

BVI's response regarding ESMA's policy orientations on possible implementing measures under the Market Abuse Regulation (Discussion Paper ESMA/2013/1649)

The BVI¹ gladly takes the opportunity to present its views on "ESMA's policy orientations on possible implementing measures under the Market Abuse Regulation" (Discussion Paper ESMA/2013/1649 – "DP"). As the representatives of German fund and asset managers, we would like to focus our comments on specific questions of the DP concerning market soundings and bearing particular relevance to the asset management sector. German asset managers act primarily on the buy-side and are therefore interested in finding a practical and clear solution regarding market sounding practices. BVI therefore supports ESMA's commitment to define arrangements and procedures for market sounding.

Q23: Do you agree with ESMA's proposals for the standards that should apply prior to conducting a market sounding?

We agree that disclosing market participants should determine the investors they intend to approach according to an internal process. Disclosing market participants should follow a comprehensive set of rules in order to have a reliable basis for any action required before information is disclosed to the buy-side.

Q24: Do you have any view on the above? (Timing of market sounding)

We agree that the hours in which market sounding may take place should not be restricted. We believe that a restriction would not have any effect since trading might still take place in a different time zone. The contact between the parties, however, would be much more difficult in practice.

Q25: Which of the 3 options described above in paragraph 82 do you think should apply? Should any other options be considered?

For the wall-crossing we consider option 1 as practical and effective. Considering ESMA's approach that the sell-side should contact a person designated by the buy-side (see Q.28, No. 103 DP), the risk of inadvertent disclosure should be reduced to a minimum.

Q28: Do you agree with the requirement for disclosing market participants set out in paragraph 89?

It is helpful to have designated persons in a register who can receive sounding approaches within the buy-side. The buy-side would also be in the position to train persons designated to be approached for market sounding.

¹ BVI represents the interests of the German investment fund and asset management industry. Its 78 members currently handle assets of EUR 2.0 trillion in both investment funds and mandates. BVI enforces improvements for fund-investors and promotes equal treatment for all investors in the financial markets. BVI's investor education programs support students and citizens to improve their financial knowledge. BVI's members directly and indirectly manage the capital of 50 million private clients in 21 million households.

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Q30: Are you in favour of an ex post confirmation procedure? If so, do you agree with its proposed form and contents?

We are in favour of a standardised confirmation procedure and therefore support ESMA's approach to give guidance regarding the contents of the confirmation. Further, it is crucial that the sell-side approaches the buy-side's designated person.

Q31: Do you agree with the approach described above in paragraph 96 with regard to confirmation by investors of their prior agreement to be wall-crossed?

We agree that the buy-side should confirm that they agree to be wall-crossed. Such confirmation is in practice often only implied by the buy-side's actions following the sell-side's approach. This should be sufficient.

Q33: Do you have any views on the proposals in paragraphs 102 to 104 above?

In practice, the buy-side sometimes receives unsolicited proposals. There is a risk that such proposals are directed to persons not sufficiently trained. Hence, we are in favour to publish the contact details of designate persons, who can be contacted for communication of soundings, in defined media. If not too burdensome for the sell-side, the contact to designated persons of potential investors in case of market sounding or insider information could be formalized. This would reduce the risk of inadvertent disclosure.

Q34: Do you agree with this proposal regarding discrepancies of opinion?

We disagree with the proposal regarding discrepancies of opinion. We believe that it is fully sufficient that the buy-side takes knowledge that the sell-side has a different opinion regarding the fact whether the information is insider information or not. We rather fear that a discussion between sell-side and buy-side on the question whether an information qualifies as insider information or not would trigger a process in which the parties exchange more facts. This would increase the risk that (by chance or else) eventually insider information is disclosed. Such disclosure of insider information, however, would increase the compliance requirements for the parties unnecessarily.

Q35: Do you think that the buy-side should or should not also inform the disclosing market participant when it thinks it has been given inside information by the disclosing market participant but the disclosing market participant has not indicated that it is inside information?

We think that it should not be necessary to inform the disclosing market participant in case the buy-side qualifies information as insider information which the sell-side does not. The buy-side may have stricter compliance rules or even additional knowledge. The exchange of information and the reasoning why the buy-side qualifies this information as insider information might again trigger a process of information exchange which contains insider information (see already answer to Q34). Finally, all responsibility to deal with potential insider information remains with the respective party.

Q36: Do you agree with the proposal for the buy-side to report to the competent authorities when they suspect improper disclosure of inside information, particularly to capture situations where such an obligation does not already otherwise arise under the Market Abuse Regulation?

The report of suspicious transactions to the Competent Authority might be an ultimate sanction. We would not consider this as appropriate in a business relationship. Market participants of the buy-side would need very clearly defined criteria for "improper disclosure of insider information". We disagree fiercely with ESMA's opinion that this kind of reporting should not be an onerous process. The buy-side does not need to mirror all duties imposed on the sell-side. The obligations for the sell-side could be easily integrated into their audit and therefore would be commented and reported by the auditors to the relevant Authority.



Q37: Do you have any views on the proposals in paragraphs 113 to 115 above?

We do not agree with ESMA's proposal to require the buy-side maintaining a full audit trail of its analysis whether securities are related securities. There are sufficient market practices to define related securities. We do not see any additional value in a full audit trail. Further, the objective of ESMA's proposal to conduct certain calls on recorded mobile or land line is unclear (No. 115).

Q38: Do you think there are any other issues that should be included in ESMA guidelines for the buy-side?

ESMA's proposals would impose inappropriate burdens to the buy-side. It seems that the idea is to mirror duties of the sell-side. The sell-side, however, possesses the information and is the one to decide whether and what information it will provide to the buy-side. We believe that the sell-side/issuer will in most cases possess more information than the buy-side. The buy-side regularly only knows the facts of a potential offer, whereas the sell-side often possesses much more information. Duties imposed on the participants should take this fact into account. Hence, in our view the buy-sides legal requirements are sufficient and the guidelines should not impose more legal requirements on the buy-side but focus on the practicability of the process.

Q39: What are your views on these options?

We would strongly favour Option 2. We generally share the fear that the buy-side does not know that the information is cleansed and would hence be prohibited to trade in the relevant securities. In practice, information about cleansing is often not made public. An agreement or clear guidance how to deal with the cleansing process including the fact that the sell-side should inform the buy-side of cleansing at the earliest appropriate time would be very helpful.

We hope that our views will help ESMA to pursue a balanced and viable approach when drafting the guidelines. Please do not hesitate to contact us with any questions or comments relating to our reply.

Yours sincerely

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