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BVI[1] Position on the EBA Consultation Paper on the Guidelines on the application of the group capital test for investment firm groups in accordance with Article 8 of Regulation (EU) 2033/2019

We take the opportunity to present our views on the consultation paper of the EBA related to guidelines on the application of the group capital test for investment firm groups in accordance with Article 8 of Regulation (EU) 2033/2019 (IFR). According to Article 8(1) IFR, competent authorities may allow the application of a group capital test (GCT) for investment firm group structures which are deemed to be sufficiently simple, and provided that there are no significant risks to clients or to market stemming from the investment firm group as a whole that would otherwise require supervision on a consolidated basis.

In general, **we reject the draft guidelines and contents as a whole** for the following reasons:

1) The EBA lacks the mandate to issue guidelines.

- The guidelines are not in line with the powers conferred on the EBA by the IFR. In particular, **Article 8 IFR – unlike Article 7 IFR – does not provide for a mandate for the EBA to define the criteria introduced in the IFR for the application of the GCT** (here: sufficiently simple group structure without significant risks to clients or to the market) via regulatory technical standards (RTS) or guidelines. Hence, the decision on the application of the GCT lies with the competent authorities (CAs), notwithstanding the fact that they have to notify the EBA when they allow it (cf. Article 8(1) IFR).

- The EBA itself summarised in its final report on Draft Regulatory Technical Standards on the scope and methods of consolidation of an investment firm group under Article 7(5) IFR (published in May 2023) that **Article 8 IFR is not in the scope of the EBA mandate, nor are the criteria for its application which are listed in the IFR text and left to the CA for application** (cf. feedback on the public consultation, page 36, No 1). It is therefore surprising that the EBA now wants to assess this approach differently after only a few months and de facto eliminate the CAs' reasonable discretion on the application.

- Moreover, before the IFR came into force, the EBA itself recommended that CAs should have the power to require the application of GCT **on a case-by-case basis** (cf. Annex to the EBA Opinion, EBA-OP-2017-11, in response to the European Commission's call for advice of 13 June 2016, para. 77). However, an individual case decision would no longer be possible on the basis of the now strict specifications in the draft guidelines.

- There is also no need for further action by the EBA to establish supervisory practices and to ensure a common, consistent, and coherent application of Union law within the meaning of **Article 16 of the EBA Regulation (EU) No 1093/2010**. The fact that the requirements for GCT are interpreted

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BVI
Bundesverband Investment und Asset Management e.V.

Contact
Phone +49 69 15 40 90 0
www.bvi.de

BVI Berlin
Unter den Linden 42
10117 Berlin

BVI Brussels
Rue Belliard 15–17
1040 Bruxelles

BVI Frankfurt
Bockenheimer Anlage 15
60322 Frankfurt am Main

Executive Board
Thomas Richter CEO
Rudolf Siebel MD

differently by the CAs is precisely the result of the discretion deliberately provided by the legislator at Level 1, considering the specifics of the individual markets, business models and risks.

- Even an increased interest in the application of the GCT does not justify any special significance but is rather an outflow of the application of Article 8 IFR and its exemption provisions. This applies all the more as, according to the EBA's survey of the CAs, applications were also definitely rejected (cf. sample of EBA GCT data collection, page 28 of the consultation paper).

- **A special significance cannot be derived from the fact that only nine CAs out of 28 have provided feedback to the EBA at all** and that individual EU Member States with a large number of investment firms and investment firm groups (e.g., Germany) are not included. For one, since there is no information given as to the motive of the remaining 19 CAs choice not to participate and whether these CAs have received any applications to and/or granted the application of the GCT since the IFR came into force. Moreover, the applications are not evenly distributed among these nine participating CAs but indicate that there is a greater interest in exemption in certain EU Member States. In any case, no particular significance for the entire EU market can be derived from this in order to have to set uniform criteria that no longer allow for a case-by-case solution.

  In any case an increased interest in the application of the GCT would only strengthen the initial recommendation made by the EBA itself according to which the application of the GCT should be the rule and application of prudential consolidation requirements should be the exception (cf. Annex to the EBA Opinion, EBA-OP-2017-11, in response to the European Commission's call for advice of 13 June 2016, Recommendations 8 and 9, p. 27). The fact that the initially recommended order of application order of GCT and prudential consolidation has been reversed in the final version of the IFR for structural causes to reflect the system of the CRR is by no means to be seen has a predetermination that the GCT cannot be applied for most investment firm groups.

- The group capital test requirements are explicitly not part of the **review clause in Article 60 IFR.** This is also an indication that the EU legislator, in general, did not see a mandate for the EBA in this respect. However, the EBA in cooperation with ESMA is free to address this aspect in its review report to the Commission as long as the EBA actually sees a need for action due to different practices that are no longer justified by different business and market practices in the EU Member States. Until then, however, we do not see any mandate to limit the freedom of action of the individual CAs specified at Level 1 by means of guidelines. In such a review process, however, the practices of all 28 CAs would have to be included and not only the nine feedbacks available so far.

2) The proposed guidelines go far beyond the requirements of Level 1

Even if one were to assume that the EBA would in principle be allowed to issue guidelines on this issue, the **proposed content is in any case no longer covered by the Level 1 requirements in Article 8 IFR.** Rather, the EBA proposal goes far beyond the objective of the European legislator and even contradicts it.

- The EBA now ultimately proposes – in contrast to what is set out at Level 1 in Article 8 IFR – **quantitative/objective criteria that no longer allow for any discretionary leeway**. For example, groups of investment firms are to be allowed to apply the group capital test if the group does not include more than six entities or consists of a maximum of three group levels and at least one Class 2 investment firm. In addition, further quantitative thresholds shall apply. In the IFR, the EU legislator explicitly spoke out against a quantitative approach for the GCT and thus decided against

the continuation of the previous practice according to Art. 15 and 17 CRR. However, by wanting to reintroduce exactly comparable quantitative criteria via guidelines, the EBA is ignoring the will of the EU legislator, acting against the rationale of Level 1 and thus exceeding its competences. Moreover, by reducing the first sentence of Article 8(1) IFR to conclusive quantitative-objective criteria, not only are the **principle-oriented qualitative-subjective criteria of the first sentence of Article 8(1) IFR** turned into the opposite in terms of content, but also the discretionary scope of the CA is **de facto reduced to zero**.

- The **proposals in the guidelines will lead to considerable additional effort for the investment firm groups concerned, which was precisely to be avoided through the application of the GCT required in Article 8 IFR**. According to the EBA proposal, the investment firm groups must on an ongoing basis (even after application of the GCT has been granted) calculate the capital requirements according to Article 7 IFR on a consolidated basis (e.g. capital requirements on a consolidated level, K-factor calculation, cf. paragraph 35 of the draft guidelines) and compare these with those on the basis of the regulated relief according to Article 8 IFR in order to assess if they will be in line with the thresholds set by the EBA. However, **the motive for the introduction of the GCT in Article 8 IFR as well as for such an application, but also the legal consequence of Article 8 IFR, is to no longer be obliged to carry out capital calculations on a consolidated basis as it is required in Article 7 IFR**. For this reason alone, the guidelines and the thresholds proposed therein are inappropriate because they clearly contradict subject and scope of the requirements of the EU legislator. Notwithstanding this, such a comparison between the outcome of Articles 7 and 8 IFR is also currently not possible in practice at all, because the concrete regulatory technical standards for calculating the capital requirements on a consolidated basis according to Article 7 IFR have not yet been adopted at EU level. In this respect, we also refer to our considerable concerns that we have made clear to the EBA in connection with the further consolidation approaches under Article 7 IFR (cf. BVI position paper, pages 7 et seq.).

- Moreover, the quantitative approach is also not suitable for assessing the complexity of a group, since the nature of investment firm groups may vary considerably. Moreover, it is not clear why a restriction on the number of group entities (max. 6) and acceptable group levels (max. 3) is considered adequate for investment firm groups to which at least one Class 2 EU investment firm belongs, whereas other risk-mitigating and structure-simplifying aspects, such as the total number of Class 2 (and Class 3) EU investment firms in an investment firm group or the question of whether the investment firm group is already supervised within another European supervisory regime (e.g. the nature of the permitted activities, the total number of Class 2/Class 3 EU investment firms in an investment firm group or the question of whether the investment firm group is already supervised within another European supervisory regime (e.g. **conglomerate supervision**), shall be irrelevant.

  In our view, the principle-oriented qualitative-subjective criteria of sentence 1 of Article 8(1) IFR calls to evaluate on a case-by case basis, for example, weather:

  (i) the investment firm group structure is sufficiently simple in terms of a clear organisational structure with precisely defined, transparent and consistent responsibilities, economic transparency and whether the group's participation structure is understandable, i.e., not overly complex, non-transparent and factually inconclusive and

  (ii) there are no significant risks (RtC and RtM as the relevant categories) to clients or to market stemming from the investment firm group as a whole in terms of the RtC and RtM risk profiles existing at the individual level of the investment firms in the overall view can still be viewed as

adequate. This also requires that the respective risk factors (RtC and RtM) go beyond market standards and are not already covered by the regulations of other supervisory regimes (significant increase in risk).

Moreover, we wonder why the EBA did not transfer its previous considerations from other guidelines here. For example, it has recognised in its guidelines on common procedures and methodologies for the supervisory review and evaluation process (SREP) under Directive (EU) 2019/2034 that **investment firms that do not deal on own account the risk assessment should be less comprehensive**, whereas for investment firms that deal on own account the assessment should be granular and more comprehensive (cf., paragraph 325 of the EBA guidelines).

- It is also unclear how the EBA intends to deal with those **cases that have already been granted permission to conduct the GCT on the basis of other individual assessments of the CAs** (deviating from the quantitative thresholds proposed by the EBA). Would these then have to be revoked in order to ensure uniform practice at EU level? This would lead to unequal treatment of investment firm groups and favour those who already have permission to GCT.

Due to the serious shortcomings of the draft guidelines, we refrain from addressing the individual issues raised by the EBA. Rather, we strongly urge that the guidelines be discarded or fundamentally redesigned after careful analysis of the current supervisory practices of all CAs. In doing so, the EBA should urgently refrain from also requiring calculations under Article 7 IFR and also from introducing quantitative thresholds. We are at your disposal to make further suggestions for this.