

ESMA Consultation Paper on Guidelines on Article 25 of Directive 2011/61

BVI¹ gladly takes the opportunity to present its views on ESMA's proposals for Guidelines on Article 25 of Directive 2011/61/EU (AIFMD). Article 25 AIFMD requires NCAs to identify funds with a potential systemic risk or impact on financial stability (macro level) and to take steps in order to mitigate identified systemic risks. We welcome the proposed Guidelines as the hitherto missing tool enabling them to perform the important task on a harmonised basis.

Regarding the specific questions raised in the Consultation Paper, we would make the following remarks:

Q1. What are your views on the frequency at which the risk assessments should be performed by NCAs?

For the sake of regulatory consistency and in order to avoid disproportionate administrative burden, the frequency of the risk assessments should be aligned with the frequency of reports according to Article 24 AIFMD, as specified in Article 110 of Commission Delegated Regulation 231/2013 (quarterly, half-yearly or yearly depending on AUM managed by the AIFM, the use of leverage and other factors). The assessment frequency would thus correlate with the reporting frequency, thus ensuring that the assessment is always based on up-to-date data. In any case, the assessment frequency should not be higher than the reporting frequency and must not lead to additional reporting obligations.

Q2. What are your views on the sample of funds to be included under Step 1? Do you agree in including in the risk assessment not only substantially leveraged funds but also funds not employing leverage on a substantial basis which may pose financial stability risks?

We do not agree with the idea of including funds not employing leverage on a substantial basis. This approach would render the scope of funds covered in Step 1 unnecessarily broad. Paragraph 13 b) of the draft Guidelines should hence be deleted.

¹ BVI represents the interests of the German fund industry at national and international level. The association promotes sensible regulation of the fund business as well as fair competition vis-à-vis policy makers and regulators. Asset Managers act as trustees in the sole interest of the investor and are subject to strict regulation. Funds match funding investors and the capital demands of companies and governments, thus fulfilling an important macro-economic function. BVI's 114 members manage assets more than 3 trillion euros for retail investors, insurance companies, pension and retirement schemes, banks, churches and foundations. With a share of 23%, Germany represents the largest fund market in the EU. BVI's ID number in the EU Transparency Register is 96816064173-47. For more information, please visit www.bvi.de/en.



We also struggle with the concept of including funds that do not qualify under Paragraph 13 a) (and Paragraph 13 b), as the case may be), but that employ an “unusually high use of leverage, as measured through the indicators of Table 1” in the sense of Paragraph 13 c). The “type” approach in Paragraph 14 is not standardised in terms of fund types/categories and thus not appropriate to serve as the basis for risk assessment. The mechanism should therefore be discarded.

Finally, Table 1 of the guidelines contains, in addition to the known methods of the AIFMD Delegated Regulation (gross / commitment), additional leverage indicators such as "adjusted gross leverage" and "financial leverage", which are defined neither in the AIFMD nor elsewhere. Such indicators do not provide for comparability as long as there are no clear rules or guidance for their calculation. AIFMs should not be burdened with further, let alone ambiguous calculation requirements.

Q3. Do you agree with the proposed threshold identified under Step 1? Would you set the same threshold for all AIFs, or would you be in favour of setting different thresholds based for different types of AIFs (e.g.: real estate, hedge funds, private equity etc) or sub-types of AIFs (please specify) based on a statistical analysis (e.g. percentile)? Should you prefer the latter option, please provide proposals and detailed arguments and justification supporting them.

We agree with the quantitative thresholds “size of NAV” and “leverage > 3” according to the Commitment approach. These criteria, obviously inspired by the partial exemption in Article 3(2)(a) AIFMD, are unambiguous and ensure clear results.

We disagree, however, with the concept of differentiating the threshold according to fund categories and see no reason for such differentiation. Please also refer to our answer to Q2.

Q4. Would you identify other relevant transmission channels?

No.

Q5. What are your views on using not only leverage indicators, but also other types of indicator such as those indicated under Table 2 of the draft Guidelines? Do you agree with the list of indicators provided?

We are of the opinion that only leverage indicators, based on the gross and commitment methods, should be used. This is the regulatory approach enshrined in Level 1 (Article 25(1) AIFMD). In contrast, we do not see any legal basis for using criteria that are not related to leverage, as proposed in Table 2.



Q6. What are your views on using not only AIFMD data but also other external data sources to perform the assessment? Which types of external data sources would you consider more useful for the purpose of performing the assessment under Step 2, other than those already identified in Annex of to the draft Guidelines?

AIFMD data reporting provides NCAs with exhaustive information on both the management companies and the AIFs. It should be sufficient to perform the assessment required under Article 25 AIFMD. The AIFMD reporting mechanism is specifically designed to provide NCAs and ESMA with the relevant information to perform their AIFMD-related duties. In any case, requirements for external data must not lead to further reporting requirements on behalf of AIFM.

Q7. Which other restrictions would you consider as appropriate?

We do not see any need for additional restrictions.

Q8. What are your views on the application of the leverage limits? Should those be applied only on the single fund or, where appropriate, limits should also be applied on group of funds? In this case, how would you identify the group of funds?

Leverage limits according to Article 25(3) AIFMD must account for the investment strategy of a given fund and hence are best placed on the level of a single fund. The concept of “group of funds” appears unclear and opens the door for incoherent interpretation within the EU, thus partially thwarting the underlying rationale of the Guidelines.

In practical terms, the funds of a group might be managed under the responsibility of different managers. Compliance with a leverage limit on group level might be difficult to ensure since any change in the leverage of one fund would affect the remaining leverage margin of the others.

Q9. How would you assess the efficiency of leverage limits in mitigating excessive leverage?

While leverage limits imposed by the Home State NCA of a fund according to Article 25(3), 2nd sentence, must be considered a measure of last resort under exceptional circumstances, they appear to be highly efficient to mitigate potential systemic risks that may derive from excessive leverage employed by the affected investment funds.