.BVI

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BVI[1] Position paper on EBA's consultation paper on Draft Guidelines on liquidity requirements exemption for investment firms under Article 43(4) of Regulation (EU) 2019/2033

In general, we have some concerns regarding the legal scope of the draft guidelines. The reference in ***paragraph 7*** of the draft guidelines to the definition of financial institutions of the EBA Delegated Regulation and the MiFID II definition of investment firms is very far-reaching and not in line with the scope of the IFD framework. This would involve several entities which are not in scope of the IFD framework but provide MiFID services (such as credit institutions providing MiFID services). The scope of the EBA guidelines should be clearly limited to investment firms in the meaning of Article 2 IFD (authorised and supervised under MiFID II) which do not meet the conditions of Article 12 IFR. Therefore, we request amending the addressees of the draft guidelines (paragraph 8) as follows:

> '7. These guidelines are addressed to competent authorities as referred to in point (v) of Article 4 (2) of Regulation (EU) No 1093/2010 and defined in point 5 of Article 3(1) of Directive 2019/2034/EU, and to ~~financial institutions as referred to in Article 4 (1) of Regulation (EU) No 1093/2010that are~~ investment firms ~~as defined in Article 4(1)(1) of~~ ***as referred to in Article 2(1) of Directive 2019/2034/EU authorised and supervised under*** Directive 2014/65/EU and do not meet all of the conditions to qualify as small and non-interconnected investment firms under Article 12(1) of Regulation (EU) 2019/2033 ('investment firms').'

Regarding the questions raised for consultation, we have the following specific remarks:

Question 1: *With regards to the investment services and activities eligible for the exemption listed in paragraph 13, do you consider that other services and activities should be included? If yes, please provide an explanation.*

According to the EBA proposals, only certain small investment firms may be exempted from the liquidity requirements. Even if the proposed approaches under ***paragraph 13*** of the draft guidelines seem appropriate in principle, they fundamentally limit the legal scope of application. This is because Article 43(1) of the IFR, second subparagraph, allows competent authorities to exempt all investment firms that meet the requirements as small and non-interconnected investment firms within the meaning of Article 12(1) IFR. Article 43(4) IFR only empowers the EBA to specify in the guidelines further criteria which the competent authorities may take into account.

Question 2: *Do you consider that the exemption based on investment firms' financial resources needs for its orderly wind down is sufficient?*

In principle, we agree with the approach taken in the draft guidelines. In particular, we welcome the proposal that investment firms which provide investment advice of an ongoing nature or portfolio management on a delegated basis to other financial institutions may be exempted by competent authorities. However, we request the EBA to amend ***paragraph 20*** as follows:

[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 116 members manage assets of some EUR 4 trillion for retail investors, insurance companies, pension and retirement schemes, banks, churches and foundations. With a share of 27%, 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.

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> '20. Competent authorities may exempt investment firm which is providing ***investment advice of an ongoing nature or*** portfolio management ~~or investment advice on an ongoing basis~~ when an investment firm manages assets which are delegated for it by other financial institutions.'

The current wording could give the impression that investment advice of an ongoing nature may only be exempt if it is provided by way of delegation. Such a limited approach seems not appropriate because the investment service of investment advice per se does not entail increased liquidity needs. The risk of losses of fees earned by an investment advisor are already covered by the prudential capital and liquidity requirements of the IFD and IFR. This applies even more because the K-factor AUM now explicitly takes into account ongoing investment advice and can thus in practice lead to higher own funds than was the case before the introduction of the IFD and IFR. In this context, it is of utmost importance to clarify that an advisor only gives a recommendation to its clients. The final decision whether or to which extent to invest in a financial instrument will be taken by the client. A client of an advisor may only suffer losses where an investment firm provides inadequate investment advice on which basis the client has made an investment decision. From a prudential perspective, the advisor has to ensure that the firm is well organised to avoid such inadequate recommendations and that the firm has sufficient own liquid capital to cover legitimate claims resulting from this liability only. Therefore, any risk to which an investment adviser is exposed must be linked to the question of whether this is based on a lack of internal standards. In our view, this question is not linked to a specific liquidity risk which is not already covered by the IFD/IFR framework.

Furthermore, we request the EBA to amend ***paragraph 22*** of the draft guidelines as follows:

> '22. For the purpose of the assessment for the exemption, competent authorities should use all relevant information, such as, where available: (i) regulatory reporting, (ii) accounting and financial reporting, (iii) internal investment firm's accounts, (iv) ILAAP and ICAAP conclusions, (v) the investment firm's wind-down plans***, where available***.'

The requirement in paragraph 22 could be misunderstood to mean that all investment firms must have recovery/wind-down plans in place and available information on recovery action and governance arrangements should then be considered by competent authorities. According to Article 63 of the IFD, the scope of the Directive 2014/59/EU (BRRD) and thereby the obligation to implement recovery plans is limited to certain investment firms which are subject to the initial capital requirements laid down in Article 9(1) of the IFD. This only includes those that are authorised under MiFID to engage investment activities listed in points (3) and (6) of Section A of Annex I to Directive 2014/65/EU and must maintain initial capital of €750,000 for this purpose. All other investment firms (such as portfolio managers) not covered by the BRRD are not obliged to draw up corresponding recovery plans. We therefore suggest clarifying that information on recovery plans should be only considered if it is required by law.

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