Frankfurt am Main,
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BVI comments on the MiFIR review report on the obligations to report transactions and reference data

We[1] support the ESMA initiative to review the transaction and reference reporting obligation with respect to Article 26 MiFIR. We will focus our answer on UCITS/AIF fund management companies:

Q1: Do you foresee any challenges for UCITS management companies and AIF managers in providing transaction reports to NCAs? If yes, please explain and provide alternative proposals.

Yes, we expect significant and complex challenges for UCITS/AIF managers to provide MiFIR transaction reports to the NCAs. UCITS/AIF managers are today not in the scope of Article 26 MiFIR transaction reporting and have therefore not built up any technical capabilities to manage and report transactions to the NCAs.

Also, transactions in MiFID financial instruments executed between UCITS/AIF managers and investment firms are already reported today to the NCAs. According to Article 26 para 5 of MiFIR, the operator of a trading venue shall report details of transactions in financial instruments traded on its platform which are executed through its system by a firm (e.g. UCITS/AIF managers) which is not subject to the MiFIR reporting obligation. Sell-Side firms are already required today to also report transactions to the NCAs executed with their Buy-Side clients. This includes also transactions executed off venue.

In this context we strongly reiterate our position that investment funds (UCITS/AIFs) are among the most strictly regulated and transparent financial products. Fund management companies (UCITS/AIF) report data for each fund or share class to their respective NCAs at regular intervals. There are regulatory fund reports (UCITS, AIFM and reporting to the National Central Bank), transaction reportings (EMIR, SFTR, as well as reports to institutional investors (CRR, Solvency II). Additionally, there are numerous f special reports and ad hoc queries by regulators on various risks and reward as well as other economic factors relating to funds.

As mentioned above, the extension of the reporting obligation will enhance the reporting burden and the complexity for the fund industry. This approach is not in line with the long-term supervisory reporting vision initiated by the EU Commission for their European strategy for data (EDS) and the Digital Finance Strategy (DFS). The EU Commission overall objective is to have a reporting environment that delivers accurate, comparable, and timely data to supervisory authorities at EU and national level, while at the same time minimising the reporting costs and burden for supervised entities (e.g. UCITS/AIF managers) and supervisors. We strongly encourage ESMA to take into consideration the long-term supervisory reporting vision of the EU Commission and also the EU principle of proportionality when ESMA submits its report to the EU Commission for endorsement.

[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 114 members manage assets than 3,68 trillion euros 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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In sum, we do not see the requirement to expand the scope of the MiFIR reporting obligation to UCITS/AIF managers. It is of utmost importance to be more precise in the analysis of the situation as reflected in Q1 and chapter 3.1 of the consultation paper.

We do not agree with the ESMA analyses in respect to UCITS/AIFM due to the following reasons:

1. AIFMs

ESMA refers to Article 6 para 4 AIFMD and lists three non-core services. ESMA describes a potential "regulatory gap" and a survey undertaken by ESMA to collect feedback from NCAs how they retrieve *"missing information concerning the activity of AIFMs/UCITS management companies"* (para 13 of the CP). However, we would like to highlight ESMA's attention to the first sentence of Article 6 para 2 and 4 AIFMD. Member States shall require that no external AIFM engages in activities other than those referred to Annex I of the AIFMD. The three non-core services can only be provided by way of derogation from Article 6 para 2 AIFMD if such services are authorised within the EU Member States.

ESMA's concerns refer only to the non-core services which may not be provided in all Member States. ESMA's survey and any conclusions therefore are limited as only a small fraction of NCAs have authorised external AIFMs to provide the relevant non-core services. These findings therefore may not be extended to other situations and Member States.

The relevant non-core services do principally not trigger a MiFIR reporting obligation. The service "investment advice" does not trigger a reporting requirement for investment firms according to Article 26 MiFIR. Furthermore "safe-keeping and administration in relation to shares or units of collective investment undertakings" would only open a very limited scope for reports under Article 26 MiFIR. In practice it is very unusual that AIFMs safe-keep and administrate fund units.

Also, in the case of safe-keeping only securities movements from one client account to another account need to be reported according to Article 26 MiFIR except such movements do not result in a change of ownership (please consider No. 5.6.1 of ESMA's Guidelines ESMA/2016/1452) or are an acquisition or disposal that is solely the result of a custodial activity (Art. 2 para 5 (d) of Commission Delegated Regulation (EU) 2017/590). RTS 22 (Article 2 para. 5 (g) of Commission Delegated Regulation (EU) 2017/590) also exempts the creation or redemption of units of a collective investment undertaking by the administrator of the collective investment undertaking.

The third non-core activity refers to the "reception and transmission of orders in relation to financial instruments". This activity seems to correspond to the activity mentioned in Annex I Section A para. 1 of MIFID II. AIFMs engage in such an activity on a very limited basis. Although such service is a main activity under MiFID is not more than a non-core AIFM service. This consideration is relevant to assess the potential reporting burden intended to put on AIFMs for such very rare activities compared to MiFID firms.

2. UCITS management companies

As far as ESMA refers to the non-core services of investment advice and safe-keeping and administration in relation to units of collective investment undertakings, we refer to our answers in respect to AIFMs above.

The provision of investment advice does not trigger a reporting obligation under Article 26 MiFIR (Article 2 para 1 and 2 of Commission Delegated Regulation (EU) 2017/590).

ESMA also refers to the “management of portfolios of investments, including those owned by pension funds, in accordance with mandates given by investors on a discretionary client-by client basis, where such portfolios include one or more of the instruments listed in Annex I Section C to Directive 2004/39/EC”. Such an activity – provided by a licensed Manager under MiFID – triggers a reporting obligation in respect to Article 26 MiFIR.

However, we do not agree with ESMA’s assessment summarised in para. 12 of the CP:

- ESMA describes that only the buyer/seller needs to be reported by the trading venues to the NCAs. However, ESMA argues further that information on the decision makers is essential for the purpose of market abuse surveillance. We believe that ESMA should consider that the investment decision is made in the context of managing a portfolio of investment funds. The decision maker of a fund does not benefit from market abuse activities. We see ESMA’s wish to introduce an extremely expensive reporting regime for UCITS managers which is simply not in line with the EU principle of proportionality given the lack of market abuse in fund management situations.

- A market abuse may only occur in the cases if the decision maker concludes transactions on behalf of their own account. Such transactions are already reported under Article 26 MiFIR by the banks and the MiFID firms maintaining the decision makers private securities account today. Against this background there is no regulatory gap.

- ESMA has provided the EU Commission with draft technical standards (please see EU Commission Delegated Regulation (EU) 2017/590) describing that investment firms should only report the next legal part the transaction chain. This approach is applied also in cases where the next leg of the transaction chain is not an investment firm. As a consequence, a person who plans market abuse and intends to hide his forbidden activity would only require an agent, acting on his behalf which is not be an investment firm (e.g. a friend).

  In this example, the investment firm would only report the agent used as buyer/seller rather than reporting the person represented by the agent. If the decision maker is of such importance for market abuse surveillance, it is difficult to understand why anonymity is tolerated by ESMA for more cases while requesting in parallel the expensive implementation of Article 26 MiFIR by UCITS managers for very unlikely cases of market abuse.

3. BREXIT leads to an unlevel playing field

In para 14 of the consultation paper ESMA demands a level playing field between investment firms providing the same type of MIFID services and UCITS/AIF managers.

However, Brexit will create a unlevel playing field if only UCITS/AIF managers should be subject to the reporting obligation on Article 26 MiFIR. Within the UK Withdrawal Act, UK made the MiFIR regulation part of the national regulation. Any amendments of the EU27 MiFIR that occurs after the end of the transition period will not become part of UK MiFIR.

UK-Asset Managers would therefore be able to offer their services to third country clients at lower costs than Asset Managers operating in the EU27. Only EU UCITS/AIF managers have to carry the new costs for transaction reporting.

In this context, we do not share ESMA’s assumption that there is a unlevel playing field with respect to investment firms licensed under MiFID. It is at the discretion of the investment firms to decide whether they apply for a license under MiFID or a license under the AIFMD/UCITS Directives. This applies for

both EU27 investment firms and UK-investment firms. We do not see an unlevel playing field now but – quite on the contrary - fear that the amendments proposed by ESMA will create an unlevel playing field.

4. Introduction of a new reporting obligation

In sum, we encourage ESMA to take the following points into considerations with respect to a reporting obligation for UCITS/AIF managers:

- We disagree with ESMA's assumption in para 13 of the CP that a *"regulatory gap"* exists. Article 2 para 1 of Directive 2014/65/EU states that MiFID II shall not apply to collective investment undertakings and pension funds whether coordinated at Union level or not and the depositaries and managers of such undertakings. Therefore, we see no *"regulatory gap"*.

- ESMA compares core-activities of investment firms with non-core services of AIFM/UCITS management companies. ESMA refers to those activities which are executed on a very infrequent basis. The additional reporting obligation will therefore increase only the reporting costs for AIFM/UCITS management companies without creating additional value for the NCAs. The missing information is already reported to the NCAs and national Central Banks. In this context, we strongly encourage ESMA to consider the long-term supervisory vision of the EU Commission by removing any undue legal and technical obstacles to reporting and to provide the appropriate tools for sharing supervisory data among the relevant NCAs and Central Banks. If this could be implemented ESMA does not need to extend the reporting obligation to UCITS/AIF managers.

- ESMA should not only request the provision of market abuse surveillance evidence after a public consultation. If ESMA demands an additional reporting obligation for UCITS/AIF managers due to the missing market abuse information, ESMA should clearly provide evidence for market abuse cases with regards to the non-core activities of AIFM/ UCITS management companies. ESMA has to provide clear evidence that such non-core activities in reality contributed to cases of market abuse. Otherwise any additional reporting burden is not appropriate and does not comply with the EU legal principle of proportionality.

- The possible extension of the MiFIR reporting scope to the management of portfolios of investments (Art. 6 para 3 (a) UCITS Directive) will also be a breach of the principle of proportionality as expensive additional reporting costs will be created for the goal of detecting market abuse which is very unlikely to happen for this non-core-service. On top of that, such introduction is difficult to justify as ESMA does not require full transparency in cases which already today allow to hide market abuse behaviour.

However, if ESMA intends to proceed with the introduction of an additional reporting obligation for UCITS/AIF managers on non-core-services, we believe that the implementation period should be at least two or three years. The cost for implementation will be high because Article 26 MiFIR is one of the most complex reporting requirements within the financial market. Additional costs and time for implementation would be needed if the synchronisation of trading clocks is made mandatory as well.

5. Alternative options instead of mandating UCITS/AIF manager to Art. 26 MiFIR

We understand that ESMA would like to obtain more details of the decision-maker. **We believe that ESMA and the NCAs would benefit most if two additional reporting fields are introduced in the existing MiFIR reporting instead of mandating UCITS/AIF managers to report under Article 26 MiFIR (new data fields "End of Chain" and "Decision Maker of Non-Investment Firm").**

Such an approach could deliver the additional data requested by ESMA/NCAs without increasing the reporting burden for the UCITS/AIF managers:

a. Additional reporting field "End of Chain (EOC)"

This field should only be populated by an investment firm if it faces a person that is currently reported as Buyer/Seller but acts as agent or broker on behalf of a third party without being an investment firm. Facing such a person, the investment firm shall populate the EOC field with the LEI or National-ID of the person represented by their counterparty (respectively in case of a broker for whom the broker executes that transaction. This information should already be available at least in cases of agency because an agent has to name the person represented in an order not to become liable itself under the transaction for its client. Furthermore, retrieving this information is part of the investment firms KYC-process and existing AML-requirements.

If the investment firm faces an AIF/UCITS managers, acting as the operator of the relevant investment fund, the EOC field could be populated with the LEI of such investment fund which has already been considered as buyer/seller. If the operator of an investment fund has outsourced the portfolio management to AIFM/UCITS management companies, the EOC field should be populated with the LEI of the investment fund (buyer/seller).

If the AIFM/UCITS management company represents an individual client, the EOC field is populated with the LEI or National-ID of the individual client. In such cases, the current reports made by investment firms today show the AIFM/UCITS management company. The proposed EOC field should also close the envisaged information gap for ESMA/NCAs.

b. Additional Reporting field "Decision Maker of Non-Investment Firm"

This field should only be populated by an investment firm if it is a Buyer/Seller that is not an investment firm. If the EOC field is completed with a value, the field "Decision Maker of Non-Investment Firm" shall be completed with the LEI or National-ID provided by the Buyer/Seller with respect to the applicable decision maker.

That means, in case of a complete EOC field, this could be either the LEI or National-ID already reported as EOC. If the investment decision has been made by a different person (e.g. agent), the LEI or National-ID of that person should be used. If the Buyer/Seller (who is not an investment firm) reported by the investment firm is unable or not willing to determine the decision maker within the remaining chain, the investment firm shall report the value "UNKNOWN". This value will be sufficient to trigger further investigations by the responsible NCA.

If the investment firm faces an AIFM/UCITS management company, the investment firm could populate the additional reporting field "Decision Maker of Non-Investment Firm" with the National-ID of the portfolio manager who made the investment decision within the AIFM/UCITS management company.

For the avoidance of doubt, if an investment decision has been made by a committee within the AIFM/UCITS management company, the investment firm should populate the reporting field "Decision Maker of Non-Investment Firm" with the National-ID of the portfolio manager who decided to apply that "general decision" to the given investment fund.

If the investment firm faces an AIFM/UCITS management company that represents a client, the above rule should apply as well: Either the LEI or National-ID already reported as EOC shall be reported via the "Decision Maker of Non-Investment Firm" field or if the investment decision has been made by the

AIFM/UCITS management company acting as agent of that client, the National-ID of the relevant portfolio manager.

For the avoidance of doubt, in cases where the client only recommends an investment or asks the AIFM/UCITS management company to consider a potential transaction, the final decision is made by the AIFM/UCITS management company. In such cases, the investment firm should report the National-ID of the relevant portfolio manager within the AIFM/UCITS management company to determine the decision maker.

In sum, our approach has the following advantages:

- close the “information gaps” by allowing a better market abuse surveillance for ESMA/NCAs
- reduce the implementation- and the reporting burden for AIFM/UCITS management companies significantly compared to ESMA approach as Asset Managers only provide the counterparties with two values rather than implementing the whole MiFIR reporting regime
- guarantee a level playing field with respect to international mandates

Therefore, we encourage ESMA to also consider our approach.

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