



Bundesverband Investment
und Asset Management e.V.

Mr. Fabrice Demarigny
Secretary General
CESR the Committee of European
Securities Regulators
11-13 avenue de Friedland
75008 Paris
FRANCE

Contact:
Dr. Magdalena Kuper
Phone: +49.69.154090.263
Fax: +49.69.154090.163
magdalena.kuper@bvi.de

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Call for Evidence on Evaluation of the Supervisory Functioning of the EU Market Abuse Regime

Dear Mr. Demarigny,

BVI¹ welcomes the opportunity to share with CESR its experiences and views with regard to the practical implementation of the Market Abuse Directive. While fully aware of the extraordinary complexity of the exercise, we would like to endorse CESR in its plans to evaluate the current functioning of the market abuse regime in order to prepare ground for convergent interpretation and application of respective EU measures. BVI will make best efforts in order to assist CESR in the conduct of its preliminary work.

At the current stage of the evaluation process, we would like to draw CESR's attention to the following issues:

1. Definitions of "recommendation" and "research" (Art. 1 No. 3, 4 of the Implementing Directive 2003/125/EC)

The definitions of recommendation and research are very broad and create many problems in their practical application. In particular, due to the absence of criteria for distinguishing research from marketing communications, the line between these two activities is often blurred. As

¹ BVI Bundesverband Investment und Asset Management e.V. represents the interest of the German investment fund and asset management industry. Its 83 members currently nearly 7,500 investment funds with assets under management close to € 1,200 bn. The units of these funds are held by some 15 million unit holders. Mandates for portfolio management services provided by our members comprise assets in excess of € 150 bn. For more information, please visit www.bvi.de.

Director General:
Stefan Seip
Managing Director:
Rüdiger H. Päsler
Rudolf Siebel

Eschenheimer Anlage 28
D-60318 Frankfurt am Main
Postfach 10 04 37
D-60004 Frankfurt am Main
Phone: +49.69.154090.0
Fax: +49.69.5971406
info@bvi.de
www.bvi.de

the production of research or other recommendations corresponds with the obligations laid down in Articles 2-6 of the Implementing Directive, many market participants have recently adopted a very reluctant attitude when it comes to providing their clients or the general public with marketing information on financial instruments. This is particularly true in relation to companies being part of global financial conglomerates where determination of major shareholdings and conflicts of interests pertaining to all group members on regular basis amounts to a grave burden in the operation of business.

Obviously, this state of affairs has not been intended by the EU legislator. Abusive or misleading market behaviour may be only suspected in cases in which a statement issued for marketing purposes is presented in a way giving impression of objective or neutral recommendation. If, however, the marketing context of the information is clearly disclosed to its recipients, no misleading signals are given to the market. Hence, in these circumstances, the provisions of the Directive 2003/125/EC aiming at preventing market abuse should not apply.

Appropriate criteria for distinguishing research from marketing communications have been set in Article 24 of the MiFID Implementing Directive 2006/73/EC. In order to be considered investment research and to imply additional duties on investment firms producing it, information must be labelled or described as investment research or in similar terms, or otherwise presented as an objective or independent explanation of the matters in question. Even though Article 24 para. 2 of Directive 2006/73/EC indicates that such understanding of research might not comprise all cases covered by the Market Abuse Directive and its implementing measures, we think it necessary to reconsider the approach adopted in the latter context on basis of market experiences described above.

Therefore, we strongly encourage CESR to introduce guidance on a more restrictive interpretation of the terms “recommendation” and “research” as defined in Article 1 No. 3, 4 of Directive 2003/125/EC, taking into account the probability and dimension of potential market manipulation. In view of protection of market integrity as a primary legislative objective (see recital 1 of Directive 2003/125/EC), this interpretation appears compatible with the wording and spirit of the cited provisions. Nevertheless, should CESR for some reasons come to the conclusion that this measure exceeds its powers at Level 3 of the Lamfalussy process, we urge CESR to recommend to the EU-Commission a respective amendment of the Implementing Directive.

2. Treatment of „Marking the Close“-Trades (Article 4 (g) of the Implementing Directive 2003/124/EC and point 4.12 (a) of CESR guidance CESR/04-505b)

We agree with CESR that trades conducted at the close of the market in an effort to alter the closing price of the financial instrument in question should



be covered by the prohibition of market manipulation. However, there are cases in which trading at the close of the market takes place for legitimate purposes as it constitutes the only feasible way of execution.

This pertains in particular to trades conducted by index funds in response to changes in the composition or valuation of financial indexes. As the value of an index is determined on close, asset managers and other market participants tend to place orders for execution at guaranteed closing prices in order to avoid deviations of portfolio performance from the subsequently fixed index value. Even though index reference or valuation dates often involve large transactions, the respective market impact is usually being mitigated by the activities of hedge funds and other investors taking opposite positions in the market.

Most importantly, trades taking place in order to align fund portfolios with modified valuation of reference indexes are not aimed at influencing or manipulating the market, but a legitimate and necessary consequence of index-replicating investment strategies. In light of the altogether immense volume of transactions triggered by changes in index composition, any impact deriving from single trades must be considered negligible.

Thus, we deem it appropriate to amend the wording of point 4.12 (a) of the first set of CESR guidance and information on the common operation of the Market Abuse Directive in order to exclude transactions concluded on behalf of index-replicating funds due to changes in reference data of financial indexes.

We hope that our comments are of help for CESR's continuing work on evaluation of the EU market abuse regime and remain at your disposal for any questions that may arise.

Yours sincerely

BVI Bundesverband Investment und Asset Management e.V.

Signed:
Marcus Mecklenburg

Signed:
Dr. Magdalena Kuper