Frankfurt am Main,
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BVI's response to the Joint Committee Discussion Paper on the Use of Big Data by Financial Institutions

BVI[1] gladly takes the opportunity to present its views on the consultation paper on the Use of Big Data by Financial Institutions.

Description of the phenomenon

Q2: *Which financial products/activities are (likely to be) the most impacted by the use of Big Data and which type of entities (e.g. large, small, traditional financial institutions, Fintechs, etc.) are making more use of Big Data technologies? In light of ESAs' objective to contribute to the stability and effectiveness of the financial system, to prevent regulatory arbitrage, do you consider that there is a level playing field between financial institutions using Big Data processes and those not using them (e.g. because they do not have access to data or the (IT) resources needed to implement Big Data processes) or between established financial institutions and potential new entrants (e.g. Fintechs) using Big Data processes? Please explain.*

In our view, the activities provided by firms with direct access to customer data are possibly making more use of Big Data technologies than firms usually having no direct access to customer data such as investment management companies. This is based on the background that German investment management companies generally do not distribute their funds to investors directly but commonly through MiFID firms or independent investment advisors. Furthermore, fund units or shares are usually issued in bearer form and German investment law does not provide for an investors' register. Consequently, for the use of customer related Big Data, German management companies would have to gain access through e.g. distributors. Whether such access is possible depends on several aspects including legal aspects such as data protection law but also factual aspects such as whether distributors have an interest in sharing such data.

Q5: *Do you consider there are (non-regulatory) barriers preventing you (or which could prevent you in the future) from collecting and processing data? Are there barriers preventing you from offering/developing Big Data tools in the banking, insurance and securities sectors? If so, which barriers?*

We fully agree with the remarks on the use of Big Data by Asset Managers. Especially portfolio managers traditionally make use of Big Data mainly through the analysis of structured/ unstructured market or company data and financial market trends for their portfolios, particularly for investment strategies regarding securities. A good and unrestricted access to market data may lead to better and more informed decisions, more efficient processes and more appropriate services. We see also the increased use of data firms can collect from the market place and their own sales and compliance

[1] BVI represents the interests of the German investment fund and asset management industry. Its 98 members manage assets of EUR 2.8 trillion in UCITS, AIFs and discretionary mandates. As such, BVI is committed to promoting a level playing field for all investors. BVI members manage, directly or indirectly, the investments for 50 million private clients in 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.

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operations to generate customer- led market insights. Using natural language processing and machine learning capabilities in the monitoring of voice (and chat) trading (mainly sell side) firms will increasingly be able to acquire a more holistic view of their trading environment and be able to generate new trading strategies for their (buy-side) customers. We agree with the discussion in the IOSCO FinTech report of February 2017 at p. 41 et seq. on the use of unstructured data. Most of the conclusions seem applicable outside the bond trading area under scrutiny by IOSCO. Therefore, a open access to all data sources for Portfolio Management without restrictions (e.g barriers to use set by data vendors through excessive license contract and fee requests) is a prerequisite.

A complete and fair access to all kinds of market data has become an integral requirement for any Asset Manager to deliver the investment analysis and risk management being demanded by its investors. Otherwise, we fear further cost increases, as already in the market data (index) management, at the expense of the investors.

Furthermore, from our point of view, it would be useful to promote an expansion of economic statistical data provision of all kinds (e. g. new GDP-growth data sets based on Big Data such as satellite image analysis of the lighting levels of cities) by the public sector in order to reduce dependency on purely commercial data deliveries / data licenses.

Regulatory framework applicable to Big Data

Q6: *Do you agree with the above short, non-exhaustive, presentation of some of the main applicable requirements? If not, please explain why. Please also mention whether you consider that other legal requirements are essential and should be mentioned.*

We generally agree with the presentation of the main applicable requirements. We notice, however, that the footnotes do not in all cases refer to all regulatory requirements under the mentioned EU financial legislation. For instance, the footnote regarding management of conflicts of interest does refer to the respective MiFID and IDD requirements but not e.g. to Art. 12(1)(d) of the AIFMD or Art. 12(1)(b) of the UCITS Directive. Any further assessment should always take existing rules applicable to fund management companies and investment funds into account.

Special attention should be given to the alignment of the preconditions for consent under the General Data Protection Regulation and other relevant EU legislation in such a way as to avoid difficulties in interpretation. An example of this is the declaration of consent of the investor for the availability of legally required notices or the collection and use of personal data according to Directives 2009/65/EU or 2016/1034/EU.

Q7: *Do you consider any of these regulatory requirements as unjustified barriers preventing you from using Big Data technologies? If so, please explain why. Please also explain whether you consider that further regulation (including soft law/guidance, etc. and insofar as it falls within the scope/remit of the ESAs) should be introduced to facilitate the use of Big Data technologies.*

No, we generally do not consider any of these regulatory requirements as unjustified barriers preventing from using Big Data technologies. However, the current regulatory requirements according to MiFID II for instance with respect to the target market definition and its matching within the appropriateness or

suitability test are very complex. Any revision of these requirements – also in view of the use of Big Data – should be proportionate and should not impose excessive requirements on MiFID firms.

Potential benefits and risks for consumers and financial institutions

Q8: *Do you consider the potential benefits for consumers and respectively financial institutions to be accurately described? Have you observed any of them in practice? If so, please provide examples. If not, please explain whether you are aware of any barriers that may prevent the above potential benefits from materialising?*

Yes, we share the ESAs' assessment of potential benefits. Other than lack of access to Big Data (cf. Q 2) and data protection law, we are not aware of any barriers. Clearly, we believe that data protection law is a justified barrier.

Q9: *Do you agree with the description of the risks identified for consumers and respectively financial institutions? Have you observed any of these risks (including other risks that you are aware of) causing detriment to consumers and respectively financial institutions? If so, in what way? If not, please explain why. Please also mention whether certain risks for consumers and financial institutions have not manifested yet but have the potential of developing in the future and hence need to be closely monitored by Supervisory Authorities.*

We agree in particular with the risk that customers could comprehend products or services as tailored while they are not. In this respect, however, financial institutions should in their own interest for potential liability reasons provide customers with clear information on the degree to which the product/service is tailored. Whether Big Data will be used for more aggressive marketing remains to be seen. Clearly, it could be used for targeted marketing which we would not in itself consider as a risk for consumers. We do not share the ESAs' concern regarding reduced comparability at least not for investment funds (cf. Q. 15).

Q10: *Is the regulatory framework adequately addressing the risks mentioned above? Bearing in mind the constant evolution of technologies/IT developments and that some of the above mentioned regulatory requirements are not specific to the financial services sector (e.g. GDPR), do you think further regulation is needed to preserve the rights of consumers of financial services in a Big Data context? Please explain why.*

We have not yet identified any shortfalls which would require additional regulation with respect to the use of big data.

Q11: *Do you agree that Big Data will have implications on the availability and affordability of financial products and services for some consumers? How could regulatory/supervisory authorities assist those consumers having difficulties to access financial services products?*

We do not share the ESAs' concern regarding reduced availability and affordability of financial products and services for some consumers with respect to investment funds. The ESAs' concern might be true with respect to other financial products or services where for instance the investors' debts are of significant concern.

Q12: *Do you believe that Big Data processes may enable financial institutions to predict more accurately (and act accordingly) the behavior of consumers (e.g. predicting which consumers are more likely to shop around, or to lodge a complaint or to accept claims settlement offers) and could therefore compromise the overarching obligations of financial institutions to treat their customers in a fair manner? Please explain your response.*

The use of Big Data is still at an early stage and it is hard to predict how this can and will be used. Insofar as Big Data allows financial institutions to better predict consumers' behaviour, this could mainly be to the benefit of consumers. The overarching obligations to treat customers fairly and to manage conflicts of interest properly apply also with respect to the use of Big Data. Consequently, the market participants complying with the existing laws could not misuse Big Data in this regard.

Q13: *Do you agree that Big Data increases the exposure of financial institutions to cyber risks? If yes, what type of measures has your institution adopted or is going to adopt to prevent such risks? What could supervisory/regulatory authorities do in this area?*

Since the fund industry uses Big Data only in the manner described, we do not see any increased risks in this sector due to the restricted use.

Q14: *Would you see merit in prohibiting the use of Big Data for certain types of financial products and or services, or certain types of customers, or in any other circumstances?*

We do not see such merit at the moment. On the contrary, as stated in the IOSCO FinTech report of February 2017 at p.46: "Regulators can leverage the increase in available data, as well as the greater capability to access and process this data, including through the use of data analysis tools and software to evaluate compliance with regulatory requirements (for example best execution, trade reconstruction). Regulators can also explore leveraging new compliance software and surveillance tools to monitor traders and detect rogue trading or quoting conduct issues. This area may warrant further comparative research of available technologies (often referred to as regulatory technologies or Regtech)." The same is true for firms compliance and surveillance programs.

Q15: *Do you agree that Big Data may reduce the capacity of consumers to compare between financial products/services? Please explain your response.*

We think that the risks of reduced comparability should already be tackled by existing legislation, at least as far as distribution of fund units or shares are concerned. Legislation such as MiFID II and PRIIPs provide for sophisticated systems regarding cost transparency including one cost indicator and the potential effects of costs on performance. In particular the PRIIPs regime aims at comparability of all PRIIPs, thereby covering many financial products.

Q16: *How do you believe that Big Data could impact the provision of advice to consumers of financial products? Please explain your response.*

We share the ESAs' view described in para. 49 of the DP.

Q17: *How do you believe Big Data tools will impact the implementation of product governance requirements? Please explain your response.*

The product governance requirements follow the idea that the product should already manufactured to meet the needs of an identified target market of end clients. Big Data tools would allow manufactures to better identify the target market and the objective and needs of specific clients. The more meaningful customer data is available to manufacturers, the better the product may be tailored in order to meet the customers' needs.

Additional comments

Q23: *Are there any other comments you would like to convey on the topic of use of Big Data by financial institutions? In particular, are there other relevant issues that are not covered by this Discussion Paper?*

Blockchain basically means a shared record, a ledger, distributed to all the participants allowing multiple parties to transfer and store information in a space that is secure, permanent and easily accessible. In view of the application of this technology, the legal issues are to be examined carefully. One of the major questions for us is: Who is liable for the blockchain information? The answer to this question seems to be complex, because ownership, management and control are automated and human involvement is limited or removed. We fear that the mere participation creates a joint liability of all its participants. We wonder if the rules of the European E-Commerce Directive are applicable to blockchain technology or if this is a new form of legal structure for which further specific regulations are necessary.