Frankfurt,
26 October 2021

BVI comments to EBA Consultation Paper, EBA/CP/2021/30, Draft Regulatory Technical Standards on criteria for the identification of shadow banking entities under Article 394(4) of Regulation (EU) No 575/201

Question 5: In general, what are your views on the treatment of funds in these draft RTS? Do you agree with the approach adopted in these draft RTS, that follows the approach in the EBA Guidelines on limits on exposures to shadow banking entities, or alternatively should it be extended to capture those funds as shadow banking entities?

We[1] recognise that the EBA seeks to include banking activities carried out by AIFs in the definition of shadow banking entities.

However, when considering the regulatory framework for AIFs, the EBA only refers to the AIFMD. This assessment overlooks the – admittedly not harmonized – existing product regulation for AIFs at the national level of the Member States and thus provides an incomplete picture of the actual regulatory landscape.

Further, we are concerned that the wording of Article 1 (5) of the draft RTS without further clarification could potentially cause (unintended) negative effects for AIFs which, according to the reasoning stated in section "Background and rationale" paras. 74-75, should not be shadow banking entities.

The practical relevance of this issue can be illustrated by the example of the German Special-AIF pursuant to sec. 284 of the German Capital Investment Code (CIC) which is the predominant investment fund vehicle in Germany for institutional investors, including but not limited to credit institutions.

A Special-AIF according to sec. 284 (4) CIC has statutory limitations, e.g., it may borrow only up to 30% of its assets provided that such borrowing takes place on a temporary basis and, furthermore, may not employ leverage on a substantial basis. A Special-AIF may, inter alia, invest in assets eligible for UCITS, which include securitised debt (cf. Article 2 (1) (n) ii) and Article 50 (2) (a) UCITS-Directive 2009/65/EC) such as promissory note loans (German *Schuldscheindarlehen*).

According to Article 1 (5) (c) of the draft RTS an AIF should be regarded as a shadow banking entity except where its rules or instruments of incorporation effectively prevent from originating "exposures" or purchasing third-party "exposures". From our point of view, the latter criterion (purchase of third-party exposure) is too vague and bears the risk of an unintended expansion of the scope beyond that of the EBA Guidelines. Hence, the same wording as used in the EBA Guidelines which refer to "originate loans or purchase third party lending exposures" should be used also in this RTS.

[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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Such clarification is also in line with the statement in section “Background and rationale” para. 76 of the CP that AIFs which “do not grant loans or purchase third parties’ lending exposures onto their balance sheet should be excluded from being identified as shadow banking entities”. Furthermore, exposures comparable to those of UCITS have to be excluded. Otherwise, it would lead to the absurd result that an AIF, even if its investment conditions mirror those of an UCITS in terms of eligible assets, would be considered as a shadow banking entity.

Therefore, for the avoidance of doubt, the EBA should stress that the RTS are not intended to change the previous supervisory approach with respect to AIFs as set out in the *EBA guidelines on limits on exposures to shadow banking entities which carry out banking activities outside a regulated framework under Article 395(2) of Regulation (EU) No 575/2013* (EBA/GL/2015/2, published December 2015).
In addition, the EBA should sensibly restrict the scope of the criterion “purchase of third-party exposure” in order to avoid an arbitrary classification of AIFs with conservative investment conditions due to legal restrictions, such as German Special-AIF pursuant to sec. 284 CIC, as shadow banks. Furthermore, it should be made clear that AIFs which are prevented by applicable laws to invest in “lending exposure” are also excluded from the definition of “shadow banking entities”. It cannot make a difference if such investment restriction is explicitly set out in the fund rules or whether the relevant laws and/or regulation already provide for such restriction.

Question 8: Do you face any difficulties identifying whether an alternative investment fund (AIF) should be considered as a shadow banking entity?
See our answer to Question 5

Question 9: Have you got any specific comments with regard to AIFs and in particular, with points (b) and (c) of Article 1 paragraph 5?
See our answer to Question 5