



Bundesverband
Sachwerte und
Investmentvermögen

bsi Stellungnahme im Rahmen der Konsultation des Entwurfs der PRIIP-Level-2 Verordnung/ bsi comments on draft regulatory technical standards (RTS) with regard to presentation, content, review and provision of the key information document, including the methodologies underpinning the risk, reward and costs information in accordance with Regulation (EU) No 1286/2014 of the European Parliament and of the Council

29.01.2016

I. Introductory comments

bsi Bundesverband Sachwerte und Investmentvermögen (Real Asset Investment Association) represents the German industry of real assets investments. Our members are asset managers, depositaries, accountants, lawyers, tax advisers and valuers. Our asset managers are manufactures of collective investment undertakings as Alternative Investment Funds (AIF). The invested capital stems from both professional and retail investors. The funds invest in real assets as e.g. real estate, aviation, infrastructure, renewable energy projects. bsi consists of 59 members in total with assets under management of approximately 130 billion euros.

We welcome the opportunity to comment on the ESAs' draft regulatory technical standards with regard to presentation, content, review and provision of the key information document, including the methodologies underpinning the risk, reward and costs information in accordance with Regulation (EU) No 1286/2014 of the European Parliament and of the Council. In our introductory remarks we want to **highlight our two main aspects** we dwell upon within the scope of the specific questions.

1. We acknowledge that the task to fulfill the objectives of the PRIIP Regulation to specify methods for the assessment of the risk indicator and the underlying is extremely challenging and complex because of the wide range of products and their specific characteristics the ESA's have to take into account. **However, in the specific targets for determining the risks measures which the draft envisages for the closed-ended real asset investments that we represent (AIFs in property, infrastructure, renewable energies etc.), we see an**

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unreasonable and disproportionate disadvantage compared with other investment vehicles. The danger here is that real asset investments could regularly get assigned indiscriminately to MRM class 5 and wouldn't have the option of featuring a MRM geared to their specific risk. Revision and greater flexibility are required in order to resolve this contradiction.

2. We are concerned that the draft RTS could lead to costs into the tens of millions on behalf of closed-ended funds which have been initiated long before the AIFM Directive entered into force (so called "pre-AIFM closed-end funds") - some of them decades ago - just because they can be subject of activities on a nearly irrelevant secondary market initiated by the investor. **We urge the ESAs to adjust the wording of recital 20 to clarify that the sale of a unit or a share in a closed-ended fund initiated by the investor does not oblige the PRIIP manufacturer to draw up or review a key information document in accordance with the requirements of the PRIIP regulation.**

In addition we encourage the ESA's and the Commission to consider and initiate a postponement of the entry in force of the PRIIP Regulation.

- The time frame for the implementation of the new key information document is too short. It is foreseeable that the final RTS will not be published before summer. Therefore market participants will have at most a few months' time in order to implement the necessary processes and systems that will enable them to draft up a key information document in accordance with the detailed requirements of the PRIIP regulation. The given time frame will lead to severe practical problems and high liability risks on the side of the manufactures. This will be even more the case if "pre-AIFM closed-end Funds" whose unites or shares are not emitted by the manufacturer anymore would be obliged to draw up a key information document for the first time. Many of them don't expect being addressed by PRIIP regulation and because there is no transposition time for them would have little time to comply with the new regulation.
- It is of utmost importance that the content of the PRIIP regulation (especially the requirements of the target market, the disclosure of risks as well as costs and charges associated with the PRIIP) is in conformity with the corresponding MiFID regulations. To secure the needed alignment it seems appropriate to wait for the pending MiFID regulations.

II. Question 8: "Do you agree with the scales of the classes MRM, CRM and SRI? If not, please specify your alternative proposal and include your reasoning."

We do not agree with the proposed approaches to the assessment and scaling of MRM. In principle, we support the approach of the draft for determining the market risk measure (MRM), which subdivides PRIIPs into different categories and applies various principles and methods for determining the MRM. As we understand it, this approach was chosen in order to better manage the abundance and diversity of PRIIPs.

However, in the specific targets which the draft envisages for the closed-ended real asset investments which we represent (AIFs in property, infrastructure, renewable energies etc.), we see an unreasonable and disproportionate disadvantage compared with other investment vehicles. The danger here is that real asset investments could regularly get assigned indiscriminately to MRM class 5 and wouldn't have the option of featuring an MRM geared to their specific risk. This is all the more astonishing since the Juncker plan is intended explicitly to promote investments in real assets such as infrastructure. We see a contradiction here between the political will and regulatory implementation. Revision and greater flexibility are required in order to resolve this contradiction.

In detail:

- **Reliability of real assets:**

The key features of real assets are consistent cash flows and stable developments. They are less dependent on major macroeconomic fluctuations (compare Diagram 1 "The Real Estate sector provides a lower elasticity to adjustments of the GDP" in the Annex using the example of office buildings in Germany). In addition, real assets offer long-term protection against inflation-induced reductions of asset values. Thanks to their low correlation with other investment classes, real assets retain their value even during periods of extreme economic volatility (see Steinbeis Hochschule Berlin, Real Investments Study 2007). Unlike company shares, losses in value can be minimised even in periods featuring a turbulent capital market environment because capital withdrawal is ruled out. Nevertheless, real assets have a return potential similar to that of shares. A comparison with fixed-income investments also shows that they carry a similar risk with higher profitability (compare Diagram 3 "Performance and risks of investments made by Germans (historical view) from 12/1969 to 06/2014").

Global developments also point to the conclusion that the demand for real assets will continue to rise in the future. One example of this is the steady growth in world population and the associated depletion of fossil-based resources. This trend implies that plants for the generation of renewable energies will increase in significance. Another example is provided by the aviation industry: In 2015 around 24,000 aircraft were in operation carrying around eight million passengers per day. In 20 years, passenger and aircraft numbers are expected to double (Euro - Wirtschaft | Politik | Börse dated 18.02.2015, page 82 / Dept: Börse & Investments). The demand for real assets will therefore rise inexorably in the future.

- **Alternative real asset investments can stabilise investors' total assets and provide greater security.**

Real asset investments tend to be used to spread risk and optimise portfolio diversification. Studies recommend investing between 10% and 15% of free assets in closed-ended investment funds (compare market research study: Savings bank expert estimate - Asset allocation and closed-ended investment funds; Technical University of Chemnitz; 06/2015). Accordingly, real assets are to be considered a stabi-



lising factor to incorporate into the portfolio, which will ultimately reduce the level of risk.

- **Congruence between vehicles (long term) and assets (long term)**

Closed-ended real asset investments are long-term investments. The useful life of the investment object, the maturity of the loan and the investor's investment horizon match and operate on the same time scale. Because the opportunity for redemption is restricted, the interest triangle remains in balance. The investment is prevented from becoming unstable by premature or too extensive redemptions. This instability effect has been apparent in recent years in German open-ended property funds. Many had to close because too much capital had been withdrawn and the necessary liquidity could not be achieved rapidly enough through the sale of property. The stabilising effect on the risk potential caused by congruence between the closed-end investment vehicle and the investment property, the management of which benefits the investor, ought to be reflected in the SRI.

- **Qualitative classification as MRM 5 creates unreasonable disadvantage**

According to our estimations so far, the requirements for category V lead to a majority of closed-ended AIFs invested in real assets being assigned indiscriminately to MRM class 5. As substantiation for this, we see that German closed-ended AIFs regularly invest over 50% of their fund volume in real assets and that according to the product targets of the German Capital Investment Code (KAGB), which implements the AIFM Directive, they would be able to accept credits of up to 60% of the value of the investment properties.

In principle, it should be noted that real assets feature a very specific risk situation which relates to the individual investment object and the actual local circumstances. This is why the risk management of closed-ended AIFs is not generally based on a VaR analysis – instead, the focus of attention is shifted onto the specific risk situation of the real asset. Nevertheless, it is possible, for example, in the case of a property portfolio, to calculate a VaR using benchmark portfolio solutions. There is increasing demand from institutional investors for such an indicator for special AIFs. Various models of this type can be observed in the market. Some of them are benchmark comparisons based on the performance of similar open-ended property investment assets, or historical data of similar properties taken from independent databases (e.g. IPD or NCREIF).

The envisaged generalised, indiscriminate classification leads to unreasonable and disproportionate disadvantages for property portfolios in particular. Calculation of the VaR using benchmark models for property portfolios reveals volatilities to the tune of around 2% pa for these portfolios. According to the table under No. 29 of the draft RTS (page 38) these would actually be assigned to MRM 2 or 3.

This should be illustrated by the following **case example**: The calculation is based on an AIF which invests in a property portfolio composed of: Germany retail (30.69%), France offices (25.14%), Germany offices (17.85%), Netherlands offices (17.79%) and



Germany logistics (8.53%). Comparative data from the Investment Property Databank (IPD), one of the world's biggest and most transparent property databases, is consulted. The IPD database covers property portfolios in 32 countries, which allow an historical perspective of property value trends over a period of more than 30 years. Based on a benchmark portfolio which is itself modelled on the AIF property portfolio, a volatility of 2.1% pa can be calculated with a confidence level of 99%.

- **Lack of differentiation within the real asset investments**

The indiscriminate classification of closed-ended real asset investments as MRM class 5 also does not adequately reflect the risk potential of each individual real asset investment strategy. Within the property asset class alone, the markets for various usage types and localities are subject to different market fluctuations and thus to different risks (Example, development of the total return from office buildings in Germany compared with the Netherlands, compare Diagram 2 "Markets within Europe develop differently")

A risk-averse approach in the design, for example, by choosing lower risk segments, would not be rewarded by an indiscriminate assignment to a particular MRM. This makes the overallocation of higher risk segments, which frequently feature a higher return potential, more likely.

- Against this background, the indiscriminate classification of closed-ended real asset investments seems to be an arbitrary solution. Creating this kind of disadvantage for **PRIIP manufacturers, who already have to shoulder high expense and costs to produce the PRIIP KID**, does not seem reasonable. Also, from the standpoint of investors, indiscriminate classification of closed-ended real asset investments makes a rather negative impression because this distorts the information.
- In this context, the **significance of the risk indicator in sales should not be underestimated**

The SRI constitutes an important parameter for determining which product should and can be offered to which client. In our experience, practical considerations often dictate recourse to a relatively simple, standardised method of comparison, with the client's willingness to accept risk representing the upper limit. Using such a method for practical reasons would lead to real asset investments only being offered to a small circle of clients, which would indiscriminately eliminate an entire asset class.

- **More flexibility:**

The regulation of closed-ended real asset investments in Europe is still a really new development, instigated by the AIFM Directive which was to be implemented into national law by July 2013. In the wake of the AIFM Directive, new and wide-ranging rules for evaluating alternative investment assets and for reporting were introduced. In the long term, this will lead to an improved body of data on real asset investments. Implementation of the AIFM Directive also leads to new standards in risk management. In the market, models for calculating a VaR of real asset investments are being developed. With regard to property portfolios, the market is really quite well devel-



oped, though for other asset classes such as aircraft or renewable energies the models for determining risk indicators are largely still in their infancy.

The RTS Regulation should create an opportunity for models for determining a VaR and other approaches for determining a specific market risk. With reasonable and proportionate procedure for determining market risk it should be possible to determine a specific MRM instead of using a generalised, indiscriminate MRM assignment.

Proposal:

Against this background, we propose the following amendments and addition to Annex II No. 14:

“iv. where such PRIIPs invest at least 50% of their assets in illiquid asset classes, such PRIIPs shall be assigned to MRM class 4 if they comply in accordance with the legal requirements of the AIFM Directive and as the case may be with additional requirements imposed by Member States for AIF for the marketing to retail investors concerning the principles of risk spreading, risk and liquidity management and leverage.”

Reasoning:

The draft does not at present adequately address the fact that in implementing the AIFM Directive, real asset investments in the form of AIFs have to satisfy extensive regulatory measures (including with regard to liquidity and risk management). Germany has issued additional, extensive product-specific rules for the design of public AIFs, such as leverage caps of up to 60%. The PRIIP draft should make a distinction between these regulated PRIIPs and other investments for which no risk management needs to be established. In the absence of a European passport, sales in the public domain are directed at national investors. Disharmony between national regulation and European requirements would not be sensible and would compromise the development of the financial centre. Therefore, in the context of the RTS, the focus should be on national implementations of the AIFM Directive.

In addition, another alternative should be added to Annex II No.14; previous alternative “iv.” would then become alternative “vi.”:

„v. where such PRIIPs invest at least in 50 % of their assets in illiquid asset classes and a recognized standard method for the assessment of the market risk of the illiquid assets classes exists, the market risk can be assessed accordingly.

~~iv-vi.~~ PRIIPs shall be assigned to MRM class 5 if they do not meet the requirements of paragraphs (i) (ii) ~~or~~ (iii) (iv) or (v).”

Reasoning:

In category V, an opening clause should enable a move away from generalised, indiscriminate classification and create an opportunity for new model calculations which are still at development stage. A one-size-fits-all model has its limits, as has been explained more fully above. If the intention is to promote investment in real assets, such as infrastructure, restrictive regulations must not be created, nor must a putative comparability be propagated.

III. Q 28: “Are there significant impacts you are aware of that have not been addressed in the Impact Assessment? Please provide data on their scale and extent as far as possible.”

With respect to closed-ended funds traded on secondary markets, we disagree with ESA’s impact assessment in relation to producing pre-contractual disclosures for PRIIPs traded on exchanges, cf. page 124 Consultation Paper.

Nearly 5,000 closed-end funds, some of which were issued in the 1990s, are currently managed in Germany and do not have key information documents pursuant to Commission Regulation (EU) No. 583/2010 of 1 July 2010 (KIID Regulation). These funds regularly fall under the transitional provisions of article 61 para. 3 of the European Alternative Investment Fund Managers Directive (AIFM Directive). The sale of units and shares in these “pre-AIFM closed-end funds” was concluded long ago when these units and shares were placed. There is a risk that as of 31st December 2016, a key information document will be required for these „pre-AIFM closed-end funds” pursuant to Regulation (EU) No. 1286/2014 (PRIIP Regulation) as the draft of recital 20 of the Regulatory Technical Standards (RTS) Regulation on the PRIIP Regulation of 11 November 2015 suggests that the scope of the PRIIP Regulation may be extended to include the sales of units and shares to private investors on the secondary market. **This would require enormous effort and lead to costs in the tens of millions, without generating income or providing other compensation for companies in return.** As few sales take place on the secondary market for closed-end funds in Germany, this expense would be entirely incommensurate with the added value – already questionable within the secondary market – of the key information document for the buyer on the secondary market. **The RTS Regulation should clarify that a PRIIP-manufacturer is only required to draw up a key information document if the PRIIP units and shares were offered on the manufacturer’s initiative or with their approval.**

In detail:

- **The structure of closed-end funds in Germany**

Units and shares in closed-end funds are only issued during an initial placement phase (primary market). Once they have been placed, the funds are closed, which means that no new units and shares are issued or redeemed. The placement phase typically lasts no longer than 18 months. Unlike open-end funds, closed-end funds do not provide for



redemption rights, so that the only option left to private investors wishing to dispose of their units and shares during the typically long maturity period of the fund – approx. 10 to 15 years – is to sell the units and shares on the secondary market.

If the agreements governing the „pre-AIFM closed-end funds“ allow for the transfer of units and shares, as is typically the case, fund managers no longer have any influence on whether and to whom investors sell their units and shares. Under German law, a subsequent amendment to such a contractual provision requires the approval of the relevant investors – the fund manager has very limited influence in this regard.

- **The secondary market for closed-end funds in Germany**

The secondary market for closed-end funds in Germany is characterised by the fact that the sale of “used” units and shares (in the vast majority of cases) is not initiated or accounted for by the product manufacturer, but rather is made by the investors themselves. As a rule, sales are organised over internet-based platforms (such as the Fondsbörse Deutschland Beteiligungsmakler AG), where bids may be submitted for funds which are still being managed but for which units and shares are no longer emitted. Fund units and shares are also transferred through private purchases rather than through a trading platform. There is no fully functional secondary market for all units and shares. The price of units and shares in closed-end funds is ruled by supply and demand. Often no buyers can be found for sales offers.

- **Until now, no information summary has been required for closed-end funds on the secondary market**

For the majority of the nearly 5,000 „pre-AIFM closed-end funds“ that could potentially be traded in the secondary market, the obligation to create a key information document would be entirely new. Prior to the effective commencement of the German Capital Investment Code (KAGB), implementing the AIFM Directive in Germany, closed-end funds were not subject to any European directives on account of being industrial investments, and from 2005 to 2013, they were essentially only subject to a national duty to publish an issuing prospectus. The duty to publish an issuing prospectus was not supplemented by the duty to draw up an information summary (investment information sheet) until June 2012, although this duty was (and under the regulation of the KAGB still is) limited to the period of the placement of units and shares on the primary market. For closed-end funds established prior to June 2012, an information summary was never required. For closed-end funds established after this date, an information summary was (and is) not required for sales in the secondary market.

The transitional provision in article 32 para. 2 of the PRIIP Regulation does not apply to the „pre-AIFM closed-end funds“ at issue here. This provision requires a key information document modelled on the key investor information for UCITS funds. As they lack such key investor information, they do not benefit from the transitional provision and would be required to draw up such documents starting as soon as 31 December 2016. This would leave these funds little time to prepare for provisions that are entirely new for them.



- **Millions in expenses for affected „pre-AIFM closed-end funds”**

The introduction of the obligation to draw up key information documents for closed-end funds for the first time would be both extremely time-consuming and very expensive: In 2012, the costs for the initial drawing up of key information documents (investment information sheets) under national law average EUR 3,700 per fund in terms of personnel and advising (excluding printing and shipping costs); The costs for annual updates to the information average EUR 1,800 per fund. For pre-AIFM closed-end funds that have been managed for many years and that are not subject to prudential supervision, significantly higher costs are to be expected for the initial drawing up and auditing. In addition, the long maturity periods – typically 10 to 15 years – of closed-end funds must be taken into account, while old real estate funds were even designed for maturity periods of 20 to 30 years. We estimate the total costs for the almost 5,000 funds affected to exceed EUR 50 million. (Calculated on the basis of 5,000 funds x EUR 10,000 for drawing up and updating. This is a conservative estimate.)

The effort and costs are not offset by any income for the fund manager or the fund management company, who typically also do not profit in any other way from the sale of individual units and shares in the secondary market. These costs were also never part of the cost calculation for this concept.

- **The immense effort and costs are not offset by added value for the buyer on the secondary market**

Particularly in light of the secondary market’s limited relevance for closed-end funds in Germany, the costs for „pre-AIFM closed-end funds” seem unreasonable. In 2015, the market-leading trading platform Fondsbörse Deutschland Beteiligungsmakler AG achieved a sales volume of only EUR 254 million. Considering that the affected 5,000 „pre-AIFM closed-end funds” have a potential trade volume of more than 100 billion EUR, their trade volume is less than 1 percent. Many of the „pre-AIFM closed-end funds” which could potentially be traded in the secondary market have never been traded before and are unlikely ever to be traded in the future. The fact that just under 5,000 units and shares were traded by the market-leading Fondsbörse Deutschland in 2015 and involved 925 different closed-end funds is a case in point. A key information document would be completely meaningless for the rest of the „pre-AIFM closed-end funds”. In this context, we find it problematic that the fund manager has little or no influence on an investor’s decision to sell their share and cannot predict such a decision. For the fund manager, it therefore remains unclear which „pre-AIFM closed-end funds” require a key information document.

Since the average small investor tends to not be familiar with the secondary market for closed-end funds as a vehicle for capital investment, buyers on the secondary market are primarily insiders, experts or institutional investors. These types of investors regularly read annual reports, balances of current accounts and other market and fund analyses. For these investors information summaries intended for the placement phase in the primary market offers no added value.



The important information for the pricing of fund units and shares as well as the pertinent parameters for the buyer such as redemptions, repayment of loans, etc., are not shown in the key information document. This is yet another reason why the benefits of these documents on the secondary market should be called into question.

- **The impending obligation to provide key information documents prevents private investors from selling their units and shares in the secondary market**

As a rule, sellers of units and shares of closed-end „pre-AIFM closed-end funds“ are themselves private investors. According to article 13 of the PRIIP Regulation, anyone selling units and shares in a PRIIP must henceforth provide private investors with a key information document pursuant to the PRIIP Regulation. This obligation, which carries a penalty, therefore directly affects small investors and makes it harder for them to dispose of their units and shares during the maturity period of the investment.

- **The PRIIP Regulation leaves enough scope to impose the recommended limitation on the obligation for „pre-AIFM closed-end funds“ in the secondary market.**

Recital 12 of the PRIIP Regulation and article 5 of the PRIIP Regulation do not stand in the way of the recommended limitation that would exempt „pre-AIFM closed-end funds“ that can be traded in the secondary market from the obligation to subsequently draw up a key information document. Recital 12 of the PRIIPs Regulation states that the obligations under this Regulation, which are laid down in the provisions on the drawing up and the revision of the key information document, should apply to the PRIIP manufacturer for **as long as** the PRIIP is traded in secondary markets. This can be understood to mean that the recital refers to the obligation to update the information, but does not establish a retroactive obligation to draw up this information for PRIIPs which were not originally obligated to draw up key information documents when first issuing their units and shares.

Proposal

The RTS Regulation should clarify that PRIIP-manufacturers are only required to draw up a key information document if the PRIIP units and shares were offered on the manufacturer’s initiative or with their approval. No such duty should apply to manufacturers if the issued units and shares are offered by investors themselves.

In order to provide legal certainty in this regard, we suggest to supplement the wording of Recital 20 to Draft PRIIPs RTS as follow:

“20. Where a PRIIP is not currently available for retail investors, the continued review and revision of the key information document for that PRIIP would be disproportionate, however a review and revision of the key information document should be undertaken if such a PRIIP is ~~to become~~ made available to retail investors again by the PRIIPs manufacturer. Provided that the PRIIPs manufacturer originally had the obligation to draw up a key information document pursuant to Article 5 PRIIPs Regula-



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tion ~~¶~~the trading on a secondary market taking place upon approval of the PRIIPs manufacturer however would not exempt the PRIIP manufacturer from the obligation to continue to review and revise the key information document for that PRIIP.”

The Real Estate sector provides a lower elasticity to adjustments of the GDP

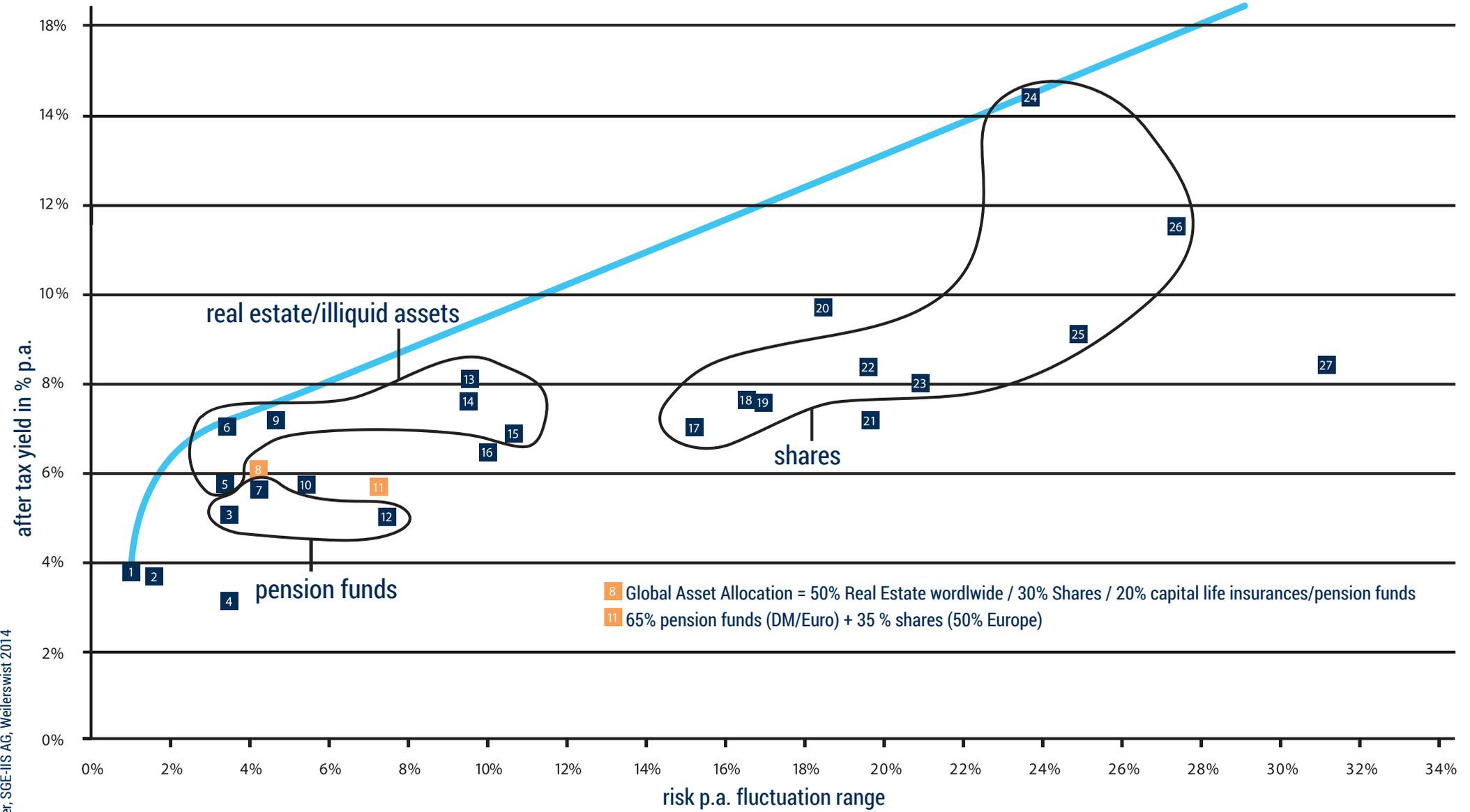


Source: Statistisches Bundesamt / IPD

Markets within Europe develop differently



Performance and risks of investments made by Germans (historical view) from 12/1969 to 06/2014



Source: Werner Egeler, SGE-IIS AG, Weilerswist 2014

- 1 Cash 2 Open-ended Real Estate Funds 3 Pension Funds Germany 4 Capital Life Insurance/Pension Funds Germany 5 Real Estate Germany Total 6 Real Estate Europe without Germany
- 7 Pension Funds Europe 8 Global Asset Allocation 9 Real Estate World 10 Open-ended Real Estate Funds Europe 11 Pension Funds (65%) & Shares (35%) 12 Pension Funds World
- 13 Container Ships 14 Real Estate Asia/Pacific 15 Real Estate North America 16 Life Insurance UK 17 Shares World 18 Shares Europe 19 Shares North America 20 REITS USA 21 Gold
- 22 Shares Pacifik 23 Shares Germany 24 Shares EMF World 25 Shares EMF Asia 26 Shares EMF Europe & Middle East 27 Private Equity & Venture Capital