EBA/CP/2013/30
17/07/2013

Consultation Paper

Draft Regulatory Technical Standards

On own funds requirements for investment firms based on fixed overheads under Article 97(4) of Regulation (EU) No 575/2013

Consultation Paper on Draft Regulatory Technical Standards on own funds requirements for investment firms based on fixed overheads under Article 97(4) of Regulation (EU) No 575/2013

Contents

1. Responding to this consultation

The EBA invites comments on all proposals put forward in this paper and in particular on the specific questions summarised in 5.2.

Comments are most helpful if they:

- respond to the question stated;
- indicate the specific point to which a comment relates;
- contain a clear rationale;
- provide evidence to support the views expressed/rationale proposed; and
- describe any alternative regulatory choices the EBA should consider.

Submission of responses

To submit your comments, click on the 'send your comments' button on the consultation page by 30 September 2013. Please note that comments submitted after the deadline, or submitted by other means, may not be processed.

Publication of responses

All contributions received will be published following the close of the consultation, unless you request that your contribution is not disclosed. Please indicate clearly and prominently in your submission any part that you do not wish to be publicly disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with the EBA's rules on public access to documents. We may consult you if we receive such a request. Any decision we make not to disclose a response is reviewable by the EBA's Board of Appeal and the European Ombudsman.

Data protection

Information on data protection can be found at www.eba.europa.eu under the heading 'Legal Notice'.

2. Executive summary

The EBA is mandated in Article 97(4) of Regulation (EU) No 575/2013 (CRR) to develop, in consultation with the European Securities and Markets Authority (ESMA), draft Regulatory Technical Standards (RTS) on own funds requirements for investment firms with limited authorisation to provide investment services, as set out in Articles 95 and 96 of the CRR. Specifically, investment firms are required to hold eligible capital of at least one-quarter of the fixed overheads of the previous year, or projected fixed overheads in the case of an investment firm not having completed business for one year. This Consultation Paper (CP) outlines the calculation of fixed overheads and other aspects relevant for this purpose.

This CP is also relevant to management companies, as defined under the Undertakings for Collective Investment in Transferable Securities (UCITS) Directive, and Alternative Investment Fund Managers (AIFMs), both internal and external managers of AIFs, as defined under the AIFM Directive (AIFMD) ([1]).

The aim of these RTS is to harmonise calculations of capital requirements and to provide a clear definition of fixed overheads. The CRR does not introduce any new or additional own funds requirements for investment firms, as the requirements will not be changed with respect to the Directive 2006/49/EC.

The CP also aims at harmonising the conditions under which competent authorities can make adjustments to the capital requirement in a case where there has been a material change in the business activities of an investment firm. The proposal of the CP is to consider a change in business activities as material if the fixed overheads change by at least 20% or there is an absolute change of EUR 2 million in the capital requirement.

The approach for calculating the fixed overheads proposed by these draft RTS is a so-called 'subtractive' approach, whereby variable costs items are deducted from the total expenses as calculated according to the applicable accounting framework. The subtractive approach ensures that changes to the accounting framework are automatically taken into account and cannot be arbitraged by changing the accounting categorisation. It can also be used in cases where a firm does not use the International Financial Reporting Standards (IFRS) accounting framework and is, therefore, appropriate for smaller or limited-authorisation investment firms, towards which these draft RTS are to a large extent targeted.

The introduction of the subtractive approach changes the existing practices in some EU Member States, where a so-called 'additive' approach is already in place. The additive approach consists of adding up a number of pre-defined accounting items, but the existence of many different national accounting standards makes this approach impractical; furthermore, the additive approach is

([1])Article 7(1)(a)(iii) of the UCITS Directive (2009/65/EC) and Article 9(5) of the AIFMD (2011/61/EU) require management companies and AIFMs to have own funds that must at no time be less than the amount prescribed in Article 21 of Directive 2006/49/EC (now Article 97 of the CRR).

considered less prudent. However, given that the use of the subtractive approach will be a substantial change in practices in some Member States, the EBA is particularly interested in gathering views on the consequences of this change.

These draft RTS also propose the inclusion of the use of tied agents in the calculation of fixed overheads, because business carried out through a tied agent exposes an investment firm to risk in the same manner as business carried out by the investment firm itself. Furthermore, there should not be incentives for firms to reduce their capital requirements through the use of these agents. Therefore, a firm should maintain a capital component for tied agents. As calculating fixed overheads for tied agents in the same manner as for investment firms themselves would pose many practical problems, the use of a fixed lump sum per tied agent is proposed instead. This addresses the fact that tied agents have some element of variability in some cases but probably cannot be considered a fully variable cost item.

As required in Article 97, the EBA has consulted ESMA at the working level on these draft RTS and will consult ESMA again before their finalisation in order to ensure a consistent framework for investment firms.

3. Background and rationale

The EBA has developed these draft Regulatory Technical Standards (RTS) in accordance with the mandate contained in Article 97(4) of the CRR.

These proposed draft RTS complement the text of the near-final draft RTS on own funds, published in EBA/CP/2012/02 on 4 April 2012, focusing only on certain investment firms with limited authorisation to provide investment services.

All RTS related to own funds requirements are intended to be put forward as one integrated draft regulation, as already announced in EBA/CP/2012/02 (the EBA Consultation Paper on RTS for own funds – part one), published on 4 April 2012. The rationale for this approach is that it will be useful to group these regulations together in one legal act, facilitating a comprehensive view, improving understanding and providing compact access to the regulations by legal or natural persons subject to the obligations laid down therein.

Background and regulatory approach followed in the draft RTS

The regulatory framework of own funds is derived from Capital Requirements Directive (CRD) I, in particular Articles 56 to 67 of Directive 2006/48/EC and Articles 12 to 17 of Directive 2006/49/EC, as transposed by each Member State. Even though most of the business activities of investment firms are covered by Directive 2004/39/EC (MiFID) and have to be authorised under MiFID first, certain investment firms are excluded from the scope of the CRR/CRD framework, e.g. local firms and investment firms as set out in point (c) of paragraph 2 of Article 4. Therefore, the CRR definition of 'investment firm' is more limited than that of MiFID. CRR/CRD regulates prudential supervision of investment firms, which includes provisions for own funds requirements.

This CP is also relevant to management companies, as defined under the UCITS Directive, and AIFMs, both internal and external managers of AIFs, as defined under the AIFMD. Article 7(1)(a)(iii) of the UCITS Directive and Article 9(5) of the AIFMD require management companies and AIFMs to have own funds that must at no time be less than the amount prescribed in Article 21 of Directive 2006/49/EC (now Article 97 of the CRR).

This CP puts forward draft RTS related to Article 97(4) of the CRR, which states that the EBA in consultation with ESMA shall develop draft RTS to specify in greater detail:

1. the calculation of the requirement to hold eligible capital of at least one-quarter of the fixed overheads of the previous year;
2. the conditions for the adjustment by the competent authority of the requirement to hold eligible capital of at least one-quarter of the fixed overheads of the previous year; and
3. the calculation of projected fixed overheads in the case of an investment firm that has not completed business for one year.

According to paragraph 2 of Article 95, investment firms with limited authorisation to provide investment services, referred to in Article 95(1), shall calculate their total risk exposure amount as either the sum of points (a) to (d) and (f) of Article 92(3) of the CRR after applying Article 92(4), or as the result of 12.5 multiplied by the amount of one-quarter of the fixed overheads for the preceding year, whichever is higher. For investment firms referred to in Article 96(1), the total risk exposure amount shall be calculated as the *sum* of the items referred to in points (a) to (d) and (f) of Article 92(3) of the CRR after applying Article 92(4) and 12.5 multiplied by the amount of one-quarter of the fixed overheads for the preceding year. This means that in both these cases the amount of own funds shall be calculated taking into account the amount of fixed overheads of the previous year. The EBA is now consulting on how to calculate the amount of capital that both types of investment firms are required to hold, based on the fixed overheads, in order to have a sufficient level of own funds.

The provisions included in these draft RTS focus on the items that comprise the amount of fixed overheads of the previous year based on the most recent audited annual financial statements. Where there is a change in the business of an investment firm that the competent authority considers material, the competent authority may adjust the requirement for eligible capital, as provided for in Article 97(2) of the CRR. The conditions that need to be met before the competent authority can do so are provided in these proposed draft RTS. The draft RTS also elaborate on the calculation of projected fixed overheads; this projection shall be used in case an investment firm has not completed business for one year.

The EBA has developed these draft RTS on the basis of Regulation (EU) No 575/2013. As required in Article 97, the EBA has consulted ESMA at the working level on these draft RTS and will consult ESMA again before their finalisation in order to ensure a consistent framework for investment firms. Subsequently, the EBA will, as required, submit these draft RTS to the European Commission (EC) before 1 March 2014.

Various indications are given in the text in square brackets to clarify to the reader where the text proposed in this consultation fits with the texts of the previous consultations related to own funds.

The nature of RTS under EU law

The present draft RTS are produced in accordance with Article 10 of the relevant EBA regulation ([2]). According to Article 10(4) of the regulation, these RTS shall be adopted by means of a regulation or decision.

According to EU law, EU regulations are binding in their entirety and directly applicable in all Member States. This means that, on the date of their entry into force, they become part of the national law of

([2])Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010, establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision No 2009/78/EC.

the Member States and that their implementation into national law is not only unnecessary but also prohibited by EU law, except in so far as this is expressly required by them.

Shaping these rules in the form of a regulation will ensure a level playing field by preventing divergent national requirements and will facilitate the cross-border provision of services; currently, an institution that wishes to take up operations in another Member State has to apply different sets of rules.

4. Draft RTS on own funds requirements for investment firms based on fixed overheads under Article 97(4) of Regulation (EU) No 575/2013

In between the text of the draft RTS that follows, further explanations on specific aspects of the proposed text are occasionally provided, which either offer examples or provide the rationale behind a provision, or set out specific questions for the consultation process. Where this is the case, this explanatory text appears in a framed text box.

Also please note that various indications are given in the text in square brackets to clarify to the reader where the text proposed in this consultation fits with the texts of the previous consultations**.**

EUROPEAN COMMISSION

Brussels, XXX
[…](2012) XXX draft

COMMISSION DELEGATED REGULATION (EU) No …/..

of XXX

[…]

supplementing Regulation (EU) No 575/2013 of the European Parliament and of the Council with regard to regulatory technical standards for Own Funds Requirements for Investment Firms based on Fixed Overheads

COMMISSION DELEGATED REGULATION (EU) No …/..

of XXX

[…]

supplementing Regulation (EU) No 575/2013 of the European Parliament and of the Council with regard to regulatory technical standards for Own Funds Requirements for Investment Firms based on Fixed Overheads

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26/06/2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012[3], and in particular Articles ...and 97(4), third subparagraph [ARTICLE NUMBER TO BE ADDED TO THE LEGAL BASES OF THE TEXTS AS PRESENTED IN EBA/CP/2012/02] thereof,

Whereas:
[THE FOLLOWING RECITALS TO BE ADDED AFTER RECITAL 4 AS PRESENTED IN EBA/CP/2012/02]

(4a) Regulation (EU) No 575/2013 establishes, among other matters, prudential requirements for investment firms in order to ensure that investment firms are safe and sound and comply at all times with the capital requirements. Own funds requirements are covered by Article 92 of that Regulation which seeks to ensure that risks stemming from business activities are covered by a sufficient amount of own funds. According to Article 97 of Regulation (EU) No 575/2013 investment firms can use an alternative method based on fixed costs to calculate the total risk exposure. It is therefore necessary to establish the methodology for calculating fixed overheads and the list of items that would be included in the calculations in order to have a common approach in all EU member states.

(4b) In order to ensure that investment firms are able to organise an orderly winding down or restructuring of their activities, they should hold sufficient financial resources to withstand operational expenses over an appropriate period of time. During the winding down or restructuring, an investment firm still needs to continue its business and be able to absorb losses which are not matched by a sufficient volume of profits, to protect investors. While some costs (such as staff bonuses) may decrease other costs (such as legal expenses) may increase. In order to more adequately reflect the effect of these variable expenses in the own funds, the method where variable costs are deducted from total expenses should be used.

[3] OJ L 176, 27.6.2013, p.1.

[THE FOLLOWING RECITAL TO BE ADDED AT THE END OF RECITAL 16 AS PRESENTED IN EBA/CP/2012/02]

(16) [cont. ...]In relation to Articles 36-36b of this Regulation, the European Banking Authority has also consulted with the European Securities Markets Authority (ESMA) before submitting the draft technical standards on which this Regulation is based.

HAS ADOPTED THIS REGULATION:

[THE FOLLOWING ARTICLES TO BE INSERTED AS ARTICLE 36 IN LINE WITH THE TEXT PLACEHOLDER IN THE TEXT INCLUDED IN EBA/CP/2012/02]

Article 36-

Calculation of the eligible capital of at least one quarter of the fixed overheads of previous year according to Article 97(1) of Regulation (EU) No 575/2013

(legal basis Article 97(4)(a))

1. For the purposes of Article 97(1) of Regulation (EU) No 575/2013 investment firms shall calculate their fixed overheads of the previous year, using figures resulting from the applicable accounting framework, by subtracting from the total expenses in their most recent audited annual financial statements, the following items:

   (a) fully discretionary staff bonuses;
   (b) employees', directors' and partners’ shares in profits, to the extent that they are fully discretionary;
   (c) other appropriations of profits, to the extent that they are fully discretionary;
   (d) shared commission and fees payable which are directly related to commission and fees receivable, which are included within total revenue, and where the payment of the commission and fees payable is contingent upon the actual receipt of the commission and fees receivable;
   (e) fees, brokerage and other charges paid to clearing houses, exchanges and intermediate brokers for the purposes of executing, registering or clearing transactions;
   (f) fees to tied agents;
   (g) interest paid to customers on client money;
   (h) extraordinary non-recurring expenses.

2. For the purposes of paragraph 1, items shall only be subtracted from total expenses if the items are included within total expenses before any deductions.

3. Where fixed expenses have been incurred on behalf of the investment firms by third parties, these shall be allocated based on the underlying expenses of the third party, when

such a break-down is available. When such a classification is not available, the investment firms shall add these expenses to the figure resulting from paragraph 1.

Explanatory text for consultation purposes

The EBA has considered two possible approaches for the calculation of the fixed overheads to be used for determining the capital requirement: the so-called ‘additive’ and ‘subtractive’ approaches. This consultation paper (CP) is based on the subtractive approach, which is considered the most appropriate definition, although the EBA recognises that the additive approach also has a number of advantages.

The additive approach is based on a list of cost items that would be summed up to an overall fixed overhead figure. This has the advantage of being in line with the practices in some European countries, and if implemented properly would ensure a harmonised clear definition of fixed overheads. Unfortunately, the existence of national GAAPs complicates a straightforward (granular) mapping. In addition this approach would result in a definite list of cost items, which raises the risk that some cost items could be inconsistently classified. Hence this approach may be less prudent.

The subtractive approach is based on total expenses from which a number of pre-specified variable cost items may be deducted. This approach is more prudent as it would ensure that changes to the accounting framework are automatically taken into account and cannot be arbitraged by changing the accounting categorisation. Also, it is simple to apply for investment firms reporting under national GAAPs. Since these RTS apply to investment firms with limited authorisation, it is likely that there are many non-IFRS firms that would calculate capital requirements based on fixed overheads.
The extraordinary non-recurrent expenses mentioned in article 36.1.h are expenses the investment firm incurs only at one point in time and that do not have to be made periodically. Examples of extraordinary non-recurrent expenses are, for instance, the costs of reorganizations or costs of legal procedures.

<u>Questions</u>

Q1. Do you agree with the subtractive approach proposed in Article 36(1)?

Q2. If yes, do you agree with the list of items? What items should be added or deleted?

Q3. In case you prefer the additive approach, please elaborate on the advantages of using such an approach and on how to minimise the risk of faulty classification.

4. Where the investment firm makes use of tied agents, the investment firm shall add [35%] of the costs related to the tied agent to its fixed overheads.

5. Where the firm's most recent audited financial statements do not reflect a twelve month period, the firms shall divide the result of the calculation of paragraphs 1 and 2 by the number of months that are reflected in the financial statements and shall subsequently multiply the result by twelve, so as to produce an equivalent annual amount.

Explanatory text for consultation purposes

The inclusion of tied agents in the calculation of fixed overheads is necessary because the business carried out through tied agents exposes the investment firms to the risks in the same manner as the business carried out by the investment firm itself. Also, the RTS should not provide incentives for firms to reduce their capital requirements by the use of these agents. Therefore a firm should maintain a capital component for tied agents.

As the calculation of fixed overheads in the same manner as for the investment firms itself would pose many practical issues, EBA proposes the use of a fixed lump sum per tied agent. The EBA has been considering the range of 20-50% of the costs related to a tied agent and proposes 35% as a reasonable estimate. This captures the fact, that tied agents have some element of variability in some cases, but probably cannot be considered a fully variable cost item.

Q4. Do you agree with the inclusion of tied agents as set out in Article 36(4)? If not, what alternative do you suggest?

Q5. Do you agree that the inclusion of tied agents would be covered with a certain amount related to a tied agent rather than a variable sum? Or do you prefer the capital requirement to be calculated in the same manner as for the investment firm?

Q6: Currently a 35% share is proposed as the proportion of costs to be included for tied agents is proposed. Do you believe this is adequate?

Article 36a-

Conditions for the adjustment by the competent authority of the requirement to hold eligible capital of at least one quarter of the fixed overheads of the previous year according to Article 97(2) of Regulation (EU) No 575/2013

(legal basis Article 97(4)(b))

For the purposes of Article 97(2) of Regulation (EU) No 575/2013, competent authorities shall consider that a material change has occurred in the business of an investment firm since the preceding year where one of the following conditions is met:

(a) the change in the business of the firm results in [20%] change in the firm's projected fixed overheads;
(b) the change in the business of the firm results in changes in the firm's capital requirements that amount to [2 million EUR] or more.

Explanatory text for consultation purposes

The CRR mandates the EBA to specify conditions for the adjustment by the competent authority described in Article 97(2) CRR. Adjustments in capital requirements can be made in case there is a material change in the business activity. Since there is no common definition of 'material change' and it would affect the capital requirement immediately without waiting for the next accounting year when it would be automatic, the EBA proposes the introduction of a 20% threshold.

As this 20% threshold might be too burdensome for small investment firms and competent authorities, especially in the start-up phases of a firm, the EBA is considering the introduction of a *de minimis* amount, hence investment firms with capital requirements below certain level will be exempt from this requirement.

The 2 million EUR threshold is introduced for larger investment firms in order to capture changes in the capital requirement that are considered material in an absolute sense.

Q7. Do you agree with the proposed 20% threshold in Article 36a? Please provide evidence of the potential impact of this threshold.

Q8. Do you consider it necessary to set a de minimis amount for small investment firms, as set out in Article 36a(5)? If yes, what should the amount be?

Q9: Do you agree with the introduction of the 2 million EUR absolute threshold? If not, what should the amount be?

Article 36b-

Calculation of projected fixed overheads in the case of an investment firm that has not completed business for one year according to Article 97(3) of Regulation (EU) No 575/2013

(legal basis Article 97(4)(c))

Where a firm has not completed business for one year from the day it starts trading, it shall use, for the calculation of items (a) to (h) of Article 36, paragraph 1, the projected fixed overheads included in its budget for the first twelve months' trading, as submitted with its application for authorisation.

..... [REMAINING ARTS OF EBA AS PRESENTED IN EBA/CP/2012/02]

5. Accompanying documents

5.1 Cost–benefit analysis/impact assessment

5.1.1 Introduction

1. As per Article 10(1) of the EBA regulation (Regulation (EU) No 1093/2010 of the European Parliament and of the Council), any draft implementing technical standards/regulatory technical standards developed by the EBA – when submitted to the EC for adoption – shall be accompanied by an Impact Assessment (IA) which analyses 'the potential related costs and benefits'. The Impact Assessment shall provide the reader with an overview of the findings as regards problem identification, the options identified to remove the problem and their potential impacts.

2. This note outlines the EBA's assessment of the impact of the requirements regarding the calculation of fixed overhead requirement used to calculate the total risk exposure of investment firms. The development of draft RTS covering these matters stems from the requirement presented in Article 97(4) of Regulation (EU) No 575/2013 of the European Parliament and of the Council on prudential requirements for credit institutions and investment firms (CRR).

5.1.2 Problem definition

Issues addressed by the European Commission (EC) and the EBA regarding the calculation of fixed overhead requirement

3. Investment firms have to calculate their capital resources requirement taking into account the risk-weighted exposures the firm has to the markets and other firms and general overheads. Once calculated, the relevant parts of the capital resources calculations should exceed the relevant sections of the capital resources requirement in order for the firm to meet its prudential requirements.

4. Directive 2006/49/EC (CRD I) requires investment firms to calculate a quarter of the firm's relevant fixed expenditure or total expenditure in the firm's most recent audited annual report and accounts, excluding certain expenses. The requirements regarding this calculation currently vary between Member States and this calculation is not uniformly conducted across the EU.

5. The proposed draft RTS will supplement at a technical level the provisions of the CRR and clarify how an investment firm should calculate its overhead expenses for the purpose of estimating itscapital resources. These clarifications will contribute to achieving some of the following specific objectives defined by the EC in its impact assessment of CRR:

   - S4: Enhance legal clarity
   - S5: Enhance level playing field

- S6: Enhance supervisory cooperation and convergence

5.1.3 Technical options considered

6. The EBA considered two alternatives regarding the content of the CP relating to the definition of fixed overheads:

   - Option A:define fixed overheads as a positive list ('additive procedure'), which means listing all the cost items that would have to be included as fixed overheads; or

   - Option B:define fixed overheads as a negative list ('subtractive procedure'), which means deducting a more limited list of variable costs from total expenses.

7. Option A entails a definite list of fixed overheads to be added up and would ensure a high degree of comparability across countries. A complete list could be generated under IFRS, but, given that this RTS applies only to investment firms with limited authorisation to provide investment services, which are often non-IFRS firms, such a list would need to be adapted to take into account national generally accepted accounting principles (GAAPs) and would result in different lists for many countries. Another disadvantage of using option A would be that any subsequent changes to the accounting standard would not be incorporated.

8. Option B, a subtractive approach, is based on deducting certain variable cost items from the total expenses calculated according to the applicable accounting framework. This approach is more prudent, as changes to the accounting framework are automatically taken into account and cannot be arbitraged by changing the accounting categorisation. Furthermore, it requires fewer adjustments for those firms that do not use IFRS, which include most of the smaller or limited-authorisation investment firms affected by this RTS.

9. The EBA favours option B, the subtractive approach, as it is more prudent. Moreover, as many investment firms are likely to use national GAAPs rather than IFRS, this approach will be simpler to implement.

Tied agents

10. The EBA is proposing to include a provision for investment firms providing investment services through their tied agents. When an investment firm with tied agents is winding down, it is likely that some of its tied agents will also have to wind down their business. As calculating fixed overheads for tied agents in the same manner as for investment firms themselves would be challenging, the EBA suggests adding a fixed lump sum per tied agent instead. This method addresses the fact that tied agents have some element of variability in some cases but cannot be considered a fully variable cost item.

Thresholds for the adjustment of capital requirements by competent authorities

11. Own funds requirements are generally set for one year. During that time, firms may face a material change in the level of projected overheads or in the activities allowed in the firm's authorisation (e.g. a firm withdraws some of the services it has provided or gets an authorisation to provide

more services). As a result of a large change, a capital requirement based on projected overheads may no longer be aligned with the actual level of capital needed by a firm. The EBA, therefore, proposes to introduce thresholds defining when a change in business activities is large enough that competent authorities should allow adjustment to the capital requirement. Introducing thresholds would enable harmonisation regarding what constitutes a ‘material change’ and would fulfil the mandate of the EBA and ESMA under Article 97(4)(b).

12. The EBA proposes to implement an absolute and a relative threshold. The absolute threshold would be introduced for larger investment firms in order to address changes in capital requirements considered material in an absolute sense, which would affect larger investment firms.

13. The proposal tries to strike the right balance regarding the level of the threshold. A low materiality threshold would increase the supervisory burden for national competent authorities, given that competent authorities would have to adjust the requirements even if small changes in the business of a firm were to take place; this would not be particularly useful or cost-efficient, particularly given the one-year horizon of this requirement.

14. On the other hand, a high materiality threshold could lead to situations in which investment firms might hold either insufficient capital, when a company is expanding, or an excessive amount, when the business of a firm is shrinking. In addition, while it could be argued that a low threshold falls within the mandate for establishing conditions for the exercise of the competent authorities’ adjustment of capital requirements, a considerably high threshold in the RTS would end up circumventing the CRR provision that provides the National Supervisory Authorities (NSAs) with the power to adjust capital requirements.

5.1.4 Impact of the proposals

Costs

15. For investment firms, the implementation of this RTS will generate two types of costs:

- Direct compliance costs, as investment firms will have to check if the current calculation they make meets the requirements of this RTS. Because most investment firms should have already implemented the processes necessary to conduct the calculation of their overhead expenses, this assessment should not require significant resources.

- If some of the calculations currently made by an investment firm do not meet the requirements, this institution may need to raise additional capital as a result. In Member States where less prescriptive requirements than those proposed by these RTS are in place, investment firms are more likely to have to raise additional capital.

Q10: Could you provide any evidence (qualitative or quantitative) or data that would help the EBA to estimate more precisely the potential change in the own funds requirement in your jurisdiction?

16. The implementation of this RTS may have additional resource implications for NSAs, in terms of additional staff time for supervision. However, these additional resources should not be significant, as NSAs should already be monitoring the compliance of investment firms with the requirements on capital resources.

Benefits

17. By establishing harmonised practices for the calculation of fixed overhead requirements, the RTS will ensure that institutions in different Member States use the same practices when they estimate their capital resources requirement, ensuring legal clarity and a level playing field, as well as facilitating the calculation of this requirement for cross-border firms.

Q11: Do you agree with our analysis of the impact of the proposals in this CP? If not, can you provide any evidence or data that might further inform our analysis of the likely impacts of the proposals?

5.2 Overview of questions for consultation

Q1. Do you agree with the subtractive approach proposed in Article 36(1)?

Q2. If yes, do you agree with the list of items? What items should be added or deleted?

Q3. In case you prefer the additive approach, please elaborate on the advantages of using such an approach and on how to minimise the risk of faulty classification.

Q4. Do you agree with the inclusion of tied agents, as set out in Article 36(4)? If not, what alternative do you suggest?

Q5. Do you agree that the inclusion of tied agents would be covered with a certain amount related to a tied agent rather than a variable sum? Or do you prefer the capital requirement to be calculated in the same manner as for the investment firm?

Q6. Currently, a 35% share is proposed as the proportion of costs to be included for tied agents. Do you believe this is adequate?

Q7. Do you agree with the proposed 20% threshold in Article 36a? Please provide evidence of the potential impact of this threshold.

Q8. Do you consider it necessary to set a *de minimis* amount for small investment firms, as set out in Article 36a(5)? If yes, what should the amount be?

Q9. Do you agree with the introduction of the EUR 2 million absolute threshold? If not, what should the amount be?

Q10. Could you provide any evidence (qualitative or quantitative) or data that would help the EBA to estimate more precisely the potential change in the own funds requirement in your jurisdiction?

Q11. Do you agree with our analysis of the impact of the proposals in this CP? If not, can you provide any evidence or data that might further inform our analysis of the likely impacts of the proposals?