

RESPONSE TO CONSULTATIONS

ESMA

Guidelines on Liquidity Management Tools of UCITS and open-ended AIFs



association of the
luxembourg fund industry

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?

While the elements (5) listed out in Paragraph 17 are appropriate illustrations of factors to be considered when selecting Liquidity Management Tools ('LMTs'), it would be beneficial to highlight that this list is not purposing to be exhaustive. The selection of LMTs should in fact be based on all relevant factors. A closed list would neither be flexible enough to capture the heterogeneity of products (from the investment strategy to the operational set-up) on the market nor future-proof.

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)?

As stated above, ALFI is of the view that the distribution policy is a relevant criterion to be considered when selecting the appropriate LMTs toolbox. However, it is believed that anti-dilution levies remain the responsibility of the fund or investment fund manager. In certain circumstances and set-ups, third party distributors may apply fees for there facilitation services but they are not related to the fund underlying assets liquidity and to the dilution caused by transacting those assets.

Consequently, ALFI considers that fees applied by third-party distributors are not anti-dilution tools as per the meaning of the Annex V of the AIFM Directive and of the Annex IIA of the UCITS Directive as amended by the Directive (EU) 2024/927 and should not qualify as such. Accordingly, fees applied by third-party distributors should not be called an anti-dilution tool and should be clearly set out in the fund documentation.

It is necessary to distinguish fund manufacturing and fund distribution activities. The selection, activation and calibration of anti-dilution levy is directly link to the product features (investment strategy, underlying assets, structure, etc) and therefore is within the remit of competence and responsibility of the fund manager.

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?

For most part, the principle to combine at least one quantitative LMT and at least one ADT is economically sound. Nevertheless, this conclusion is generic and does not account for the many contingences for which such consideration would not be appropriate. For illustration purposes, these specificities could relate to the nature of the fund's strategy and underlying assets but also the availability of other LMTs outside the list as referred to in Paragraph 12 of Section 2 ("Background") of the consultation. Regarding the fund's strategy, MMF obtained a derogation to select only one LMT on this basis. Although not in Directive (EU) 2024/927, the same rational could apply to certain alternative real assets strategies. As a consequence, the consideration to select at least one quantitative LMT and at least one ADT, for those alternative real assets strategies would not be appropriate due to dilution being materialized differently

on illiquid assets. Regarding the availability of other LMTs outside the list, it is possible that these 'other' LMTs address well one aspect (quantity or anti-dilution) but that the other aspect must be addressed with two tools within the list.

Against this background, ALFI recommends neither to make an explicit requirement nor a suggestion to select at least one quantitative LMT and at least one ADT. The closed list of the Annexes and the requirement to select at least two tools is sufficient for manager to adopt a complete and effective toolbox acknowledging for various fund features.

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

The Guidelines on LMTs should reflect the consensus reached on the Guidelines on Liquidity Stress-Testing ('LST') (ESMA34-39-897) as mentioned in section V.2.:

"V.2 Guidelines applicable to depositaries

74. A depositary should set up appropriate verification procedures to check that the manager of a fund has in place documented procedures for its LST programme.

75. The verification does not require the depositary to assess the adequacy of the LST. For example, one way of verifying that LST is in place and carried out is to confirm that the UCITS RMP or AIF RMP provides for the manager to carry out LST on the fund.

76. Under both the UCITS Directive and the AIFMD, depositaries are required to implement procedures to verify that the fund is acting in compliance with obligations under those Directives.¹⁴

[...]."

ALFI recommends that the the depositary duties should not go further than the verification that the manager of a fund has in place documented procedures.

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?

The proposed elements to be included in the policy are mostly coherent with the industry governance practices and considerations around the selection, calibration and activation of LMTs. There is a need to take a flexible approach as to the costs and the extent these can be anticipated. In addition, the below targeted concerns pose significant challenges to the industry and could hinder the effective use of LMTs.

a) Distinction to be made between policy and procedure

Several listed items require to include procedures within the policy. This in particular refers to item i), j), o) and p). Procedures and policy are two distinct elements with different purposes. While the policy can refer to the procedures, procedures should not be embedded into the

policy. The governance focus of policy documents is at risk to be lost because of the operational focus and continuously evolving nature of procedure documents.

ALFI recommends for procedures to be referred to but not included into the policy.

b) Adaptable review frequency

Item e) establishes the requirement to define and disclose the frequency of monitoring and review of activated LMTs. Item m) establishes the requirement to define and disclose the frequency of the review of the assumptions related to the availability of data. In addition, Paragraph 29 explicitly imposes a bi-annual (every six months) frequency for the review of the ADT costs estimation methodology.

The difference between methodology and operation needs to be highlighted. While operations and the parametrization tweak involve a monitoring on a regular basis, methodologies are more stable. Accordingly, the bi-annual review requirement does not match this temporal feature. Furthermore, the bi-annual frequency of planned review is higher than standard review and due diligences processes (rather annual).

Considering that methodologies are reviewed on ad-hoc basis outside the planned review schedule when demanded by the market conditions, ALFI recommends not to impose a specific review frequency to better adapt to the level of sophistication of the method used and prevailing conditions. In addition, a disclosure to investors of review frequencies could turn into a horserace between incomparable funds with fundamentally diverging characteristics, models and data. ALFI therefore recommends this frequency not to be disclosed to investors.

c) Checks does not equate to back testing

Item n) establishes the requirement to include in the policy and as a consequence to carry out routine checks that include back testing. The terminology back testing carries a very strict statistical meaning. This implies the exact comparison of forecasts or nowcasts with subsequent observable realizations. In practice, some measures, due to lack of observables or low frequency, cannot be subject to such statistical testing but rather to '*controls*' or '*consistency checks*'. Indeed, with regards to LMTs activation, the realizations are often not directly observable. For most quantity based LMTs there is no obvious observable or counterfactual. For ADT, dilution (costs and impacts) is to be forecasted but actual dilution is not observable and needs to be estimated relying on strong assumptions. In this respect, there is a trade-off between model risk and costs. Either back testing can be carried out effectively with precise estimates acquired at high costs (such as intra-day data) or back testing results have limited reliability because of the noise induced by model risk stemming from the assumptions taken (such as taking opening price instead of actual time of the day price). Some industry players are fortunate to have access to quality estimates at reasonable and proportionate costs because of their firm wide operational model (in-house desk, in-house data solution, etc) but this cannot be generalized to all. In this context, the control framework and controls carried out should be designed to strike a balance between the benefits added by the controls and the associated costs ultimately born by the investors. In this sense, a full fledged back testing, in the pure statistical sense of the semantic, might not always be proportionate.

ALFI recommends to adhere to the wording 'routine checks' and to refrain from mentioning

'back testing' due to the strict statistical meaning it carries and to allow managers to adopt testing procedures proportionate to a cost-benefit analysis and adapted to the peculiarities, such as the level of sophistication, of the underlying model used.

A secondary comment relates to the item i "*procedures to ensure the operational readiness and effectiveness of the manager and relevant stakeholders (e.g.: depositary, accounting, distributors and other services providers) in the event of the activation of LMTs*" being welcomed by the asset servicers, depositaries and custodians as it supports their procedures monitoring activities.

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.

Disclosure is a potent tool to inform investors of the cost of liquidity and of their access to capital under different market regimes. However, it could have unintended consequences if investors could anticipate LMTs activations relying on disclosure jointly with other data points or information. The benefits of disclosure are reached with governance focused and principle-based disclosure. The information which could be exploited adversely relate to the detailed application of the tools such as computation methodologies, parametrization and calibration, checks and ex-post activation data. Accordingly, the nature is more relevant than the quantity of the disclosed information.

ALFI recommends to favour principle-based disclosure rather than the operational details listed in Paragraph 28.

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?

It is important that no description of exceptional circumstances is considered as a specific definition outlining criteria to act upon. Given the extraordinary nature of such conditions it would be difficult to provide any exhaustive definition or list prescribing them. The suggested description is an illustration of what situations could constitute exceptional circumstances but is not to be seen as encompassing all exceptional circumstances. For clarity and ease of interpretation, one part of the sentence appears redundant and could be deleted. This refers to the complementing information stating "*and which would temporarily prevent the manager to meet the funding obligations*". Avoiding this redundancy, the definition would read as follow:

Exceptional circumstances can be defined as unforeseen events and/or

operational/regulatory environments that impact materially on the fund's ability to carry out normal business functions and activities arising from the liabilities side of the balance sheet. A non-exhaustive list includes: asset valuation difficulties; severe liquidity issues (e.g.: due to margin calls, significant size withdrawal) where executing the sale of underlying assets could cause liquidity issues for the fund (e.g.: large discounts in asset sales, large dilution of remaining investors); critical cyber incident that impacts on the fund, the manager and/or fund's services provider capacity to operate; unforeseen market closures, trading restrictions, closure of trading venues; severe financial and/or political crisis; identification of significant fraud; natural disaster.

Note: quotation marks are not used to highlight that the original proposal has been amended

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?

Mirroring the draft RTS on LMTs (ESMA34-1985693317-1095), the draft Guidelines do not foresee the opportunity to suspend only redemption or only subscription. As detailed in the ALFI response to the draft RTS, imposing a symmetry on the LMT does not echo to the asymmetric nature of financial markets liquidity. This additional constrain creates a discrepancy between the funds' liquidity (coerced to be symmetrical) and the underlying assets' liquidity (empirically and economically asymmetrical). As a consequence, the first tool of the Annex V of the AIFM Directive and of the Annex IIA of the UCITS Directive as amended by the Directive (EU) 2024/927, would have a very limited scope and ability to address and protect investors' best interest under varying 'exceptional circumstances'. For more technical details and evidence on the asymmetric nature of liquidity please refer to ALFI's response to the draft RTS consultation.

Against this background, and coherently with the answer to the draft RTS, ALFI recommends allowing the suspension of subscription and redemption to be managed independently. These should be allowed to function independently and to still qualify as per the tool in the Annexes of the AIFMD and UCITS Directive. As a consequence, ALFI recommends including in the LMT plan an element referring to whether the suspension is applied simultaneously to redemption and subscription or not and the motivation for this choice.

In addition, the plan covers extensively all aspects relating to the activation of a suspension of redemption and subscription. Suspension may arise in different situations and for various reasons. The plan appears to be tailored for structural suspensions referring to a medium to long term situation characterized by idiosyncratic or systematic exceptional circumstances. Suspension of other nature may occur such as technical suspensions of short-lived and predictable complexion, and characterized by operational circumstances. Considering the varying degree of the impact on investors of these two cases, ALFI recommends to introduce proportionality on the elements to be included in the LMT plan depending on the nature of the suspension. This recommendation would be further strengthened should soft close be included in the RTS.

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?

The list is in line with economic rational and industry practices with the exception of the activation threshold. Suspension of redemption is predominantly perceived as the ultimate last resort tool within the LMT toolbox. Suspension is the tool of choice to face the most exceptional and abrupt circumstances that can stem from fundamentally diverging causes as highlighted in the definition provided in Paragraph 30. As a consequence, a pre-defined activation threshold is not an ideal feature for the tool to be effectively addressing extreme, unprecedented and disparate situations. The level of redemption leading to suspension, for an identical fund, could vastly diverge depending on the nature and cause of suspension. In these circumstances, the threshold would not be even merely indicative and the benefit of having any threshold at all is challenged. In addition, although Paragraph 33 mentions that any mechanistic approach should be avoided, establishing a threshold could create an anchor for decision making. This would increase the predictability of suspension activation leaving the fund more vulnerable to adverse behaviour and run off.

On the basis of these arguments and the limited benefit of a threshold for suspension, ALFI recommends not to include the threshold in the list of elements to calibrate suspension.

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

No specific comment

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

As noted in ALFI's response to the consultation on the draft RTS on LMT, the incapability to activate redemption gate if the level of redemption remains below the threshold severely hinders the capacity to protect investors across comprehensive market conditions. While an exceedance of the threshold prompts a discretionary choice of the manager on whether to activate gating or not, redemption levels below the threshold does not offer this flexibility and strictly prevent the manager from activating redemption gates. Severe episodes of evaporating liquidity, systematic or market specific, have resulted into temporary yet non-negligible liquidity costs for unanticipated transaction levels. Accordingly, material transaction costs may materialize even for modest level of redemption (in percentage term) below the threshold:

- under specific market conditions; and
- for large funds (in term of asset under management in monetary term).

This shortcoming is further aggravated by the fact that the threshold is agnostic to the size of the fund. Although the redemption expressed in percentage of the net asset value ('NAV') may appear modest, it could still lead to encounter liquidity constraints and costs.

Echoing the recommendation from the response to the RTS consultation, ALFI advocates for the RTS and Guidelines to allow for redemption gating below the threshold when the market conditions and the absolute transaction size make it an imperative in order to protect remaining investors. An indicative threshold with appropriate disclosure and governance would result in

gate activations better protecting investors from changing market conditions and fund footprint on the underlying markets.

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 would recommend that fund managers should retain discretion over when to implement repurchase limitations or gating, and at what level. Managers should have the ability to appropriately determine whether to activate or deactivate a gate, and equally whether to retain a repurchase limitation in the form of a limit on repurchases as a percentage of NAV, appropriate to the fund's liquidity, underlying strategy, and the best interests of investors.

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?

As mentioned in Question 11, the threshold should not become a criterion restricting the use of redemption gates when it is in the best interest of investors. An indicative threshold rather than a binding threshold would be a better tool to ensure that investor can be protected whenever necessary instead of relying on less appropriate or more severe tools because of the lack of availability of gating.

An indicative threshold should be defined on the basis of various hypothetical scenarios considering among other factors:

- the dynamic of volume available to transact under normal and stress conditions;
- the dynamic of costs to transact under normal and stress conditions; and
- the fund footprint (monetary unit) on underlying markets under different AUM growth scenarios;

acknowledging for the fact that those are inherently impotent to capture all possible eventualities.

While historical redemption requests and LST could be factors to consider, they are not all-encompassing when it comes to review possible future developments. All relevant factors related to the above bullet points are to be taken into account in this context.

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?

As advocated in Question 11, the threshold should not become a criterion restricting the use of redemption gates when it is in the best interest of investors. The definition of a fixed minimum activation threshold would reinforce the limitations highlighted in the case of a binding threshold. A generic and largely arbitrary threshold would fail to capture:

- the diversity of underlying assets and markets as well as their specific liquidity dynamic (e.g. broker intermediated vs exchange traded market);
- the diversity of investors type, investor base and distribution model;
- the footprint of the fund (size of the fund relative to underlying market and prevailing conditions); and
- the time-changing nature of the above elements;

and be less adapted to the fund (no one-size-fits-all threshold), less reactive to market liquidity deterioration and less relevant to protect investors.

Following the same logic as Question 9, fixing the minimum activation threshold would increase the predictability of gates activation leaving the fund more vulnerable to adverse behaviour and run off.

ALFI does not recommend to use a fixed minimum activation threshold. ALFI further recommend to use an indicative threshold rather than a binding one allowing to activate redemption gates for redemption level below the threshold when the conditions dictate it in order to preserve investors' best interests.

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?

In Question 14, ALFI did not recommend a fixed minimum threshold. Besides, a recurring market feedback on the current threshold practice is highlighting the already existing widespread lack of economic rational and justification behind the predominant use of a 10% threshold.

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?

No specific comment

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 overwhelming majority of private equity ('PE') and real estate ('RE') funds have standard notice period as it is considered to be a very appropriate LMTs for these asset classes. Although some standard minimum figures are frequently mentioned (such as 3 months), these values only refer to an average. Depending on the conditions, the minimum notice can diverge because PE and RE are not homogeneous asset classes (e.g. core, core plus, value added, and opportunistic as the least granular classification possible for RE). As a conclusion, although some average trends exist, a minimum notice period cannot be provided for all funds.

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?

On average there should be mechanically a relationship between the notice and extension. For instance, a fund with a longer notice will rarely extend for a short period of time. Yet this does not represent a strict rule. Depending on the conditions that have triggered the notice extension and the time needed to resolve to a situation with minimal impact for investors, the length of the extension may deviate from this rule of thumb.

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?

No specific comment

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

No specific comment

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

The operational costs and efficiency are also relevant criteria to consider as the processing of redemptions in kind can be resource demanding which should be reflected in the Guidelines.

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

The list is in line with economic rationales with the exception of the two following elements:

a) Disclosure whereabouts

Paragraph 47 states

“Redemption in kind should be activated on the NAV calculation dates at the discretion of the manager, as foreseen in the fund’s prospectus/articles of incorporation.”

The use of “/” creates interpretation uncertainty as to whether the redemption in kind activation scheme should be disclosed:

- in the fund prospectus or the article of incorporation; or
- in the fund prospectus and the article of incorporation?

While the former is appropriate, the latter would impose significant costs and rigidity for virtually no added value. As expected, in practice the costs, time and resource for modifying article of incorporation has proven to be extensive and surpassing by a significant margin those of modifying prospectus. Articles of incorporation are pivotal legal documents, yet they are rarely used by investors. In term of investor disclosure and transparency, the fund prospectus provides for a much better format.

ALFI recommends to clarify that the LMTs disclosures can be made in fund prospectus or articles of incorporation in the context of redemption in kind but also for all other LMTs across the RTS and Guidelines.

b) Independent third-party

Paragraph 48 states

“In case of the activation of redemptions in kind, an independent third party (e.g.: the fund auditor, depositary) should perform the valuation of the asset(s).”

In Luxembourg, the reliance on an independent third party is one of the already existing safeguards to ensure that the redemption in kind is done at arm’s length. However, this role is undertaken by the fund auditor and not the depositary. It is not the role of the depositary to perform valuation of assets and this is to be considered in light of the prohibition of AIFMD Directive (see Article 19(4)).

ALFI recommends to delete the reference to the depositary in this context.

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

No specific comment

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?

The draft Guidelines remain silent on the method to select assets to be redeemed in kind. On the other hand, the RTS establishes the key requirement to select assets on a pro rata basis as stipulated in Article 8(3) of the draft RTS

“If the AIF is solely marketed to professional investors or if the investment policy of the AIF is to replicate the composition of a certain stock or debt securities index and that AIF is an ETF fund, AIFMs or the fund Board as

applicable may decide whether they transfer assets to professional investors on a pro rata basis of the assets held by the AIF.”

Note: Only the AIF wording is quoted here to avoid redundancies. Yet, the draft RTS dedicated to UCITS adopts the same provision.

The reliance on the notion of pro rata in order to protect the non-redeeming parties which are not providing prior consent is theoretically sound. However, the principle of pro rata should be defined. Indeed, while in theory a pure pro rata is possible, in practice only a ‘quasi’ or ‘near’ pro rata can be achieved. Accordingly, the notion of pro rata should be defined providing some flexibility and room for manoeuvre operationally.

A definition of quasi pro rata (or near pro rata) could refer to a modification that does not substantially alter the portfolio profile and characteristics. Characteristics that may be considered include:

- the fund’s risk return profile;
- the fund’s liquidity profile; and
- the funds’ compliance with portfolio (legal and contractual) rules.

In addition, this definition of quasi pro rata is fully aligned with actual disposition methods relied upon to serve classical not in-kind redemptions.

ALFI recommends to follow the near pro rata definition above to select the assets to be redeemed in kind.

Q25: How should redemptions in kind be calibrated?

No specific comment

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.

ALFI would like to highlight that anti-dilution mechanisms are primarily business as usual tools to protect long term investors. For this reason, managers are best placed to define multiple appropriate anti-dilution / liquidity management techniques appropriate for their business and the circumstances on when and how to use them. Whilst it is paramount to retain proportionality and flexibility in the use of the anti-dilution tools, it is paramount to react quickly when markets become stressed. Bearing this in mind, managers are above all acting as fiduciaries in the best interest of investors and would not simultaneously activate ADTs where this would not be for the benefit of the investor, especially where ADTs have a similar (albeit not the same) effect by protecting remaining investors in a fund against dilution.

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 welcome that ESMA mentions the activation of ADTs under normal and stressed market conditions, as we see these tools primarily business as usual tools to protect long term investors. In addition, we welcome that ESMA refers to "estimated costs of liquidity". Whilst paragraph 56 of section 6.5.4 of the draft LMT Guidelines captures a wide range of elements, there are particularities that are not captured.

We would also like to point out that alternative funds will have additional or rather different characteristics for Real Estate funds, because the "explicit" costs will vary depending on location (e.g. on notary fees that are different in each country, local taxes etc.), although it is possible to estimate with reliable data.

For "implicit" costs for such alternative funds, which are driven by demand, it will depend on the quality of the property and market conditions. Due to the lack of market data, we want to point out that it is hard to even sometimes estimate the "implicit" cost accurately and given it is based on a lot of subjectivity, there is a risk that there is a wide difference in the calibration for similar funds. This in turn will inevitably lead to higher costs chargeable to the funds as managers instruct professional advisors to assist in demonstrating the fair treatment of investors in the process.

As regards the notion of "market impact", which is the difference in price in the fund valuation at which subscriptions/redemption are transacted to that actually achieved via security purchase/ sale, we do not believe that the assessment of market impact should be mandatorily required. While such consideration has in principle merits, in practice, there are important constraints as all models measuring market impact are based on estimates and therefore run important model risks and hinder consistency across the market. A number of factors that may move in different directions or magnitudes (and cannot be disaggregated) may play a role in price slippage: such as spread widening, liquidity premium based on trade size, secular market sentiment, which makes the accuracy of any proprietary model questionable.

Finally, as regards "Significant Market Impact" mentioned in paragraph 50 of the present consultation, we would like to remind that also IOSCO mentioned in its Guidance for Effective Implementation of the Recommendations for Liquidity Risk Management for Collective Investment Schemes that "an assessment (e.g., slippage assessment) is needed before the sale / purchase is made, taking into account the size of the transaction, asset class, market structure and the prevailing market conditions [...]".

Whilst slippage can act as a proxy for "market impact" we would like to outline that one deals with different calculations.

- Slippage is the difference in cost from the cost at time of the decision to place the trade to the cost of the actual trade achieved.
- Market impact is the difference in price in the fund valuation at which subscriptions/redemption are transacted to that actually achieved via security purchase/ sale.

One should also consider the effects of events that happen in the global business day where

markets in the east have closed and for which closing prices are established. If a significant market event happens post close then the opening market valuations the next day are likely to be out of sync with the closing market values from the previous day. In such circumstances the application of security level and market level fair valuation methodologies is important to negate the impacts mentioned in the guidance.

Finally, there should be no caps or restrictions that prevent anti-dilution LMTs from incorporating all costs – prospectus driven caps on swing factors are required for normal conditions but able to be extended in exceptional circumstances – with appropriate disclosure).

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

No specific comment.

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

Redemption fees are used for different purposes. In theory it could be used for commercial considerations, which we do not see as an association in practice. Redemption fees are nevertheless used when redemptions have an impact on the investment strategy of the fund (e.g. portfolio repositioning during the recommended holding period which triggers costs to the fund that should not have occurred but for the redemption during the recommended holding period).

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

Managers are best placed to lay down any activation thresholds for redemption fees. Commercial considerations play a major role on the question around whether such fee will prevent an investor from buying a fund.

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

Redemption fees are not calibrated, managers need to explain in their fund documentation, such a prospectus, what costs they are trying to cover. We are happy with the wording in paragraph 84.

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

As an Association, we have extensively written on Swing Pricing, which in our own definition provides essentially a mechanism to attribute the estimated cost of underlying capital activity to those subscribing/redeeming and thereby protects existing shareholders from impacts caused by the capital activity of others.

Swing pricing is part of the NAV calculation process and, as such, it should be subject to an appropriate internal policy, governance and transparency as well as a strong control environment. There should be appropriate documentation, particularly of any exceptions to the swing pricing process.

Section 6.5.4.2 of the draft Guidelines expressly outlines that “when calibrating swing pricing, managers should ensure that the full cost of liquidity, in light of the market conditions, is incorporated in the swing factor [...]”. As outlined above, managers cannot ensure full cost of liquidity in all circumstances, as it may sometimes not be possible. In addition, we would like to point out that the RTS refers to “estimated cost of liquidity”.

ALFI suggestion to align the wording of the Guidelines (section 6.5.4.2 of the draft Guidelines) with those of the RTS to: “When calibrating swing pricing, managers should ensure that the “estimated” ~~full~~ cost of liquidity[...]”

Whilst we agree with the characteristics that have been identified in the consultation, we would like to underline the fact that swing pricing is an estimation of costs based on historical data, which means it assesses the historical average costs prior to transacting on behalf of an investor (capital activity).

We encourage every asset manager to assess as to whether swing pricing is the most appropriate anti-dilution method for the characteristics of the particular fund in question and the asset class(es) that the fund invests in. If it is decided that swing pricing is the appropriate mechanism for a given fund, the following should be considered:

- Can estimated net cash flows be robustly determined, in time and in a format that can be consumed by operational processes?
- Are appropriate and robust data sources, including trading data, available to incorporate into the calculation of the swing factor?
- Is full or partial swinging most appropriate for the fund in question?
- Once the decision is made to apply swing pricing, what is the appropriate swing factor for a particular fund?
- If partial swing is adopted, what is the appropriate swing threshold for a particular fund?
- Would multiple thresholds and multiple swing factors be appropriate? If yes, under which circumstances?
- What are the appropriate procedures, processes and controls governing swing pricing generally and in the case of special events, such as stressed markets or specific fund events?
- What level of disclosure and transparency is appropriate?

We furthermore recommend our members to take into consideration the [CSSF FAQ](#) on swing pricing when drafting their own swing pricing policy and/or processes and/or procedures (hereinafter “policy”), in particular:

- Governance - the policy should be consistently applied, and processes outlined therein

- should be embedded in the fund NAV calculation process;
- The key principles relating to the application of swing pricing: eligible funds, partial/full swing, single/multiple factors, single/multiple thresholds, elements to be included in the calculation of swing factors, practice concerning disclosures, basis for calculation of certain elements (e.g. swung NAV or unswung NAV).
- The policy should be broad enough to allow the co-existence of different criteria and arrangements;
- The circumstances should be set out under which the swing factor applied may exceed the maximum level laid down in the prospectus and related internal and regulatory communication and approval processes;
- The treatment of material swing errors, in line with CSSF Circular 02/77, as amended, and of immaterial swing errors, in line with the CSSF FAQ on swing pricing;
- The contingency procedures, that is, consideration should be given to what, if any, additional processes and procedures may be invoked during an emergency situation, such as a global pandemic (e.g. a more frequent review and/or review process for swing factor/threshold changes, "fire drills", special sub-committees);
- Escalation procedures and processes should be set out.

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

The ALFI view is that it is effectively for each manager to define what dilution is material to them, their funds and their investors, and that we would suggest points that managers should consider when setting their dilution thresholds, including where they would view dilution as becoming material.

Anti-dilution should primarily be a business as usual tool – activated whenever applicable – based on investor flows. Based on portfolio holdings – very liquid holdings can probably have a higher liquidation threshold.

Size of net flows in relation to size (AUM) of the fund should be considered, as the normal size of investor flows and frequency of flows and the cumulative effect of small but frequent flows.

Automation – is it more practical to have the same level of threshold activation across all funds / all funds of a certain type?

Type of fund – index / tracker style funds would be impacted by lower volumes

Anti-dilution can be / should be a business as usual tool – used whenever applicable – based on investor flows.

The Responsible Entity should define the level of dilution that it will accept and put in place procedures to protect the fund from dilution above that eg 1 bp - given that the aim is to provide reasonable protection against dilution.

When considering the approach to dilution, ADL LMTs and thresholds it is important to strike the right balance between investor protection (e.g. percentage flows captured and level of dilution protection), operational effectiveness, transparency, short-term NAV volatility and

tracking error, board and investor expectations and portfolio management considerations.

It is also relevant to consider the timing and levels of investor capital activity, both historic and prospective (if available). By way of example, funds with infrequent net capital activity and/or insubstantial net flows may require a different approach to those with daily net capital activity and/or substantial net flows.

Considerations influencing the determination of the threshold may include:

- The type of threshold (percentage, monetary or a combination);
- Single or multiple/tiered thresholds to be applied;
- The fund size;
- The fund client base and its concentration;
- The type and liquidity of securities in which the fund invests;
- The costs, and hence the dilution impact, associated with the markets in which the fund invests (although this will principally impact the factor);
- The investment manager's investment policy and the extent to which a fund can retain cash (or near cash) as opposed to always being fully invested;
- Consistency considerations within a fund complex - whether consistency of thresholds could be achieved without affecting the effectiveness of the AD LMT;
- The accepted level of client net capital activity for which transaction costs can be absorbed by the fund;
- Soft closure measures on capacity constrained funds, for example a fund closed to new subscriptions but which has contractually agreed to continue to accept small regular savings plan amounts;
- The frequency of the threshold review, and any specific triggers to review;
- Transparency considerations.

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?

ALFI suggests to change the wording in paragraph 89 to refer to "estimated" cost of liquidity, as follows:

"89. When calibrating swing pricing, managers should ensure that the ~~full~~ estimated cost of liquidity, [...]". The swing factor is determined by assessing those transaction and market impacts expected to be incurred as a result of investing or disinvesting the net capital activity for that day.

The bid-offer spread is a key component to be included in the swing factor. If bid and offer

prices of underlying securities are not available, then an estimate of the bid-offer spread applicable to the market in which the securities are traded may be reasonable.

Additionally, the following could be considered when deriving the swing factor:

- Broker commissions paid by the fund on an actual or historical basis;
- Custody transaction charges on an actual or historical basis;
- Fiscal charges (e.g. stamp duty, sales tax, transactions tax either on the security or on the currency required to purchase the security), any initial charges or exit fees applied to trades in underlying investment funds, where applicable;
- Share class specific items, e.g. if there is a notable cost specific to one particular class;
- Any swing factors, dilution amounts or spreads applied to underlying investment funds or derivative instruments.
- Passive vs active investment: there may be little or no price impact for security trading in respect of certain passive investing funds, particularly those using synthetic replication;
- Potential tiering of the swing factor to reflect the size of the net capital activity thus taking account of the sliding scale of broker costs associated with trade size;
- Scalability and agility of the review process, methodologies and communication flows: should be considered – in unusual situations (e.g. significantly stressed market conditions, can swing factors be appropriately reviewed and updated in a timely fashion?);
- Operational processes relating to application of swing factors as part of the NAV calculation process.

As regards significant market impact, ALFI strongly believes that this must be left to the discretion of the manager. With respect to market impact, ALFI would like to outline that different responsible entities have different capabilities with respect to the availability of data they have at their disposal. Many firms do not presently have the depth of data required to build their own proprietary solution for market impact costs. Other firms may not all have the data centralized to be able to achieve this due to legacy structures and acquisition strategies over the years.

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

Our members take into consideration the CSSF FAQ on swing pricing when drafting their own swing pricing policy and/or processes and/or procedures (hereinafter "policy").

Q36: As dual pricing is an 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.

It is worth noting that while swing pricing is particularly relevant to single-priced funds, dilution can also occur in a dual-priced fund to the extent that the spread between the fund's bid and offer NAV does not reflect all the underlying costs of investment/disinvestment.

Q37: Do you agree with the above criteria for the selection of ADL? Is there any other criteria that should be considered?

When considering the approach to dilution, ADL LMTs and thresholds it is important to strike the right balance between investor protection (e.g. percentage flows captured and level of dilution protection), operational effectiveness, transparency, short-term NAV volatility and tracking error, board and investor expectations and portfolio management considerations.

Q38: Do you agree with the above criteria for the activation of ADL? Is there any other criteria that should be considered?

No specific comment

Q39: Do you agree that ADL should be calibrated based on the same factor used to calibrate swing factors?

No specific comment

Q40: Do you have any comments on the selection, activation and calibration of ADL?

Cost / benefit criteria should be considered by responsible entities when considering the appropriate ADL LMT to apply to their business.

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?

Please refer to the points in Q 7 on "exceptional circumstances"

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.

In the recent geopolitical context and in line with the guidance provided by authorities, regulators, and supervisors (e.g. [ESMA public statement](#) and [CSSF FAQs](#)), applications of both physical and accounting segregation based side pocket have been observed in Luxembourg. This diversity highlights that the two approaches are possible and useful to optimally serve different cases. It is also useful to mention that the cost of implementing side pocket is non-negligible and prevented some investment fund managers to activate side pockets in the last years.

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

No specific comment as description matching regulators and supervisors' guidance at the start of the Russia-Ukraine war such as [ESMA public statement](#) and [CSSF FAQs](#).

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

The appropriate level of disclosures should be in place which allows on the one hand investors to understand the LMTs that are in place, their main characteristics and the way they can be triggered while on the other hand the level of information provided does not risk anticipation of their triggering in a way that disadvantages some investors to others (e.g. more sophisticated ones). A list of the LMTs available along with a brief description of their characteristics can meet this balanced approach.

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?

The overwhelming majority of the references made to disclosure whereabouts in both the draft RTS and Guidelines rely on the wording "*fund's rules or instruments of incorporation*". This question instead states "*fund's rules and instruments of incorporation*" which can be interpreted as a cumulative requirement.

As explained in Question 22, disclosure in fund's rule (prospectus) is appropriate and value adding for investors. On the other hand, disclosure in and resulting possible updates of the instruments of incorporation would impose significant costs and rigidity for virtually no added value. As expected, in practice the costs, time and resource for modifying article of incorporation has proven to be extensive and surpassing by a significant margin those of modifying fund's rules. Articles of incorporation are pivotal legal documents, yet they are rarely used by investors. In term of investor disclosure and transparency, fund's rules provide for a much better format.

ALFI recommends to clarify that the LMTs disclosure can be made in fund's rules or articles of

incorporation.

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

See Question 6

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

This question is very relevant although difficult to estimate numerically and especially precisely as it relies on assumptions but also depends on the business and operational model of the fund managers. Hence no numerical value is provided here. However, several criteria and elements to consider for establishing a timeline are provided in the different answers to this consultation. Nevertheless, the scope of the question should also be amended in order to provide for the adaptation of the entire value chain of the fund industry. The implementation depends on other stakeholders (asset managers, depositaries, custodians, asset servicers - fund administrator, transfer agent/ centralizer of orders -, market data provider, distributor, regulator, etc.). In the event that structurally new LMTs should be implemented, a significant transition period should be provided to ensure their implementation by all stakeholders in the value chain. Transition periods will be necessary to allow all stakeholders in all Member States to carry out the necessary developments to be able to deal with all the tools, thus guaranteeing a level playing field within the EU.

Q48. Do you agree with the above-mentioned reasoning in relation to the possible costs and benefits of the technical proposal developed by ESMA as regards the policy objecting to 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?

n/a

Q49. Do you agree with the above-mentioned reasoning in relation to the possible costs and benefits of the technical proposal developed by ESMA as regards the policy objecting to 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?

n/a

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?

n/a