

BVI's ¹ response to ESMA's consultation paper regarding guidelines for persons receiving market soundings

We welcome the opportunity to comment on ESMA's draft guidelines on the Market Abuse Regulation. As the representative body of German fund and asset managers, we would like to focus our comments on specific questions concerning the guidelines on market soundings. German asset managers act 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.

We are aware that the consultation paper does not specifically ask for input to the proposed Guideline 1 and 2. Nevertheless, we would ask ESMA for the following clarifications:

Guideline 1)

While it should be the MSR's obligation to make the specific contact information the DMP requires available to the DMP, the MSR is in no position to confirm that the DMP has received all information of a contact point to receive market sounding. We would hence suggest clarifying the wording as follows:

"Where the person receiving the market sounding (MSR) designates a specific person or a contact point to receive market sounding, the MSR should ~~ensure that that~~ **make the contact** information ~~is made~~ available to the disclosing market participants (DMP)."

Guideline 2)

The current wording of the guidelines suggests an obligation for the MSR to always indicate and re-indicate to the DMP whether it wants to receive future soundings. Further this is only referred to for the time after the DMP has been contacted about a specific sounding. The MSR should, however, always be allowed but not obliged to indicate to any DMP or potential DMP if it does or does not want to receive specific market soundings or market soundings in general. However, we do not see a need for an obligation of the MSR to communicate in any case to the DMP whether he does or does not want to receive any market sounding. Rather, it is in the MSR's interest to communicate to the DMP if it does not want to receive the market sounding. We therefore suggest the following wording:

"~~After being addressed by a DMP, the~~ **The MSR should can** notify **it the DMP if whether they wish-it does** not **wish** to receive **future** market soundings in relation to either all potential transactions or particular types of potential transactions."

¹ BVI represents the interests of the German investment fund and asset management industry. Its 95 members manage assets of some EUR 2.6 trillion in UCITS, AIFs and assets outside investment funds. As such, BVI is committed to promoting a level playing field for all investors. BVI members manage, directly or indirectly, the assets of 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.



Q1: Do you agree with this proposal regarding MSR's assessment as to whether they are in possession of inside information as a result of the market sounding and as to when they cease to be in possession of inside information?

First, it is important to distinguish between the assessment of the MSR whether it is in possession of inside information and an assessment whether the information disclosed by DMP should be considered as inside information. We agree that the MSR should make a general assessment whether it is in possession of inside information on the basis of all information received either from DMP or any other sources. It would be unrealistic, however, to expect that the MSR is in a better position than the DMP to assess whether the specific information the DMP discloses is inside information. It should therefore be clear that the information received both by the DMP and by other sources have to be considered equally when the MSR assesses whether it is in possession of inside information.

Secondly, the requirement should only be limited to an analysis of the information available to the employees of the MSR that receive the information communicated by the DMP (either directly or indirectly via another employee of the MSR). It would not be feasible in practice for the MSR to clarify and determine whether and to what extent any of its employees may have information that in combination with the information communicated by the DMP would constitute inside information if such employees do not receive the information communicated by the DMP. Extending the assessment across the entirety of the MSR's employees would create (i) greater risks of inside information to be passed on or created and (ii) a significant administrative burden for the MSR.

We therefore suggest the following wording for Guideline 3:

"1) ~~While taking into account the DMP's assessment,~~ MSRs should independently assess whether they their employees who have received or are susceptible to receive the information communicated by the DMP are in possession of inside information as a result of the market sounding ~~taking into consideration as a relevant factor all the information available to them, including and~~ the obtainment of information ~~obtained~~ from sources other than the DMP.

2) ~~While taking into account~~Upon the DMP's notification that the information disclosed in the course of the market sounding is no longer inside information, MSRs should independently assess whether they their employees who have received or are susceptible to receive the information communicated by the DMP are still in possession of inside information taking into consideration all the information ~~available to them, including the information~~ obtained from the DMP as well as from other sources than the DMP."

Q2: Do you agree with this proposal regarding discrepancies of opinion between DMP and MSR?

We disagree with the proposal regarding discrepancies of opinion. We believe that it is fully sufficient that the MSR takes knowledge that the DMP has a different opinion regarding the fact whether the information is inside information or not. Where discrepancies arise in their respective assessments, the proposed guideline describes the terms upon which DMP and MSR are required to exchange their



views and share information. We fear that such discussion would generate an additional risk for the MSR in situations where it is already subject to rules governing insider information and it is in compliance therewith. Any discussion between DMP and MSR 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) insider information is disclosed eventually. Such disclosure of insider information, however, would increase the compliance requirements for the parties unnecessarily. We see no benefit in facilitating the communication between DMP and MSR on the question whether any information qualifies as inside information. In addition, it is not realistic in practice that the employee will be in the position to reject the communication without making a general statement why he or she is not allowed to do so. We therefore suggest the following wording for Guideline 4:

“1) In the case of market soundings where according to the DMP no inside information is disclosed, where the MSR assesses on the contrary they are in possession of inside information they should:

- a. ~~refrain from **informing discussing with** the DMP **of** the discrepancy of opinion **if the different assessment is due to the fact that the MSR is in possession of other information than that received from the DMP; or**~~
- b. ~~**inform the DMP of the discrepancy of opinion if the different assessment is based exclusively upon the information that the MSR received from the DMP.**~~

2) In the case of market soundings where according to the DMP inside information has been disclosed, where the MSR receives the DMP’s notification informing that the information communicated in the course of the market sounding ceased to be inside information and disagrees with the DMP’s conclusion, the MSR should:

- a. ~~refrain from **informing discussing with** the DMP **of** the discrepancy of opinion **if the different assessment is due to the fact that the MSR is in possession of other information than that received from the DMP; or**~~
- b. ~~**inform the DMP of the discrepancy of opinion if the different assessment is based exclusively upon the information that the MSR received from the DMP.**~~”

Q3: Do you agree with this proposal regarding internal procedures and staff training? Should the Guidelines be more detailed and specific about the internal procedures to prevent the circulation of inside information?

In principle, we agree with the proposed internal procedures and staff training. We think, however, that the guideline language should allow for greater flexibility in the organization of the requirements for receiving, processing, and assessing market sounding information. The current language of “function or body” suggests the need to create a dedicated unit for these responsibilities. In addition, it should be clear that all staff evaluating, processing and analysing information received in the course of market sounding can receive the same training appropriate for all types of information processing. In this regard we think that the wording under guideline 5 para. 2 requires the training for all types of staff sufficiently. We therefore suggest the following wording for Guideline 5 para. 1 lit. b):

“ensure that the ~~**staff function or body**~~ entrusted to assess whether the MSR is in possession of inside information as a result of the market sounding are clearly identified ~~**and composed of staff properly trained to that purpose;**~~”



Q4: Do you agree with this proposal regarding a list of MSR's staff that are in possession of the information communicated in the course of the market sounding?

No, we do not agree since we believe that this guideline would go beyond the level 1 text. First, the MAR only requires the DMP to maintain a record and list of potential investors to whom the information has been disclosed (Art. 11 para. 5). There is no requirement for the MSR to maintain such record. Secondly, the list would also extend to non-insiders, i.e. ESMA suggests requiring such lists in all cases any information is received in the course of market sounding regardless of whether the MSR assesses that it is inside information. From a data protection point of view, the maintenance of lists that embed personal information needs to be justified by a clear legal obligation, which is not required according to level 1. We doubt that such legal obligation can be imposed via guidelines. We hence suggest deleting this guideline.

Q5: Do you agree with the revised approach regarding the recording of the telephone calls?

We agree with removing the MSR's obligation to communicate only on recorded telephone lines when communicating by telephone. The MSR should, however, be able to only communicate on a recorded telephone line with the DMP if he wishes to do so. We therefore would like to suggest clarifying within the technical standards on market sounding that the DMP, when establishing procedures for conducting market soundings by telephone (see Art. 2 para. 2 of the draft RTS), is obliged to make the number for the recorded telephone line available to each MSR.

Q6: Do you agree with the proposal regarding MSR's obligation to draw up their own version of the written minutes or notes in case of disagreement with the content of those drafted by the DMP?

From a practical point of view we would like to point out that any signature on notes or minutes would either require the employees involved to be authorised to act on behalf of the MSR or require a representative to sign minutes of a communication he or she was not part of. In addition, a formal signature would complicate the means of providing the other party with minutes. We would therefore suggest that the MSR should either confirm that it is in agreement or provide the DMP as soon as possible with its own version. If this is documented properly within the MSR's organisation, no signature is necessary. The timeframe for the MSR to provide its own version should remain flexible since specific circumstances might require the MSR to deliver at a later point. We would therefore suggest the following wording:

"Where in accordance with [Article 6(2)(d) of Delegated Regulation (EU) .../...[RTS on Market soundings]] the DMP has drawn up written minutes or notes of the unrecorded meetings or unrecorded telephone conversation, the MSRs should:

- a. ~~sign~~ **notify the DMP about its agreement with** these minutes or notes where they agree upon their content; or
- b. provide the DMP with their own version of the minutes or notes ~~duly signed within five working days~~ **as soon as possible** after the market sounding where they do not agree upon the content of the minutes or notes drawn up by the DMP."



We generally would like to point out that the reference to the disclosing market participants' record keeping requirements in ESMA's authorisation in the level 1 text (Art. 11 para. 11 with reference to para. 8) is unclear. While paragraph 10 for instance also mentions the MSR, paragraph 8 only stipulates an obligation for the DMP and no obligation for the MSR to keep records. We therefore doubt that mirroring DMP's obligations to the MSR would be in line with the level 1 text. ESMA should therefore carefully consider whether it has the power to impose a record keeping obligation as outlined in guideline 9 according to the level 1 text.

Q7: Can you provide possible elements of compliance cost with reference to the regime proposed in the guidelines for MSRs?

It is generally difficult to accurately estimate compliance costs for MSRs with the proposed regulations, however, we anticipate significant additional compliance costs in the following areas – provided the requirements remain as they are:

- the requirement to keep records according to guideline 9 will trigger storage costs and costs for setting up specific internal processes;
- specific training requirements shall impact a wider population and are required in addition to general MAR training;
- specific internal procedures for market soundings will have to be implemented and compliance monitoring programs extended.