Frankfurt am Main,
13 May 2015

BVI´s comments on the consultation document for a review of the prospectus directive

Q1. Is the principle, whereby a prospectus is required whenever securities are admitted to trading on a regulated market or offered to the public, still valid? In principle, should a prospectus be necessary for:
- admission to trading on a regulated market
- an offer of securities to the public?
Should a different treatment should be granted to the two purposes (i.e. different types of prospectus for an admission to trading and an offer to the public). If yes, please give details.

BVI[1] supports the EU Commission's aim to improve the prospectus requirements. Asset managers act as fiduciaries for their clients and therefore have a fundamental interest in meaningful disclosure including in case of securities admitted to trading on a regulated market and offered to the public. In both cases a prospectus should be required and there should be no difference with respect to the content except for information specific for the admission or the type of offering. For instance, if securities are publicly offered but not traded on the regulated market, details regarding the liquidity of the market on which the securities are trade should be included.

Q2. In order to better understand the costs implied by the prospectus regime for Issuers please estimate the cost of producing the following prospectus

No response.

Q3. Bearing in mind that the prospectus, once approved by the home competent authority, enables an issuer to raise financing across all EU capital markets simultaneously, are the additional costs of preparing a prospectus in conformity with EU rules and getting it approved by the competent authority are outweighed by the benefit of the passport attached to it?

No response.

Q4. The exemption thresholds in Articles 1(2)(h) and (j), 3(2)(b), (c) and (d), respectively, were initially designed to strike an appropriate balance between investor protection and alleviating the administrative burden on small issuers and small offers.
Should these thresholds be adjusted again so that a larger number of offers can be carried out without a prospectus? If yes, to which levels? Please provide reasoning for your answer.

The mechanism of exemption thresholds generally takes into account specific circumstances where the requirement to publish a full prospectus seems too burdensome. Hence, we generally appreciate the mechanism. In addition, issuers who would like to attract investors but are exempt from the requirement

[1] BVI represents the interests of the German investment fund and asset management industry. Its 89 members manage assets in excess of EUR 2.6 trillion in UCITS, AIFs and assets outside investment funds. As such, BVI is committed to promoting a level playing field for all investors. BVI members manage, directly or indirectly, the assets of 50 million private clients over 21 million households. BVI's ID number in the EU Transparency Register is 96816064173-47. For more information, please visit www.bvi.de/en.

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 du Trône 14–16
1000 Bruxelles

BVI Frankfurt
Bockenheimer Anlage 15
60322 Frankfurt am Main

Executive Board
Thomas Richter CEO
Rudolf Siebel MD

to publish a prospectus generally make an offering memorandum available to investors. Since the exemptions were just reviewed with effect as of July 1, 2012, we believe that prior to any further review the impact of the revised thresholds needs to be assessed thoroughly. For the time being, we have no indication that an adjustment is necessary.

Q5. Would more harmonisation be beneficial in areas currently left to Member States discretion, such as the flexibility given to Member States to require a prospectus for offers of securities with a total consideration below EUR 5 000 000?

No. We do not see any particular reasons to harmonise such offers.

Q6. Do you see a need for including a wider range of securities in the scope of the Directive than transferable securities as defined in Article 2(1)(a)? Please state your reasons.

No response.

Q7. Can you identify any other area where the scope of the Directive should be revised and if so how? Could other types of offers and admissions to trading be carried out without a prospectus without reducing consumer protection?

There is no need to expand the scope of the prospectus directive in our view. It has to be noted, however, that investment products not covered by the UCITS/AIFM framework or the Prospectus Directive lack EU harmonised rules in terms of their public offering, even though these products are non-regulated and often more risky for investors. These products include e.g. unsecuritised profit participation rights or shareholdings. Closing these gaps in the EU regulation may support restoring retail investors' trust in capital markets.

Q8. Do you agree that while an initial public offer of securities requires a full-blown prospectus, the obligation to draw up a prospectus could be mitigated or lifted for any subsequent secondary issuances of the same securities, providing relevant information updates are made available by the issuer?

Yes. We would welcome any a simplification in secondary offerings. Listed companies are indeed already obliged to comply with certain transparency requirements (e.g. ad hoc notification requirements, half-year and annual reports).

Q9. How should Article 4(2)(a) be amended in order to achieve this objective ?

While we generally appreciate an exemption, we do not think that the threshold of 10 per cent of the number of shares of the same class provides for the correct reference. From investors' perspective, the proportion of the secondary offering is of no specific relevance regarding the information to be provided. Rather, the requirement to publish a full prospectus should include a time limit (e.g. the 12 months already included) and e.g. qualitative criteria (such as significance of changes within this time limit). We appreciate, however, that such qualitative criteria might be hard to determine and might consequently create situations of legal uncertainty.

Q10. If the exemption for secondary issuances were to be made conditional to a full-blown prospectus having been approved within a certain period of time, which timeframe would be appropriate?

We think that the 12 months period should be kept.

Q11. Do you think that a prospectus should be required when securities are admitted to trading on an MTF?

Yes, on all MTFs. We see no particular reason to differentiate between admission to trading on an MTF and admission to trading on a regulated market with respect to the prospectus requirement. Hence, we consider that a prospectus should be required when securities are admitted to trading on all MTFs (and not only on those registered as SME growth markets).

Q12. Were the scope of the Directive extended to the admission of securities to trading on MTFs, do you think that the proportionate disclosure regime (either amended or unamended) should apply?

Yes, the amended regime should apply to all MTFs.

Q13. Should future European long term investment funds (ELTIF), as well as certain European social entrepreneurship funds (EuSEF) and European venture capital funds (EuVECA) of the closed-ended type and marketed to non-professional investors, be exempted from the obligation to prepare a prospectus under the Directive, while remaining subject to the bespoke disclosure requirements under their sectorial legislation and to the PRIIPS key information document?.

Yes, such an exemption would enhance coherent regulation without impairing disclosure or investor/consumer protection. AIFMD as well as ELTIF, EuVECA and EuSEF regulations have already extensive transparency and disclosure requirements. For instance, ELTIFs have to comply with the disclosure requirements according to the AIFMD (Art. 23) as well as additional requirements according to the ELTIF Regulation (Art. 21 para. 2, 3 and 4). This means the ELTIF manager is obliged to provide information about e.g. the investment strategy including for example the type of assets and investment techniques, the investors' rights, the costs of their investment, redemption rights as well as risks related to investing in real assets including infrastructure. Additional requirements following the obligation to publish a prospectus according to the prospectus directive add a third layer of disclosure regime, thereby increasing complexity for issuers without added value for investors. Should the legislator nevertheless see shortcomings of prospectus requirements for retail funds, this should be clarified with the respective regulatory regimes, e.g. ELTIF Regulation.

Q14. Is there a need to extend the scope of the exemption provided to employee shares schemes in Article 4(1)(e) to non-EU, private companies ? Please explain and provide supporting evidence.

No response.

Q15. Do you consider that the system of exemptions granted to issuers of debt securities above a denomination per unit of EUR 100 000 under the Prospectus and Transparency Directives may

be detrimental to liquidity in corporate bond markets? If so, what targeted changes could be made to address this without reducing investor protection?

It is hard to measure the impact of such an increase because the level of liquidity in corporate bond markets depends on a multitude of other parameters. We encourage the Commission to ask ESMA to clarify the definitions of liquidity and of liquid market, and to align them with the definitions that will be elaborated in MiFID/MiFIR.

Q16. In your view, has the proportionate disclosure regime (Article 7(2)(e) and (g)) met its original purpose to improve efficiency and to take account of the size of issuers? If not, why?

No response.

Q17. Is the proportionate disclosure regime used in practice, and if not what are the reasons? Please specify your answers according to the type of disclosure regime.

No response.

Q18. Should the proportionate disclosure regime be modified to improve its efficiency, and how?

No response.

Q19. If the proportionate disclosure regime were to be extended, to whom should it be extended?

Other: MTFs, see also answer to Q 11.

Q20. Should the definition of "company with reduced market capitalisation" (Article 2(1)(t)) be aligned with the definition of SME under Article 4(1)(13) of Directive 2014/65/EU by raising the capitalisation limit to EUR 200 000 000?

No response.

Q21. Would you support the creation of a simplified prospectus for SMEs and companies with reduced market capitalisation admitted to trading on an SME growth market, in order to facilitate their access to capital market financing?

No response.

Q22. Please describe the minimum elements needed of the simplified prospectus for SMEs and companies with reduced market capitalisation admitted to trading on an SME growth market.

No response.

Q23. Should the provision of Article 11 (incorporation by reference) be recalibrated in order to achieve more flexibility? If yes, please indicate how this could be achieved (in particular, indicate which documents should be allowed to be incorporated by reference)?

No response.

Q24 (a). Should documents which were already published/filed under the Transparency Directive no longer need to be subject to incorporation by reference in the prospectus (i.e. neither a substantial repetition of substance nor a reference to the document would need to be included in the prospectus as it would be assumed that potential investors have anyhow access and thus knowledge of the content of these documents)?

No. In case a full prospectus is required, disclosure of major shareholdings should at least be included by reference since the shareholder structure is important for investors.

Q24 (b). Do you see any other possibilities to better streamline the disclosure requirements of the Prospectus Directive and the Transparency Directive?

No response.

Q25. Article 6(1) Market Abuse Directive obliges issuers of financial instruments to inform the public as soon as possible of inside information which directly concerns the said issuers; the inside information has to be made public by the issuer in a manner which enables fast access and complete, correct and timely assessment of the information by the public. Could this obligation substitute the requirement in the Prospectus Directive to publish a supplement according to Article 17 without jeopardising investor protection in order to streamline the disclosure requirements between Market Abuse Directive and Prospectus Directive?

We believe that the concept of prospectus supplements is not the easiest way for the market to comprehend changes to the information disclosed. Supplements always have to be read together with the prospectus in order to fully comprehend the new information. In this respect ad hoc publications could be a way to impart easily the changes to the prospectus since they might allow the issuer to include a complete explanation. Nevertheless, the effects of such regulatory approach on the concept regarding prospectus liability would have to be considered. In addition, such approach should not change the cases in which the issuer has to disclose the information during the offering or prior to the trading, i.e. the ad hoc disclosure requirements might have to be extended to all information which today would have to be published as a prospectus supplement. Another way to provide for a coherent disclosure during a public offering or until the shares' trading begins could be the requirement to publish a mark-up of the prospectus instead of a supplement. Accordingly, the investors would only have to review the mark-up instead of the supplement and the original prospectus.

Q26. Do you see any other possibility to better streamline the disclosure requirements of the Market Abuse Directive and the Prospectus Directive?

No response.

Q27. Is there a need to reassess the rules regarding the summary of the prospectus?

No response.

Q28. For those securities falling under the scope of both the packaged retail and insurance-based investment products (PRIIPS) Regulation, how should the overlap of information required to be disclosed in the key investor document (KID) and in the prospectus summary, be addressed?

d) Other.
Aligning the format of the PRIIPs-KID to the prospectus summary could reduce complexity for PRIIPs. However, since the PRIIPs-KID format will likely not be structured in a way that it would fit non-PRIIPs such as shares, aligning the format would indeed increase comparability between all PRIIPs securities but at the same time reduce comparability between PRIIPs securities and non-PRIIPs securities. Hence, the summary should not be eliminated for PRIIPs securities. In addition, it should not be aligned with the PRIIPs-KID format if it reduces comparability with non-PRIIPs securities. Nevertheless, we believe that the prospectus summary provides for a valuable comprehensive description of the offering / listing which would not be feasible within a (PRIIPs-)KID. For instance, risk factors are currently described in more detail than within two to three page product information sheet required for securities under German law. The summary could contain references to the PRIIPs-KID or it could be incorporated into the summary. Since the contents of the PRIIPs-KID are not yet entirely clear, an amendment of the requirements for the prospectus summary should only be reviewed after the PRIIPs-KID details have become clear.

Q29. Would you support introducing a maximum length to the prospectus? If so, how should such a limit be defined?

No. We do not believe that a maximal length for prospectuses would be effective. First, the disclosure requirements of the prospectus and hence it length differ – *inter alia* – subject to the business model and the structure of the offer. Some business models or offer structures are more complicated to explain than others. Secondly, the length of the prospectus depends on the requirements of the regulation which have to be fulfilled by the issuer. If there is a need to shorten prospectuses, the EU legislator should first identify which information could be deleted from a prospectus without reducing investors' protection. Thirdly, due to the prospectus liability, issuers might be inclined to rather include more information than less. A maximal length would not solve this problem but might rather lead to the fact that interesting information is not included since it might not be important in order to be protected from prospectus liability.

Q30. Alternatively, are there specific sections of the prospectus which could be made subject to rules limiting excessive lengths? How should such limitations be spelled out?

No. We do not believe that e.g. a limit on the number of risk factors would decrease excessive length. For instance, risk factors which would today be presented as two different risk factors could be presented as one in order to comply with the limit. Combining risk factors in order to reduce the number may also reduce the clarity of the information provided.

Q31. Do you believe the liability and sanctions regimes the Directive provides for are adequate? If not, how could they be improved?

We would encourage the EU legislator to revise the liability regime for the overall prospectus. Responsible persons should only be liable if the prospectus is misleading, inaccurate or inconsistent. We believe that this liability regime which is also provided for in the PRIIPs Regulation (see Art. 11 para. 1) should be used as the EU liability regime for legal documents such as prospectuses and KIDs.

Q32. Have you identified problems relating to multi-jurisdiction (cross-border) liability with regards to the Directive?

No response.

Q33. Are you aware of material differences in the way national competent authorities assess the completeness, consistency and comprehensibility of the draft prospectuses that are submitted to them for approval? Please provide examples/evidence.

No response.

Q34. Do you see a need for further streamlining of the scrutiny and approval procedures of prospectuses by NCAs?

No response.

Q35. Should the scrutiny and approval procedure be made more transparent to the public?

No. We do not see any specific merit in publishing prospectus drafts. Drafts are often subject to subsequent changes and would present misleading or false information in this respect. We believe there is already a significant overload of information. The publication of draft prospectuses would provide additional information with no further benefit but market participants might be inclined to have to review this anyway. Further problems regarding legal uncertainty for issuers and liability for draft prospectuses would arise. It is and should remain clear that only the final prospectus is the relevant document.

Q36. Would it be conceivable to allow marketing activities by the issuer in the period between the first submission of a draft prospectus and the approval of its final version, under the premise that no legally binding purchase or subscription would take place until the prospectus is approved? If yes, please provide details on how this could be achieved.

No response.

Q37. What should be the involvement of NCAs in relation to prospectuses? NCAs should:

a) Review all prospectuses ex ante (i.e. before the offer or the admission to trading takes place). Unlike shares or units in investment funds, securities as a product are not subject to any kind of regulation. Further, issuers are only subject to sector-specific regulation and supervision (e.g. credit institutions according to CRD IV). In addition, prospectuses provide for information regarding the offer to be made to retail investors. We consider it crucial that prospectuses are reviewed and approved before their offer or their admission takes place.

Q38. Should the decision to admit securities to trading on a regulated market (including, where applicable, to the official listing as currently provided under the Listing Directive), be more closely aligned with the approval of the prospectus and the right to passport?

Yes. Any simplification of such processes would be welcome in particular if such simplification saves costs and to reduces duplications. This would be both in the issuers' and the investors' interest.

Q39 (a). Is the EU passporting mechanism of prospectuses functioning in an efficient way? What improvements could be made?

No response.

Q39 (b). Could the notification procedure set out in Article 18, between NCAs of home and host Member States be simplified (e.g. limited to the issuer merely stipulating in which Member States the offer should be valid, without any involvement from NCAs), without compromising investor protection?

No response.

Q40. Please indicate if you would support the following changes or clarifications to the base prospectus facility.

No response.

Q41. How is the "tripartite regime" (Articles 5 (3) and 12) used in practice and how could it be improved to offer more flexibility to issuers?

No response.

Q42. Should the dual regime for the determination of the home Member State for non-equity securities featured in Article 2(1)(m)(ii) be amended?

No response.

Q43. Should the options to publish a prospectus in a printed form and by insertion in a newspaper be suppressed (deletion of Article 14(2)(a) and (b), while retaining Article 14(7), i.e. a paper version could still be obtained upon request and free of charge)?

Yes. The publication of a prospectus in a printed form and by insertion in a newspaper no longer seems appropriate.

Q44. Should a single, integrated EU filing system for all prospectuses produced in the EU be created? Please give your views on the main benefits (added value for issuers and investors) and drawbacks (costs)?

Yes. We would welcome the idea of a single, integrated EU filing system for all prospectuses produced in the EU. This would improve the investors' access to prospectuses. In addition, depending on the set-

up of the system it could provide a complete overview of the offerings and listings available. This would benefit the investors and could thereby also improve issuers' access to capital markets.

Q45. What should be the essential features of such a filing system to ensure its success?

Such filing system would have to be accessible for investors. Ideally the system would differentiate between public offerings and listings. It would allow sorting the prospectuses according to the type of the securities offered / listed, type of issuer (sector), etc.

Q46. Would you support the creation of an equivalence regime in the Union for third country prospectus regimes? Please describe on which essential principles it should be based.

The creation of an equivalence regime in the Union for third country prospectus regimes should be contingent upon the existence of an equivalent level regarding e.g. disclosure requirements. If such equivalent level would be guaranteed, we would see the merit of reducing costs for third country issuers which in the end might also benefit investors.
However, we would like to encourage the Commission to assess the question of equivalence for each third country individually. There are significant differences within the prospectus regimes throughout the world.

Q47. Assuming the prospectus regime of a third country is declared equivalent to the EU regime, how should a prospectus prepared by a third country issuer in accordance with its legislation be handled by the competent authority of the Home Member State defined in Article 2(1)(m)(iii)?

b) Such a prospectus should be approved by the Home Member State under Article 13.

Q48. Is there a need for the following terms to be (better) defined, and if so, how:
a) "offer of securities to the public"
b) "primary market" and "secondary market"?

No response.

Q49. Are there other areas or concepts in the Directive that would benefit from further clarification?

No response.

Q50. Can you identify any modification to the Directive, apart from those addressed above, which could add flexibility to the prospectus framework and facilitate the raising of equity or debt by companies on capital markets, whilst maintaining effective investor protection?

No response.

Q51. Can you identify any incoherence in the current Directive's provisions which may cause the prospectus framework to insufficiently protect investors?

No response.