ASSOGESTIONI
associazione del risparmio gestito

Rome, 23rd October 2015

ESMA – European Securities and Markets Authority
103 Rue de Grenelle
75007 Paris
France

Our ref: 376/15
Your ref: ESMA/2015/1172

Assogestioni's Reply to ESMA's Consultation Paper on Guidelines on sound remuneration policies under the UCITS Directive and AIFMD (ESMA/2015/1172)

Preliminary comments

Assogestioni[1] welcomes the opportunity to respond to ESMA's Consultation Paper on Guidelines on sound remuneration policies under the UCITS Directive and AIFMD (ESMA/2015/1172).

As a first preliminary comment, before replying to the single questions below, we would like to express our full support for ESMA's approach on proportionality and interpretation of art. 14b of directive 2014/91/UE (UCITS V).

Correctly, in the Consultation Paper ESMA considers it appropriate to apply the proportionality principle to UCITS management companies, aligning them to the provisions foreseen for AIFMs in the AIFMD Guidelines on sound remuneration policies (ESMA/2013/201). ESMA stresses that it is for the specific nature and characteristics of the product that such a position is envisaged. ESMA also rightly points to the fact that it is the difference between the sectors of the financial services industry (i.e. credit institutions and (UCITS) collective management) that justifies a different approach to proportionality, compared to the one proposed by EBA in its Consultation Paper on sound remuneration policies under Directive 2013/36/UE (CRD IV) and Regulation (EU) n. 575/2013 (CRR) (EBA/CP/2015/03).

Along these lines, acknowledging the specificities of the activities performed by the management companies and of the managed products, we recommend ESMA to also reconsider the discipline on the application of remuneration policies to AIFMD

[1] Assogestioni is the trade body for Italian investment management industry and represents the interests of members managing funds and discretionary mandates around € 1.717 billion (as of August 2015).

and UCITS subsidiaries within a group which are not subject to the provisions of directive 2013/36/UE (CRD IV).

In the Consultation Paper, ESMA makes reference to the additional draft guidelines proposed by EBA in the aforementioned consultation, providing that specific requirements of CRD remuneration regime, not included in other sectoral legislation, should apply to certain staff of AIFMD and UCITS subsidiaries. We urge ESMA to review this position, in the light of the considerations that follow.

As highlighted in our reply to the EBA's Consultation[2], it is fundamental that the group remuneration policies give due consideration to the specific characteristics of each undertaking and recognize the application of the specific existing sectoral disciplines. It is in this perspective that, given the existence of sectoral remuneration requirements for AIFM and UCITS subsidiaries and in the light of their specificities, the sectoral AIFMD and UCITS discipline shall prevail over and above the CRD IV provisions. This should not only be true for those provisions which are deemed to be "in conflict" (e.g. payment of variable remuneration in instruments[3]) but *a fortiori* for those cases where no specific requirement is foreseen in sectoral regimes: the intent of the legislation with more "proximity" to the sector should not be circumvented.

It is worth stressing that it is not our position to exclude AIFMs and UCITS management companies from the application of group remuneration principles altogether. The parent company should elaborate group remuneration policies and ensure its overall coherence, providing the necessary guidelines for its implementation and assessing that it is properly applied. This, however, should be without prejudice for the sectoral remuneration discipline to prevail. In other words, for AIFMs and UCITS subsidiaries of a banking entity, a consistent application of the different remuneration principles does not entail the *extension* to AIFMD and UCITS entities of specific requirements that are not foreseen in sectoral legislations.

It should be recalled that the reason why different remuneration policies exist between credit institutions and asset management companies is because, due to the different characteristics of the activities they performed, different underlying *rationales* are put as the basis of the regimes.

The nature of professional (both collective or individual) portfolio management is fundamentally different, from a risk perspective, from the activity of a CRD-entity operating on its own account. Management companies, be they AIFMs or UCITS

---

[2] Please, see Assogestioni's response in the EBA website at: https://www.eba.europa.eu/regulation-and-policy/remuneration/guidelines-on-sound-remuneration-policies?p_p_auth=akGojR6G&p_p_id=169&p_p_lifecycle=0&p_p_state=maximized&p_p_col_id=column-2&p_p_col_pos=1&p_p_col_count=2&_169_struts_action=%2Fdynamic_data_list_display%2Fview_record&_169_recordId=1098387&_169_redirect=https%3A%2F%2Fwww.eba.europa.eu%2Fregulation-and-policy%2Fremuneration%2Fguidelines-on-sound-remuneration-policies%2F-%2Fregulatory-activity%2Fconsultation-paper.

[3] Please see EBA's Consultation Paper, paragraph 63, p. 36 and ESMA' Consultation Paper, paragraph 15, p. 10.

00186 Roma Via in Lucina,17 Tel. 06 6840591 Fax 06 6893262 20121 Milano Via Andegari,18 Tel. 02 361651.1 Fax 02 361651.63 info@assogestioni.it www.assogestioni.it

management companies, do not typically take direct financial and operational risks. Differently from banks, asset management companies do not generally take risks onto their own balance sheet and are by nature un-leveraged institutions with small balance sheets vis-à-vis those of banks. The principles governing remuneration policies for CRD and AIFMD and UCITS entities are, thus, different: while both are conceived to ensure sound and effective risk management, it is only for the CRD remuneration principles that a prudential *ratio* is taken into account. Differently stated, while remuneration rules for CRD-entities are intended to align risks from dealing on own account with the need for credit institutions to "*rebuild their capital levels when operating within the buffer range*" (Recital 83 of CRD IV), remuneration rules for asset management companies are intended instead to improve the alignment of the interests of the portfolio manager with the interests of its clients.

Moreover, the application of CRD provisions to AIFMD and UCITS subsidiaries would hinder the independence of the subsidiary itself, which represents an essential element of the functioning of group entities: while pursuing common strategic objectives, it should not be forgotten that each subsidiary maintains its own operational autonomy. The submission of subsidiaries to the logic of group's profits would not only seriously undermine their operational independence, but it could also create potential distortions to the detriment of their end-clients. The banking group strategies and policies shall adequately weigh the interests of the group with the need to safeguard and enhance the capacity of asset management companies to act in the interests of their clients.

For all these reasons, we strongly invite ESMA to reconsider its conclusions around the application of CRD remuneration principles to AIFMD and UCITS subsidiaries, by making it clear that no part of the identified staff of management companies being part of a group shall be subject to CRD IV remuneration provisions, as they are already subject to remuneration principles equally as effective as CRD IV.

00186 Roma Via in Lucina,17 Tel. 06 6840591 Fax 06 6893262 20121 Milano Via Andegari,18 Tel. 02 361651.1 Fax 02 361651.63 info@assogestioni.it www.assogestioni.it

Q1: In this consultation paper ESMA proposes an approach on proportionality which is in line with the AIFMD Remuneration Guidelines and allows for the disapplication of certain requirements on an exceptional basis and taking into account specific facts. Notwithstanding this, ESMA is interested in assessing the impact from a general perspective and more precisely in terms of costs and administrative burden that a different approach would have on management companies. For this reason, management companies are invited to provide ESMA with information and data on the following aspects:

1) All management companies (i.e. those that hold a separate AIFMD license and those that do not) are invited to provide details on the following:

- **a) compliance impacts and costs (one-off and ongoing costs, encompassing technological/ IT costs and human resources), and**
- **b) difficulties in applying in any circumstances the remuneration principles that could otherwise be disapplied according to the provisions under Section 7.1 of the draft UCITS Remuneration Guidelines (Annex IV to this consultation paper).**

2) Management companies that also hold an AIFMD license and benefit from the disapplication of certain of the remuneration rules under the AIFMD Remuneration Guidelines are asked to provide an estimate of the compliance costs in absolute and relative terms and to identify impediments resulting from their nature, including their legal form, if they were required to apply, for the variable remuneration of identified staff:

- **a) deferral arrangements (in particular, a minimum deferral period of three years);**
- **b) retention;**
- **c) the pay out in instruments; and**
- **d) malus (with respect to the deferred variable remuneration).**

Wherever possible, the estimated impact and costs should be quantified, supported by a short explanation of the methodology applied for their estimation and provided separately, if possible, for the four listed aspects.

As mentioned in our preliminary comments, we fully support ESMA's approach on the application of proportionality to UCITS management companies, aligning the provisions of the UCITS remuneration guidelines with the AIFMD ones. We agree with the observations brought forward by ESMA which consider "*the different nature of the product and the diverse nature of the sector*" to apply remuneration rules in a proportionate manner, taking into account "*the size, internal organisation and the nature, scope and complexity of their activities"* (art. 14b of UCITS V).

To reply to ESMA's question *sub* 1), we highlight that in case the proportionality principle is not applied and a principle of "neutralization" is instead foreseen, increased costs would incur for those firms needing to adjust their firm-wide remuneration policies. In particular, we refer to those specific to defining "identified staff" and to the pay-out process, accompanied by those on the functioning of remuneration committees. A proxy for these costs would be the amount of work required to implement such changes by employing both internal and external project teams and resources.

00186 Roma Via in Lucina,17 Tel. 06 6840591 Fax 06 6893262 20121 Milano Via Andegari,18 Tel. 02 361651.1 Fax 02 361651.63 info@assogestioni.it www.assogestioni.it

In particular, we consider costs for external consultancy (employed to prepare the remuneration policy and advice the remuneration committee, for example, on mechanisms valuations and retrospective tests), compliance and information technology (to implement the valuation mechanisms related to, for example, risks, liquidity and stress tests), as well as executives occupying the remuneration committees.

Q2: Do you agree with the proposal to set out a definition of "performance fees" and with the proposed definition? If not, please explain the reasons why and provide an alternative definition supported by a justification.

Yes, we agree with the definition of "performance fees" provided by ESMA in the Consultation Paper.

Q3: Do you see any overlap between the proposed definition of 'supervisory function' in the UCITS Remuneration Guidelines and the definition of 'management body' in the UCTS V Level 1 text? If yes, please provide details and suggest how the definition of 'supervisory function' should be amended in the UCITS V Guidelines.

Assogestioni does not see any overlap between the proposed definition of 'supervisory function" in the Consultation paper and the definition of "management body" introduced in art. 2(1)(s) by the UCITS V directive.

Q4: Please explain how services subject to different sectoral remuneration principles are performed in practice. E.g. is there a common trading desk/an investment firm providing portfolio management services to UCITS, AIFs and/or individual portfolios of investments? Please provide details on how these services are operated.

Our members usually have a common trading desk providing portfolio management services to UCITS, AIFs and/or individual portfolios of investments. Some others, instead, use different desks when providing those services for funds and individual portfolios.

Q5: Do you consider that the proposed 'pro rata' approach would raise any operational difficulties? If yes, please explain why and provide an alternative solution.

As a first and preliminary remark, we wish to make a comment on the working method used by ESMA in Section 9 of the draft Guidelines, covering application of different sectoral rules to personnel "performing" activities subject to different sectoral rules.

We believe that, in relation to these principles, it would be most effective for ESMA to include specific and practical examples/cases, in order to provide concrete indications on how this discipline would work in practice. In our view, examples will better explain the concrete application to specific cases and would avoid possible

00186 Roma Via in Lucina,17 Tel. 06 6840591 Fax 06 6893262 20121 Milano Via Andegari,18 Tel. 02 361651.1 Fax 02 361651.63 info@assogestioni.it www.assogestioni.it

interpretative doubts that some of the current provisions foreseen in the draft guidelines leave space to.

Along these lines, content-wise, we are of the view that clarifications are needed in relation to some specific areas. In particular, we would like to draw ESMA's attention to the following cases:

(1) Application of sectoral regimes to personnel not *materially* performing activities falling under different sectoral rules. In particular, we encourage ESMA to clarify whether and, if so, how the application of different sectoral rules would apply in relation to executive and non-executive members of the management body of the UCITS management company (or AIFM), not comprised within the staff of the management company *materially* performing activities falling under different sectoral rules.

(2) Application of sectoral rules to staff performing UCITS and/or AIFMD activities and ancillary services under Article 6(3) of the UCITS Directive or under Article 6(4) of the AIFMD. We would also encourage ESMA to further clarify how different sectoral rules would apply in cases of staff performing UCITS and/or AIFMD activities and MiFID ancillary services. While ESMA provided some indications in the draft guidelines applicable to such cases, in our opinion, the way Section 9 is developed still gives rise to certain ambiguity.

In particular, in draft guideline 37 ESMA suggests that the UCITS/AIFMD and MiFID regimes would apply in case of personnel of a management company performing ancillary services. However, in draft guideline 33 it affirms that "*the remuneration of an individual which performs services subject to the UCITS Directive and services subject to CRD IV and/or the AIFMD, should be determined applying the remuneration principles under the UCITS Directive, CRD IV and AIFMD […]* ".

For avoidance of any doubt, in the case above the following aspects should be highlighted:

a. under "sectoral rules", we understand the application of either one or more sets of remuneration principles belonging to either UCITS, AIFMD or MiFID regimes to an individual based on his/her activities - not CRD IV. According to the UCITS Directive and the AIFMD, the performance of MiFID services (i.e. ancillary services under Article 6(3) of the UCITS Directive or under Article 6(4) of the AIFMD) by personnel of a UCITS management company or an AIFM is carried out through a UCITS or AIFMD license, not by virtue of an authorization under the CRD IV. Accordingly, the personnel of a UCITS management company or an AIFM performing such activities should be by no means subject to CRD IV provisions on remuneration;

b. on top of that and to complement what indicated at paragraph a) above, we believe that the personnel carrying out MiFID ancillary services under a UCITS or AIFM license should not be counted as identified staff in the light of the UCITS or AIFM discipline and, thus, continue to fall under the applicable

00186 Roma Via in Lucina,17 Tel. 06 6840591 Fax 06 6893262 20121 Milano Via Andegari,18 Tel. 02 361651.1 Fax 02 361651.63 info@assogestioni.it www.assogestioni.it

MiFID remuneration regime. For further considerations around this profile, please refer to our reply to Q7 below.

(3) Equivalence of outcomes of UCITS and AIFMD remuneration regimes. We wish to draw ESMA's attention to the consideration that, for cases of management of both UCITS and AIFs, the recognized "equivalence of outcome" of the two sets of remuneration rules (UCITS and AIFMD) would not require, in our view, the necessity to foresee the alternative approach according to which "*management companies could decide to apply the sectoral remuneration rules which are deemed more effective*", as provided by ESMA in draft guideline 32.
When referring to UCITS and AIFMD only, ESMA rightly highlights that "*for management companies engaging in activities covered by the AIFMD (subject to authorization under the AIFMD), compliance with the sectoral remuneration principles applying firm-wide – based on the relevant sectoral guidelines issued under the AIFMD and UCITS Directive – should be sufficient to consider that at individual level each of the sectoral remuneration principles are complied with. For example, compliance with the requirement under Article 14b(1)(e) of the UCITS Directive – which applies firm-wide – should at the same time satisfy the equivalent requirement under paragraph 1(e) of Annex II of the AIFMD for management companies engaging in activities covered by the AIFMD*" (draft guideline 36). Along these lines, in our understanding, the application of the "pro rata approach" becomes less pertinent, as both the remuneration rules are deemed equivalent. We encourage ESMA to consider, as a third option, the criterion of "prevalence" and, on the basis of the (UCITS or AIFMD) activity performed, consider to apply the set of remuneration (UCITS or AIFMD) which refers to the prevalent type of activity.

Q6: Do you favour also the proposed alternative approach according to which management companies could decide to voluntarily opt for the sectoral remuneration rules which are deemed more effective in terms of avoiding excessive risk taking and ensuring risk alignment and apply them to all the staff performing services subject to different sectoral remuneration rules? Please explain the reasons behind your answer.

Given that, for the reasons expressed in our reply to Q5 (and further elaborated in our reply to Q7), we assume that:
(a) CRD IV provisions do not apply to personnel of UCITS management companies or AIFMs performing MiFID ancillary services;
(b) MiFID ancillary services performed by personnel of UCITS management companies or AIFMs are subject to MiFID remuneration guidelines only; and
(c) UCITS and AIFMD remuneration rules are equivalent;
we understand that the alternative "pro rata" approach does not find application in this case. It is our view that the pro rata approach is not to apply in cases of performance of UCITS and AIFMD collective management services, as the two relevant remuneration disciplines are – and correctly so – equivalent and a criterion of prevalence of the activities should instead be consider. Please also refer to our reply to Q5.

00186 Roma Via in Lucina,17 Tel. 06 6840591 Fax 06 6893262 20121 Milano Via Andegari,18 Tel. 02 361651.1 Fax 02 361651.63 info@assogestioni.it www.assogestioni.it

Q7: Do you agree that the performance of ancillary services under Article 6(3) of the UCITS Directive or under Article 6(4) of the AIFMD by personnel of a management company or an AIFM should be subject to the remuneration principles under the UCITS Directive or AIFMD, as applicable? Or do you consider that that MiFID ancillary services do not represent portfolio/risk management types of activities (Annex I of the AIFMD) nor investment management activities (Annex II of the UCITS Directive) and should not be covered by the rules under Article 14b of the UCITS Directive and Annex II of the AIFMD which specifically refer to the UCITS/AIFs that a UCITS/AIFM manages? Please explain the reasons of your response.

Assogestioni is in favour of the second approach expressed by ESMA in the question, i.e. MiFID ancillary services should not be covered by the rules under Article 14b of the UCITS Directive and Annex II of the AIFMD.

The rules governing remuneration under UCITS/AIFMD and MiFID are different in so much as they address activities which are characterized by specific and different features. Remuneration requirements under UCITS and AIFMD are tailored to collective portfolio management, where individual investors are generally not, or at least less, able to influence remuneration structures. As a result, the remuneration disciplines for these two frameworks are more prescriptive in achieving a proper alignment of managerial incentives with investors' interests. Differently, in portfolio management performed on a discretionary basis, investor monies are managed in the interest of large, typically institutional, third-party clients which are able to exert greater control over their investments and affect the way in which the management company as a whole (not an individual portfolio manager) is remunerated.

In addition, in case personnel performing MiFID services falls under the UCITS or AIFMD remuneration rules and, thus, is to remunerated in UCITS or AIF units/shares, this would create distortion, as these instruments are unrelated to their activities and not tied with the performance of the individual mandate, risking to jeopardize the purpose of aligning incentives with client interests.

In any case, we are of the view that, in light of the proportionality principle, in case the asset management company manages both UCITS and AIFs and provides portfolio management services, and certain staff members are not involved in the UCITS/AIFs management activities, it should be possible not to apply, for those individual members, the provisions related to the pay-out process of UCITS/AIFMD remuneration policies.

00186 Roma Via in Lucina,17 Tel. 06 6840591 Fax 06 6893262 20121 Milano Via Andegari,18 Tel. 02 361651.1 Fax 02 361651.63 info@assogestioni.it www.assogestioni.it

Q8: Do you agree with the proposal to look at individual entities for the purpose of the payment in instruments of at least 50% of the variable remuneration or consider that it would risk favouring the asset managers with a bigger portfolio of UCITS assets under management? Should you disagree, please propose an alternative approach and provide an appropriate justification.

First of all, we would like to highlight that current practices amongst our members do not foresee that one individual is remunerated entirely for the variable part of his/her compensation in shares/units of one single UCITS (unlike exemplified by the ESMA under paragraph 38 of the CP). In our view, the approach foreseen by ESMA in regards to valuation of individual entities for the purpose of the payment in instruments may prove difficult and can potentially distort an individual's incentives by tying his/her remuneration too closely to one single fund. For these reasons, we would like to recall that, as already indicated in the AIFMD Guidelines (guideline 133) and also foreseen in the present draft guidelines for UCITS (draft guideline 137), the management company shall maintain the possibility to "*enlarge the spectrum of instruments paid also to UCITS different from the relevant one*".

In addition, we would like ESMA to clarify the following aspects:

(a) the reference to "*the legal structure of the UCITS and its fund rules or instruments of incorporation*" in art. 14b(1)(m) of the UCITS V directive. We believe that such a reference should be interpreted as to consider to allow cases where the UCITS legal structure, fund rules or instruments of incorporation make the application of such provision not possible. In particular, we refer to those instances in which the placement of a fund is concluded and, thus, there is no issuance of new units.

(b) the non application of the minimum of the 50% of variable remuneration to be payed in instruments in case the "*management of the UCITS accounts for less than 50% of the total portfolio managed*". In the Consultation Paper, ESMA provides additional guidance on how to comply with the rules of payment in instruments. In particular, it specifies what is to be considered by the 50% threshold of the total portfolio managed. It clarifies that the "*management of the UCITS*" refers to the individual UCITS managed and that the "*total portfolio managed*" is to be understood as the total portfolios managed under the authorization of the UCITS directive only.
We encourage ESMA to clarify whether the non application of the requirement to pay *at least 50%* of any variable remuneration in instruments, when the 50% threshold is not reached according to the guidance above, entails that a lower percentage can be set or that the bonus can be paid entirely in cash. This does not prevent the application of the proportionality principle and, thus, the possibility for the management company not to apply the provision of payment in instruments altogether, in case proportionality is met in accordance with the guidance in Section 7 ("Guidelines on proportionality") of the Consultation paper.

00186 Roma Via in Lucina,17 Tel. 06 6840591 Fax 06 6893262 20121 Milano Via Andegari,18 Tel. 02 361651.1 Fax 02 361651.63 info@assogestioni.it www.assogestioni.it

To conclude, we would also like to draw ESMA's attention to consider the application of the principle of proportionality *with respect to single individuals*, in case certain conditions are met. For example, it could be envisaged that, for individuals whose total remuneration does not exceed appropriate thresholds, certain provisions could be disapplied. On the basis of the size, internal organization and the nature, scope and complexity of the activities and in light of an appropriate valuation by the asset management companies, a threshold of "materiality" could be established, to identify those individuals for whose variable remuneration it could be considered appropriate not to apply certain provisions (such as those on the payment of instruments).

Q9: Do you consider that there is any specific need to include some transitional provisions relating to the date of application of the UCITS Remuneration Guidelines? If yes, please provide details on which sections of the guidelines would deserve any transitional provisions and explain the reasons why, also highlighting the additional costs implied by the proposed date of application. Please be as precise as possible in your answer in order for ESMA to assess the merit of your needs.

Yes, we consider that a transitional period should apply. Any transitional period should start as of 1 January 2017.

Q10: Do you agree with the assessment of costs and benefits above for the proposal on proportionality? If not, please explain why and provide any available quantitative data on the one-off and ongoing costs that the proposal would imply.

N/A.

Q11: Do you agree with the assessment of costs and benefits above for the proposal on the application of different sectoral rules to staff? If not, please explain why and provide any available quantitative data on the one-off and ongoing costs that the proposal would imply.

N/A.

00186 Roma Via in Lucina,17 Tel. 06 6840591 Fax 06 6893262 20121 Milano Via Andegari,18 Tel. 02 361651.1 Fax 02 361651.63 info@assogestioni.it www.assogestioni.it