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ESMA Consultation on format and content of the prospectus (ESMA31-62-532)

BVI¹ welcomes the opportunity to provide comments on the ESMA Public Consultation Papers on the draft technical advice on format and content of prospectus.

We fully support the aim of a practical and efficient implementation of the prospectus regime. However, we oppose the idea enshrined in the recent proposals of the European system of financial supervision review that the competence for the approval of closed-end fund prospectuses falling under the Prospectus Regulation should be shifted to ESMA. The solution for shortfalls of the existing regime does not lie in a change of competences but in streamlining existing requirements such as Level 2 requirements.

On the contrary, any transfer of competences to ESMA would increase existing problems and add complexity to an already complex process. The NCA is and should remain the competent authority for the approval of an AIFMD marketing notification. The AIFMD does only provide for rules on the fund manager but not for any product rules such as eligible assets or investment limits or other areas such as legal form of funds, types of investors or documentation requirements and regulatory approval. Consequently, the NCA is familiar with the fund manager and – unless the closed-end fund is the first product – also familiar with other products already launched by the manager. The NCA is familiar with the types of vehicles and how these work according to the local investment law. NCA's furthermore have to ensure that the prospectus is in line with the information in Art. 23 AIFMD (see Art. 31 (1) AIFMD and Annex III f)). This process should be used in an efficient way for the approval of the prospectus. Transferring the approval process to ESMA would deprive market participants and also investors of such efficiency. Furthermore, proximity of the NCA is indispensable for commensurate supervisory practices and effective protection of investors in the relevant marketplace. This would be lost in case the supervisory competence for the approval of prospectus were transferred to the EU level.

Therefore, we strongly believe that the solution in existing problems can be found in really streamlining the Level 2. Comparing the disclosure requirements of AIFMD and the Prospectus Directive should not just be a ticking the box exercise as to which requirements are matched and which not, but rather a proper assessment on what is the appropriate level of information that the investor in a CEF should obtain in order to make an informed investment decision. For details, please refer to our answers to Questions 64 et seq.

Besides this very important aspect, we would also like to raise a technical issue which could provide a huge improvement in practice. We strongly support the use of internationally agreed standards, such as the International Securities Identification Number (ISIN) and the global Legal Entity Identifier (LEI), as unique identifiers established in the Prospectus Regulation to meet reporting requirements on the

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. Fund companies 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 over 100 members manage assets of nearly 3 trillion euros for private investors, insurance companies, pension and retirement schemes, banks, churches and foundations. BVI's ID number in the EU Transparency Register is 96816064173-47. For more information, please visit www.bvi.de/en.



securities markets. The standardisation of financial information, namely by means of unique identifiers for institutions, products and transactions, is a priority to achieve a workable and high-quality data infrastructure. The need for easy and reliable tools to uniquely identify financial assets, transactions, issuers, guarantors and counterparties applies not only to private stakeholders but also to public authorities.

Data management is severely hampered by the fact that the ISIN and LEI are not universally used, as well as by the lack of authoritative sources for links between the two. Furthermore, the general lack of machine-readable reference information at the source and the manual work implied impact on the quality of the data received by the market place implies additional management costs for its cleaning and may result in errors affecting all fund management business areas.

We therefore welcome ESMA's proposals on implementing the mandatory ISIN and LEI in relation to the Prospectus Regulation. In order to make further progress we like to offer some comments which should be considered to for both regular but also growth prospectuses:

- **Legal Entity Identifier (LEI) in the prospectus relevant documents.** The Prospectus Regulation (Art. 6 (3)) permits the prospectus to be drawn up as a single document or as separate documents. A prospectus composed of separate documents shall be divided into a registration document, a securities note and a summary. In turn the securities note can be divided into a base prospectus and final conditions. The draft technical advice (DTAs) include the LEI of the issuer in the share, debt and derivatives registration documents but not in the securities notes for those instruments, which only contain the ISIN. In order to ensure that the different parts of a prospectus can be easily linked to the relevant institutions (issuer, guarantor, offeror) it is necessary that all documents in the prospectus contain the LEI.

- **Machine readable data in the prospectus documents.** The Prospectus Regulation (Art. 21 (13)) establishes that ESMA shall develop draft regulatory technical standards to specify the data necessary for the classification of prospectuses including the ISINs of the securities and the LEIs of the issuers, offerors and guarantors, is machine readable. While these technical standards are expected to be separately developed from the ones on content and format of the prospectus, they are connected. The current DTAs of format and content of the prospectuses do not explicitly mention machine readable data. While the data necessary for the classification of prospectuses may be provided by NCAs, the most effective way to ensure digitisation and avoid manual work would be to already have machine-readable information at the source, i.e. in the prospectus itself. Therefore, we propose to include the requirement for a specific additional section on machine readable information at the end of the prospectus, both in the single document prospectus as well as in the securities notes if they are separated. This additional section should only include the most basic information, e.g. less than ten basic attributes, already contained in other sections of the prospectus, but in a machine readable format:
 - ISIN as per ISO 6166
 - CFI code as per ISO 10962
 - FISN as per ISO 18744
 - Issue currency as per ISO 4217
 - Issuer, Offeror, Guarantor LEI as per ISO 17442



- Issuer Legal Registration Country as per ISO 3166
- The inclusion of this additional section, just one page, would incur very low costs for the prospectus production but would provide large benefits in the process of digitisation of financial information.

Both the requirement that all documents in the prospectus contain the LEI as well as the inclusion of the ISIN identifiers mentioned above will help to arrive at the Capital Markets Union in the post-trade space. To this end the European Post Trade Forum (EPTF) appointed by the European Commission published a report – replacing the Giovannini Barriers – which identifies barriers which have not yet been dismantled, as well as new barriers and bottlenecks which need addressing in order to promote a post trade services capital markets union in the EU. The full report on post-trade can be found here (https://ec.europa.eu/info/publications/170515-eptf-report_en).

In particular the EPTF Barriers 2, 6, and 7 will be reduced if the EU prospectus law is adapted as requested. In detail:

- **EPTF Barrier 2: Lack of Convergence and Harmonisation in Information Messaging Standards.** The high priority barrier acknowledges that despite standardisation efforts by the industry there remain large differences in information messaging standards, that prevent some market participants primarily active at the domestic level to fully migrate to the latest international standards. The overall consequences are higher processing costs as well as higher risk of errors due to the great level of manual processing. The report specifically recommends that in the regulatory reporting besides a standardised format a security should always be identified by an ISIN, the parties to a trade should always be identified by a LEI, a financial instrument should always be identified by a CFI, and efforts should continue to create standards for other data fields. By requiring the above mentioned ISO identifiers already in the prospectus, and in machine readable form the maintenance of reference data bases by both regulators and supervisory entities as well as by the market is extremely facilitated. Issue(r) data may go directly or through specialized vendors without mistake prone manual intervention (by retyping the content of a written prospectus) into the databases of financial market participants. Transactions can be processed from the outset more easily without prior harmonisation and mapping of the various identifiers and associated reference data. Not only the cost of reference data input but more importantly the cost for cleansing, reconciliation and IT could be reduced substantially if the market receives machine readable securities information directly from the prospectus as the same identification data does not need to be checked, reviewed, scrubbed and mapped at each financial service firm again and again anymore. The suggested change in Prospectus Regulation could help to reduce the in the EPTF report estimated 6 billion USD global reference data quality management costs substantially.
- **EPTF Barrier 6 Complexity of Post-Trade Reporting Structure.** This high importance barrier addresses the lack of harmonisation across multiple post trade reporting requirements increases the costs of reporting and the complexity of data analysis. One of the solutions suggested by the EPTF is to eliminate duplication reporting fields in regulatory reporting and the use of data standards such as the LEI. By requiring machine readable issue(r) identification already in the prospectus the reference data information could be included more easily into the regulatory reference data bases, e.g. FIRDS under MiFID II, and regulatory reporting could facilitated by avoiding duplicative reporting of reference data. The current twin absence of



harmonised data formats together with the lack of standardization of data elements starting already in the prospectus has a negative impact on the ability of any entity to analyse the data without prior cleansing or normalisation. This will negatively impact the regulatory authorities in carrying out their role in an effective and efficient manner as without a mandated prospectus standard on machine readable required minimum reference data and identifiers it is unlikely that the participants in the data value chain will implement the same solution, leading to a degradation in the level of harmonisation and consistency of data.

- **EPTF Barrier 7 Unresolved Issues Regarding Reference Data and Standardised Identifiers.** This medium importance barrier addresses the issue that financial reference data, e.g. ISIN and LEI should be available to all market participants for free or at cost, free of licence fees, copyright or similar restrictions. The concept of a license free distribution of the identifiers and associated reference data would be well supported if mandated by Prospectus Regulation on machine readable required minimum reference data and identifiers made available by the issuer for free through issuance of a public prospectus.

Beyond the post-trade space our members would benefit directly from prospectus regulation mandated machine readable required minimum reference data and identifiers in the compliance and risk management space. Specifically the UCITS Directive (2009/65/EU) requires our members to monitor investment limits on specific issuer, cf. Art. 52 to 56 UCITS Directive. While Articles 52 et seq. impose investment limits based on the issue, Art. 56 limits the concentration of investments by UCITS across all voting /non voting stock as well as all other financial instruments issued by the same issuer. Such limits apply also to group exposures. Individualised diversification and concentration limits are also set on a contractual basis, e.g. in case of AIFs. Therefore the identification of both the issue and the issuer of a instrument in its prospectus in machine readable form will be extremely helpful to allow compliance and risk management supported by automation.

Q 64: *Do you agree with the changes proposed by ESMA for collective investment undertakings?*

We neither share ESMA's opinion that the existing regime for closed-end funds largely works well nor do we think that the solution would be to provide ESMA with the competence to approve prospectuses for closed-end funds.

We believe that the requirements should be assessed against the following criteria:

- **Overlaps between the AIFMD and the Prospectus Regulation, in particular with respect to different wordings.** The new Prospectus Regulation in particular recognises the possibility to include information according to the AIFM regime by reference (see Art. 19 para. 1 (j)) of the Prospectus Regulation). ESMA therefore should analyse relevant information and simply include references in Level 2 of the Prospectus Regulation to the disclosure required according to AIFMD Level 1.
- **Necessity of information to be provided to investors due to the fact that the fund manager is regulated and supervised according to AIFMD and required to provide ongoing disclosure.** As already pointed out in the introduction, comparing the disclosure requirements of AIFMD and the Prospectus Directive should include a proper assessment on what is the appropriate information that the investor in a closed-end fund should obtain in order to make an informed investment decision. The information to be disclosed according to Annex



I of Regulation 809/2004 is generally tailored for operational companies and not for funds managed by a regulated and supervised entity thereby already providing a high level of investor protection. Where the prospectus regime requires disclosure to investors in order to allow an informed decision on the issuer's situation, the AIFM regime goes beyond this by instead requiring compliance with specific regulation.

Q 65: *Is greater alignment with the requirements of AIFMD necessary? If so, where?*

Yes, at least regarding the following disclosure requirements:

- Annex 1, 2.1 due to Art. 23 para. 1 d) AIFMD
- Annex 1, 4 due to Art. 23 para. 1 a) AIFMD and Art. 15 para. 3 c), Art. 23 para. 4 c) AIFMD
- Annex 1, 9.1 due to Art. 23 para. 1 a) g), h), k), m), n) AIFMD
- Annex 1, 10.4 due to Art. 23 para. 1 a) AIFMD
- Annex 1, 14 due to Art. 23 para. 1 d), Art. 8 para. 1 c), Art. 14 AIFMD, Art. 30 et seq. AIFM-Regulation
- Annex 1, 15 due to Art. 23 para. 1 k) and Art. 22 para. 2 f) AIFMD
- Annex 1, 16 due to Art. 23 para. 1 d) AIFMD
- Annex 1, 18 due to Art. 23 para. 1 j), Art. 14 AIFMD, Art. 30 et seq. AIFM-Regulation
- Annex 1, 19 due to Art. 14 AIFMD, Art. 30 et seq. AIFM-Regulation
- Annex 1, 20 due to Art. 23 para. 1 k), Art. 22 AIFMD, Art. 105 AIFM-Regulation
- Annex 1, 21 due to Art. 23 para. 1 m) AIFMD, Art. 23 para. 1, 1 sentence AIFMD
- Annex 1, 22 due to Art. 23 para. 1 k) and Art. 22 para. 2 f) AIFMD
- Annex 1, 25 due to Art. 23 para. 1 a) AIFMD
- Annex 15, 1.1 investment policy should be deleted due to the wording in Art. 23 para. 1 a) AIFMD
- Annex 15, 1.2 due to Art. 23 para. 1 a) AIFMD
- Annex 15, 2.1 due to Art. 23 para. 1 a) AIFMD
- Annex 15, 3.1 due to Art. 23 para. 1 i) AIFMD
- Annex 15, 3.2 due to Art. 23 para. 1 i) AIFMD
- Annex 15, 3.4 due to Art. 23 para. 1 d) AIFMD
- Annex 15, 3.2 due to Art. 23 para. 1 j) and Art. 12 para. 1 d) AIFMD
- Annex 15, 4.1 due to Art. 23 para. 1 d) AIFMD
- Annex 15, 5.1 due to Art. 23 para. 1 d) AIFMD
- Annex 15, 6.1 due to Art. 23 para. 1 g) AIFMD
- Annex 15, 6.2 due to Art. 23 para. 1 g) AIFMD
- Annex 15, 8.3 due to Art. 23 para. 1 m) AIFMD