD principle based approach is therefore more adequate.
- As the ELTIF will already have to provide to the regulator an assessment of the market and potential sale prices, valuation in relation to trades on the secondary market appears redundant and superfluous, whilst being a cost extensive exercise for certain classes of assets.
- Not all eligible assets will be disposed on the secondary market: for instance, debts, loans or underlying funds may have a maturity matching with the end of life of the ELTIF. Valuing these based on sale price would not bring any added value to the regulator whilst it might be a very costly exercise to get market quotes for these investments.

<ESMA_QUESTION_ELTIF_RTS_8>

Q9 Do you agree that the abovementioned pieces of legislation and regulatory material are relevant for the purpose of the RTS on Article 25(3) of the ELTIFs Regulation? Which other pieces of legislation and regulatory material do you consider relevant for that purpose?

<ESMA_QUESTION_ELTIF_RTS_9>
We strongly concur with ESMA concerns about the timing of the Level II finalisation versus the timing of the PRIIPS consultation, as raised under point 45 of the consultation. We are indeed deeply concerned with the number of legislative consultations going on costs and cost disclosure as listed below:

- MIFID II
- PRIIPS
- IOSCO consultation on CIS expenses

We indeed fear that, if not all requirements are aligned, this might result into divergent reports being issued under different rules/methodology, leading to significant confusion for investors and market participants.
We agree in principle with the approach to align with existing frameworks to allow asset managers to leverage on the efforts they have already made for comparable legal requirements (e.g. UCITS). It would however appear paramount to us to not copy paste but to adapt the ELTIF KIID to the product concerned and to avoid requirements that are clearly not adapted to the framework of long-term investment funds.

As a side remark, in the draft Level II text there seems to be a mismatch in the numbering of the paragraphs.
<ESMA_QUESTION_ELTIF_RTS_9>

Q10 Do you agree with the abovementioned assumptions?

<ESMA_QUESTION_ELTIF_RTS_10>
As mentioned in Q9 we are concerned about potential lack of consistency with other pieces of legislation.
<ESMA_QUESTION_ELTIF_RTS_10>

Q11 Do you agree that the types of costs mentioned in the present paragraph are annual costs that could be expressed as a percentage of the capital?

<ESMA_QUESTION_ELTIF_RTS_11>
Performance fees may be applied to certain categories of ELTIFs. Nevertheless, as foreseen in the UCITS KIID, we would not include these in the ongoing charges percentage as these expenses are not expressed as a percentage of NAV but usually as a percentage of over performance. We believe that providing a description of the calculation methodology would provide more valuable information to investors.
<ESMA_QUESTION_ELTIF_RTS_11>

Q12 Do you think that performance related fees would be relevant costs to be taken into account in the case of ELTIFs?

<ESMA_QUESTION_ELTIF_RTS_12>
Please refer to our answer to Q11 above.
<ESMA_QUESTION_ELTIF_RTS_12>

Q13 How would you include performance related fees in the overall ratio referred to in paragraph 2 of Article 25?

<ESMA_QUESTION_ELTIF_RTS_13>
Please refer to our answer to Q11 above.
<ESMA_QUESTION_ELTIF_RTS_13>

Q14 Do you agree that the types of costs mentioned in paragraph 54 are fixed costs and that an assumption on the duration of the investment is necessary to calculate these costs in the numerator of the overall ratio mentioned in Article25(2), provided that this overall ratio is a yearly ratio?

<ESMA_QUESTION_ELTIF_RTS_14>
Acquisition costs may vary a lot depending on the nature of the investment and investment policy. Whilst they may have a fixed or predetermined nature for certain predefined large investment projects, they may also have a variable nature for other instruments in the portfolio or other investment policies (like liquid assets pocket or small cap investment, for instance). We are therefore of the view that it would be overly simplistic to assume they are always fixed costs. Some flexibility shall remain to adjust the disclosure format to the nature of the investments.
<ESMA_QUESTION_ELTIF_RTS_14>

Q15 Do you agree that the types of costs mentioned in paragraph 54 may be considered as fixed costs in the case of an ELTIF?

<ESMA_QUESTION_ELTIF_RTS_15>
Please refer to our answer to Q14 above
<ESMA_QUESTION_ELTIF_RTS_15>

Q16 Do you agree with the proposed requirements? Would you suggest the introduction of any additional/alternative requirements? Please provide details and explain your position.

<ESMA_QUESTION_ELTIF_RTS_16>
In principle we agree with the requirements laid out under section 8.

However, we suggest adding an express reference in the technical standards in order to make it clear that putting in place “facilities” may include the use of a website. Indeed, the current range of facilities included in the EU national legislations often does not reflect the technological developments which (i) facilitate the exchange of and real-time access to information and data and ii) payments and cash transfers by retail investors. Such technical facilities actually meet the requirements and preference of a considerable part of the retail public.

Moreover, the requirement in some countries to have a portfolio manager or agent physically present may be disproportionate and not efficient especially where only a few investors are located in these countries.

Finally, we there is a typo on page 72 - Article 6 paragraph 2 : the last word of this paragraph should refer to paragraph 1 (not to paragraph 2).
<ESMA_QUESTION_ELTIF_RTS_16>

Q17 What would you consider as appropriate specifications for the technical infrastructure of the facilities?

<ESMA_QUESTION_ELTIF_RTS_17>
Reference to Question 16 above.
<ESMA_QUESTION_ELTIF_RTS_17>

Q18 In the event that the RTS enter into force after the date of application of the ELTIF Regulation and authorisations are granted between the date of application of the ELTIF Regulation and the date of application of the proposed RTS, do respondents see a need for specific transitional/grandfathering provisions for the proposed RTS?

<ESMA_QUESTION_ELTIF_RTS_18>
In ALFI’s views it appears relatively unlikely that the probability arises in practice. Should this however be the case then we do not see how a temporary grandfathering could possibly work. Indeed, due to the very nature of ELTIFs the set-up, investments and strategies applies by every ELTIF are defined over a long period of time and adjustments are not possible once an ELTIF has been launched. As a consequence, it appears to us that any grandfathering provision that may be established would necessarily need to grant an indefinite grandfathering to ELTIFs set-up and launched before the entry into force of the Level II rules.
<ESMA_QUESTION_ELTIF_RTS_18>

Q19 Do you agree with the above-mentioned reasoning in relation to the possible costs and benefits of the options as regards hedging? Which other costs or benefits would you consider in this context?

<ESMA_QUESTION_ELTIF_RTS_19>
TYPE YOUR TEXT HERE <ESMA_QUESTION_ELTIF_RTS_19>

Q20 Do you agree with the assessment of costs and benefits above for the proposal on the sufficient length of the life of the ELTIF? If not, please explain why and provide any available quantitative data on the one-off and ongoing costs (if any) that the proposal would imply.

<ESMA_QUESTION_ELTIF_RTS_20>
TYPE YOUR TEXT HERE <ESMA_QUESTION_ELTIF_RTS_20>

Q21 Do you agree with the assessment of costs and benefits above for the proposal on the criteria for the assessment of the market for potential buyers? If not, please explain why and provide any available quantitative data on the one-off and ongoing costs (if any) that the proposal would imply.

<ESMA_QUESTION_ELTIF_RTS_21>
TYPE YOUR TEXT HERE <ESMA_QUESTION_ELTIF_RTS_21>

Q22 Do you agree with the assessment of costs and benefits above for the proposal on the criteria for the valuation of the assets to be divested? If not, please explain why and provide any available quantitative data on the one-off and ongoing costs (if any) that the proposal would imply.

<ESMA_QUESTION_ELTIF_RTS_22>
As mentioned in our response to question 8, we prefer the baseline approach as options might lead to performing an additional valuation, which might not necessarily be relevant in all circumstances (assets maturing before the end of life of the ELTIF etc.) and may represent a cost extensive exercise for assets where there is no active market.
<ESMA_QUESTION_ELTIF_RTS_22>

Q23 Do you agree with the above-mentioned reasoning in relation to the possible costs and benefits of the option taken by ESMA as regards common definitions, calculation methodologies and presentation formats of costs of ELTIFs? Which other types of costs or benefits would you consider in this context?

<ESMA_QUESTION_ELTIF_RTS_23>
We agree with the approach to align requirements with the KIID disclosure. Please refer to our detailed comments as developed in the responses to questions 10 to 15. We are nevertheless concerned with the unaligned timing of legislations and wonder whether, if the PRIIPS RTS would defer, whether it is foreseen to align the ELTIF RTS to the PRIPPS RTS in order to avoid discrepancies between the ETIF's prospectus and the ELTIF KIID.
<ESMA_QUESTION_ELTIF_RTS_23>

Q24 Do you agree with the assessment of costs and benefits above for the proposal on the facilities available to retail investors? If not, please explain why and provide any available quantitative data on the one-off and ongoing costs that the proposal would imply.

<ESMA_QUESTION_ELTIF_RTS_24>
The recognition and inclusion of alternative means (see answer to question 16) will have a positive impact on the costs without compromising the investor protection.

We otherwise agree with the assessment of costs and benefits included in the consultation.
<ESMA_QUESTION_ELTIF_RTS_24>