

Responses to the ESMA consultation paper on the draft Regulatory Technical Standards under Regulation (EU) 2023/606

1. INTRODUCTION

INVERCO is the Spanish Association of Collective Investment Institutions and Pension Funds, and brings together, among others, mainly all Spanish Collective Investment Institutions (Funds and Investment Companies) and foreign Collective Investment Institutions registered with the CNMV for the purposes of marketing in Spain.

We are very grateful for the opportunity to provide comments in relation to this ESMA consultation paper on the draft Regulatory Technical Standards under Regulation (EU) 2023/606 of the European Parliament and of the Council, of 15 March 2023 (the “Revised ELTIF Regulation” or “ELTIF Regulation”) (“draft RTS”).

INVERCO’s responses are in line with the Revised ELTIF Regulation’s purpose of channelling capital towards European long-term investments in the EU real economy by encouraging the growth of this type of investment vehicle’s market. As a general consideration, we believe that the path to achieving this goal is by granting flexibility and allowing Managers to have internal rules and procedures that ensure investor protection without being too prescriptive or imposing extra burdens that may hinder the development of the ELTIF market in Europe.

INVERCO’s view is generally aligned with the responses submitted by EFAMA to this consultation. Nevertheless, we want to emphasise the following matters, which we consider of a special importance in the Spanish context.

2. CONSULTATION: QUESTIONS AND ANSWERS

2.1. Q1: Do you agree with the proposed approach in relation to the RTS under the abovementioned Articles 9(3), 21, and 26(2) of the ELTIF Regulation?

N/A.

2.2. Q2: 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 ELTIF Regulation? Which other pieces of legislation and regulatory material do you consider relevant for that purpose?

First of all, we note that the European Commission recently published its Retail Investment Strategy (“RIS”) which aims to amend, among others, AIFMD¹ to establish a pricing process and to specify the notion of due/undue costs.² Therefore, the draft RTS’s list of costs may conflict with such upcoming rules in the event of misalignment. That is why, in light of the foreseen timeline for adoption and application of the RIS and the RTS at stake, which might result in a very close date of application of both pieces, we understand that such ELTIF’s ad hoc list is not necessary. Therefore, although we understand it was necessary to develop article 25 of the ELTIF Regulation at the time of the mandate

¹ Directive 2011/61/EU, of 8 June 2011, on Alternative Investment Fund Managers.

² In this regard, a revision of AIFMD is also being negotiated by the legislators at an EU level.

(back in 2015), it is pointless to do so at this moment. This will avoid the industry having to implement rules that will need to be revised shortly afterwards.

Notwithstanding the above, it is important to mention that an ESMA consultation on the cost disclosure requirements has already taken place in 2019, under the mandate established by ELTIF Regulation EU 2015/760. Since the Revised ELTIF Regulation does not require ESMA to reassess cost disclosure, we query both the necessity of re-consulting stakeholders on the matter and the legal basis for such action.

Nevertheless, in the event that it is finally decided to adopt ELTIF-specific rules on disclosure of costs, we wish to provide the below responses.

We agree in general with the pieces of legislation and regulatory material proposed by ESMA, save for the following comments:

- As referred under paragraph 18 of the consultation paper, the PRIIPs Delegated Regulation has been published in December 2021 and entered into application in January 2023. In light of the recent entry into application, it may be prudent to provide more observation time before further adjusting the EU Fund costs' regulatory framework.
- Taking into account that one of the objectives of this RTS is to establish the format for the presentation of costs it may also be appropriate to consider the format reflected in Annex II of the Delegated Regulation (EU) 2017/565³ due to its importance for the industry.

2.3. Q3: Do you agree with the abovementioned assumptions? In relation to the ELTIF cost ratio figures to be expressed as yearly percentages (of the capital of the ELTIF), would you see merit in expressing it instead in terms of maximum percentages (and, in the prospectus, only refer to the corresponding yearly figures included in the KID, or in the annual report of the ELTIF)?

Without prejudice of our response to question 3, we consider in general that the PRIIPs⁴ methodology should be used as a market standard.

2.4. Q4: Do you agree that the types of cost mentioned in the present paragraph are annual costs that could be expressed as a percentage of the capital? What are your views on the list of “other costs” referred to above in paragraph 32(b) which are suggested to be added, as compared to the list of “other costs” referred to in Article 25(1)(e) of the ELTIF Regulation?

Without prejudice of our response to question 3, we agree with ESMA's approach as outlined in paragraph 32(a). Nevertheless, we consider that the list of costs in paragraph 32 (b) (Article 12.9 of the draft RTS) should be reduced and use broader concepts to allow entities sufficient flexibility as regards costs reporting (another option would be including the actual list as an example).

³ Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organizational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.

⁴ Regulation (EU) No 1286/2014 of the European Parliament and of the Council, of 26 November 2014, on key information documents for packaged retail and insurance-based investment products.

- 2.5. Q5: Do you agree that the types of cost mentioned in paragraph 33 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 cost ratio mentioned in Article 25(2), provided that this overall ratio is a yearly ratio?**

The types of costs mentioned in paragraph 33 could be considered as “one off” costs instead of “fixed costs”, since those may vary from one Fund to another or from one jurisdiction to another.

In any event, these should not be labelled as “entry costs”, because “entry costs” are usually those costs that investors must pay to access the Fund.

Would you see merit in specifying what is to be meant by the “setting-up” of the ELTIF, as referred to in Article 25(1)(a) of the ELTIF Regulation? If yes, could you indicate which elements of the “setting-up” of the ELTIF should be clarified?

Yes, a further specification would be well received.

We understand that “setting up costs” are: legal advice, notary, registers, filing with the relevant supervisory authorities, taxes and fees (including the ones to be paid to the relevant National Competent Authorities (“NCAs”)), etc.

In our view, distribution costs comprise all costs related to the distribution in the different countries, including registration costs, translation, marketing material, distribution fees which should be considered as legitimate payments for the services provided by the distributors to the management companies of the ELTIF (and not related to the services provided to the final investors), etc.

- 2.6. Q6: Do you agree that the types of costs mentioned in paragraph 36 may be considered as fixed costs in the case of an ELTIF?**

Please refer to our response to question 5, above.

- 2.7. Q7. Would you see merit in including a specific grandfathering clause (in relation to the RTS under Article 25(3) of the ELTIF Regulation) for ELTIFs benefitting from the grandfathering clause provided for in Article 2 of Regulation 2023/606?**

We see a need for specific transitional/grandfathering provisions for the proposed RTS in order to ensure legal certainty for ELTIF Managers and investors.

- 2.8. Q8: Do you agree with the proposed amendment to the existing RTS under the first paragraph of Article 18(6) of the ELTIF Regulation?**

Yes, the list of circumstances in which the life of an ELTIF is considered compatible with the life-cycle of each of its individual assets as per Article 2 of the draft RTS seems fair and comprehensive.

- 2.9. Q9: Do you agree with the proposed criteria to determine the minimum holding period (referred to in point (a) of paragraph 2 - Article 18(6)(a) of the ELTIF Regulation? What are your views on the setting of a minimum of X years for all ELTIFs, irrespective of their individual specificities (with X equal to 3, for example), with respect to the abovementioned minimum holding period?**

INVERCO is grateful for the clarification included by ESMA in page 7 and in page 25 (paragraphs 49 to 51) of the ESMA consultation paper on the draft RTS, acknowledging that the new ELTIF Regulation allows the launching of open-ended ELTIF structures. Moreover, INVERCO is of the view that the criteria to determine a minimum holding period referred to in Article 3 of the draft RTS are relevant.

Setting a minimum holding period of three years, as proposed by ESMA as a default, for all ELTIFs, unless the Manager of the ELTIF is able to justify that it could be shorter, seems arbitrary and inconsistent with market practice. In addition, Article 18 of the amended ELTIF Regulation provides for the possibility of redemption during the life of the ELTIF, to the extent that redemptions are not granted before the end of the minimum holding period (or before the end of the ELTIF ramp-up period) specified in the rules or instruments of incorporation of the ELTIF.⁵ However, no reference is made to a mandatory minimum holding period in the Revised ELTIF Regulation.

The PRIIPs Regulation is applicable when ELTIFs are marketed to retail investors. Article 8, paragraph 3, letter g (iv) of Regulation 1286/2014 stipulates that the key information document must contain an indication of the recommended holding. Having two different requirements on the minimum holding period – mandatory under the ELTIF regime and recommended under the PRIIPs Regulation – could be misleading and create uncertainty.

Allowing the AIFM to determine the minimum holding period on a case-by-case basis, under the supervision of the NCA, would provide the necessary flexibility to allow for innovation on ELTIF's strategies related to the development of the secondary market or local individual lock-up period mechanisms.

2.10.Q10: Do you agree with the proposed approach in relation to the minimum information to be provided to the competent authority of the ELTIF (referred to in point (b) of paragraph 2 - Article 18(6)(b) of the ELTIF Regulation)?

The list of minimum information to be provided to the NCAs seems excessive for the ELTIF regime which, in order to foster the proliferation of this new Fund category, should not go beyond the information requirements provided in UCITSD/AIFMD. Please note that this is regardless the Managers' obligations to have a redemption policy and liquidity management tools which should be internal obligations, not necessarily to be shared with the NCAs in the authorisation process, to avoid additional burdens that may discourage the creation of new ELTIFs.

2.11.Q11: a) Do you agree with the proposed approach in relation to the requirements to be fulfilled by the ELTIF in relation to its redemption policy and liquidity management tools, referred to in points (b) and (c) of Article 18(2) - Article 18(6)(c) of the ELTIF Regulation)?

We agree that the redemption policy should be assessed against the composition of the portfolio, the number and liquidity of their assets, the requirements for redemptions and the available liquidity management tools.

b) What are your views on the setting of a maximum redemption frequency on a quarterly basis, for all ELTIFs, irrespective of their individual specificities, as suggested in paragraph 83?

ESMA suggests that all ELTIFs would benefit from setting a maximum redemption frequency on a quarterly basis, except if the Manager of the ELTIF could justify that it could be higher.

Although common standards would be useful to compare products, we believe that a fixed maximum redemption frequency would not accommodate investors' needs as well as specific ELTIF investment strategies. Therefore, we consider that the frequency of redemptions should be determined by the Fund

⁵ Article 18, paragraph 2 (a) of Regulation (EU) 2023/606.

Manager, which must keep proper justification of this decision (which could be submitted to the NCA for approval, upon request).

c) What are your views on the setting of a notice period of Y months for all ELTIFs (with Y equal to 12, for example)? What are your views on the options 1 and 2, set out in paragraphs 87 to 90, in relation to the specific requirements/circumstances where the notice period could be less than one year, and the numerical values of the parameters Z(1) to Z(4), under option 1, and Y, under option 2?

ESMA seems to recommend a mandatory minimum notice period of 12 months for all ELTIFs. While we recognise that a minimum notice period could be an option alongside the remaining LMTs, ESMA's suggestion of a 12 months' notice period seems excessively lengthy, given that Funds already have sufficient LMTs in place to manage their liquidity without relying on a long notice period.

Likewise, retail investors accustomed to products with greater flexibility may view such an extensive notice period as an obstacle rather than an attractive feature. It should also be noted that a fixed minimum notice period would be incompatible with the diversity of redemption frequencies available: for instance, a 12 months' notice period would be impractical for a quarterly redemption as suggested under the ESMA's proposal.

Our view is that this minimum notice period should be determined by the Fund Manager on a case-by-case basis, rather than establishing a maximum period that may be insufficient taking into account the different particularities of the wide variety of ELTIFs that may exist.

Notwithstanding the above, in the event that ESMA finally decides to establish the obligation of a minimum holding period using option 1/option 2 methods, the election of the method to be applied (option 1 or option 2) should not be determined upfront, but rather be left at the Fund Manager's discretion. In particular, as regards option 2, we think that, in relation to paragraph 91, ESMA should adopt a more flexible view by allowing a wider range of circumstances to be taken into account in determining the limit on redemptions (e.g. the volume of redemptions in the last period).

d) In your view, how do these requirements on the redemption policy and liquidity management tools of the ELTIF would compare to those applying to existing long-term investment AIFs which would be similar to ELTIFs (e.g. in terms of eligible assets)? Where possible, please support your answers by providing examples of current liquidity set-up for similar long-term Funds marketed to retail investors, analyses of the data available to assess the value of ELTIF long term assets and the length of the valuation process.

N/A.

2.12. Q12: Do you agree with the proposed criteria to assess the percentage referred to in point (d) of Article 18(2) - Article 18(6)(d)?

N/A.

2.13. Q13: Do you agree with the principle-based approach suggested above, in relation to the ESMA RTS under Article 19(2a)?

In the absence of any existing similar matching request mechanism at the EU level, ESMA suggests at this stage adopting a principle-based approach to provide a certain level of flexibility for the industry when designing their matching policy.

As the impact of the use of the matching mechanism is still unknown, we firmly support ESMA's principle-based approach. We would thus discourage ESMA going beyond the ELTIF Regulation in regulating the use of this mechanism.

- 2.14. Q14: Do you agree with the proposals suggested above and corresponding draft RTS, in relation to the transfer process for both exiting and potential investors, and the role of the Manager of the ELTIF or the Fund administrator in conducting transfers, and the matching of respective requests?**

ESMA's proposal seems fair. For completeness we believe that the Manager's liability on this transfer process should be expressly limited to the compliance with the matching mechanism conditions and procedures.

- 2.15. Q15: Do you agree with the proposed approach and corresponding draft RTS, in relation to the periods of time during which exiting and potential investors may request transfer of shares or units of the ELTIF? If both systems under Article 18(2) and 19(2a) coexist, how could the risk of arbitrage between different prices in the primary and the secondary markets be, in your view, mitigated? How could (retail) investors be ensured that the purchase or sale of shares on the secondary market will be executed at prices that reflect the value of the ELTIF?**

Please refer to our responses above.

- 2.16. Q16: Do you agree with the proposals above and the corresponding draft RTS, in relation to the determination of the execution price and the proration conditions and the level of the fees, costs and charge, if any, related to the transfer process?**

We generally agree.

- 2.17. Q17: Do you agree with the proposals above, and the corresponding draft RTS, in relation to the timing and the nature of the disclosure of information with respect to the transfer process conditions?**

We generally agree.

- 2.18. Q18: Are you of the view that any of the requirements of the draft RTS under the amending ELTIF Regulation should be adjusted to take into account the specificities of listed ELTIF? If yes, could you specify which requirement should, in your view, be amended?**

N/A.

- 2.19. Q19: Do you agree with the above-mentioned reasoning in relation to the possible costs and benefits of the option taken by ESMA as regards the redemption policy of ELTIF under Article 18(2) of the ELTIF Regulation? Which other types of costs or benefits would you consider in this context?**

N/A.

- 2.20. Q20: Do you agree with the above-mentioned reasoning in relation to the possible costs and benefits of the option taken by ESMA as regards the matching mechanism of ELTIF under Article 19(2a) of the ELTIF Regulation? Which other types of costs or benefits would you consider in this context?**

N/A.

- 2.21. Q21: 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?

N/A.