Frankfurt am Main,
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BVI[1] position on ESMA's consultation paper on Guidelines on certain aspects of the MiFID II compliance function requirements

Our members are asset managers providing management services to collective investment undertakings such as UCITS or AIF. Most of them are investment management companies within the meaning of Directive 2009/65/EC ("UCITS Directive") or Directive 2011/61/EU ("AIFMD"). These Directives allow Member States to authorise investment management companies to provide certain investment services within the meaning of MIFID in addition to the collective management of investment funds, including services of management of portfolios of investments, investment advice, safe-keeping and administration in relation to shares or units of collective investment undertakings, as well as reception and transmission of orders in relation to financial instruments. Only in these cases, certain MiFID II requirements including those relating to the compliance function apply for them, respectively. Moreover, other members are investment firms which directly fall within the scope of MiFID II and the proposed guidelines because they provide investment services such as portfolio management, investment advice or execution of orders on behalf of clients without being investment management companies.

In this context, we welcome ESMA's initiative to enhance clarity and foster convergence in the implementation of certain aspects of the new MiFID II compliance function requirements. We support the approach replacing the existing ESMA guidelines on the same topic, issued in 2012.[2] In particular, we welcome that the guidelines maintain the **proportionality principle** as a general rule as set out in Article 22(1), second paragraph, of the MiFID II Delegated Regulation.

However, the draft guidelines propose many new examples and guidance on how to fulfil the rules currently in force under MiFID II. It means for our members that they need to review any implications of potentially changing or, if necessary, amending the already established processes. That process therefore takes more time the more granular the guidelines and examples are. This applies, in particular, for the new proposed monitoring and reporting requirements. Therefore, the implementation period of 60 days after the report of compliance by the national competent authorities seems too strict. Hence, we propose an **appropriate transitional period (such as six months)**.

With regard to the content of the new guidelines, in particular, we disagree with the proposals that staff members of the compliance function should interview firm's clients for monitoring activities (**paragraph 26, guideline 2**) and that the firm should establish and maintain a core team within the compliance function staff members whose sole area of responsibility is MiFID compliance (**paragraph 78**, **guideline 10**). These proposals significantly affect the responsibilities of a firm and the right to organise its own affairs. The organisational autonomy determining who is to be internally responsible for tasks must not be restricted. Moreover, we propose to review the new content of the compliance function's reports to senior management in avoiding double reports (**paragraph 32, guideline 3**).

[1] BVI represents the interests of the German fund industry at national and international level. The association promotes sensible regulation of the fund business as well as fair competition vis-à-vis policy makers and regulators. Fund companies act as trustees in the sole interest of the investor and are subject to strict regulation. Funds match funding investors and the capital demands of companies and governments, thus fulfilling an important macro-economic function. BVI's more than 100 members manage assets of some 3 trillion euros for private investors, insurance companies, pension and retirement schemes, banks, churches and foundations. With a share of 22% in the EU Germany represents the largest fund market as well as the second fastest growing market in the EU. BVI's ID number in the EU Transparency Register is 96816064173-47. For more information, please visit www.bvi.de/en.

[2] ESMA/2012/388.

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Compliance risk assessment

Q1: Do you believe that guideline 1 should be further amended and/or supplemented? Please also state the reasons for your answer.

We agree with guideline 1. However we suggest clarifying the supporting guidelines as follows:

Paragraph 19 (conducting a risk assessment): In comparison to the existing 2012 guidelines, the new supporting guideline requires that the compliance risk assessment should be '*updated'* (instead of '*performed regularly*'). That could be misunderstood in such a way that an update must be performed on a permanent basis. Hence, we understand the MiFID II requirements in such a way that the monitoring process is only required on a permanent basis, but based on a risk assessment that should be updated regularly. Therefore, we suggest maintaining the criterion 'regularly'.

Paragraph 22 (ad-hoc risk assessments): We suggest amending paragraph 22 in such a way that only '*significant*' (instead of '*relevant'*) changes in the regulatory framework should lead to a review of the identified risks on an ad-hoc basis. Given the increased complexity and the extremely wide scope of the regulatory framework, it could be very time-consuming and burdensome analysing on an ad-hoc basis whether and in which extent a new legal rule will be relevant for the firm and if there is a need to change the risk assessment on an ad-hoc basis. Such an approach should only apply where changes in the regulatory framework are significant. For all other changes, a regular review should be sufficient and appropriate for identifying risks which should be taken into consideration for the risk assessment of the compliance function.

Monitoring obligations of the compliance function

Q2: Do you agree with the suggested approach in relation to the compliance function's monitoring obligations? Please also state the reasons for your answer.

We agree with the suggested approach and welcome the clarification of the aim of the '*risk based'* monitoring program.

Q3: Do you believe that further guidance is needed to clarify the compliance function's monitoring obligations?

No further guidance is needed.

Q4: Do you agree with the addition to paragraph 26?

ESMA proposes under **paragraph 26** that the firm could use as an additional (new) tool for monitoring activities also interviewing firm's clients. We disagree with such an approach and suggest deleting that proposed amendment. The aim of the process is to monitor the adequacy and effectiveness of the internal measures, policies and procedures put in place to detect any risk of failure by the firm to comply with its obligations under MiFID II. Clients, in principle, are not able to understand the complexity of internal processes established to fulfil these requirements. Hence, such interviews of staff members of the compliance function with firm's clients could have negative impact on the client-firm relationship, especially when no failure will be identified at the end. In or view, the established and required com-

plaint management system already provides necessary information which could be used by the compliance function. We therefore propose to replace the proposed tool of interviewing firm's clients by complaints-handling data.

Reporting obligations of the compliance function

Q5: Do you agree with the suggested general content of the compliance function reports (paragraph 31 of the guidelines)? Please also state the reasons for your answer.

We agree with the suggested general content of the compliance function reports stated under guideline 3, paragraph 31. However we do not agree with the proposed new supporting guideline under paragraph 32 which explains the content of the reports in more detail. In particular, the new draft supporting guideline proposes new information requirements on how to report in fulfilling the rules. It means for our members that they need to review any implications of potentially changing or, if necessary, amending the already established processes. In our view, the content of the reports should be limited to information which is necessary, but not extended to information which is already known or available on the basis of other reports or policies. Therefore, we propose to amend the supporting guideline under **paragraph 32** as follows:

Letter a): The proposed new content of including the qualification of the personnel employed in the compliance function and reporting lines should be deleted. The qualification already is an important criterion when an employee is hired and known by the senior management of the firm. Additional information in the report seems not appropriate. The same applies for the reporting lines which are already explained in the internal compliance policy.

Letter b): The proposed new content of including a summary of the planned monitoring activities for the subsequent review should be deleted. It is not very meaningful for the report because that information is already part of the updated risk assessment.

Letter c): The proposed new content of including the number of complaints in the period under review should be deleted. Adding the number is only a counter task without any meaningfully information. The result of the review of client's complaints is much more significant.

Letter d) states as a new content of including any actions taken, including related timeline and organisational units involved, but not limited to regular or ad-hoc checks conducted. Such content will lead to a greater formalisation and additional expense that is not appropriate.

Letter c) and d) - complaint management: The content of the report should be limited to any added value in addition to the content of the already established and required complaint report.

Q6: Do you agree with the suggested content of the compliance function reports in relation to product governance arrangements (paragraph 33 of the guidelines)? Please also state the reasons for your answer.

Paragraph 33, letter c), of the new supporting guideline to guideline 3 requires that the compliance function's report to senior management on product governance arrangements should systematically include information on the number and nature of products manufactured or distributed including their respective target markets and other information, the respective distributors as part of the distribution strategy and whether products are distributed outside their (positive) target market and to which extent.

According to the guidelines, in order to meet this obligation, the compliance function may take a critical look at any work, reports or methods from the firm's function or personnel working on product governance arrangements. However, we miss a clear statement that allows the compliance function to refer to other senior management reports from the firm's product function, where existent. In particular, for firms with dedicated product functions that would be an entirely proportionate approach in line with the proportionality principle. Therefore, we would like to propose clarifying under paragraph 33 that the compliance function can also refer to such reports from dedicated product functions which, practically, still enables a management body to have effective control over a firm's product governance process.

Q7: Do you agree that the information that should be included in the compliance function reports should be proportional to the complexity and level of risks of the financial instruments manufactured and/or distributed by the firm? Do you believe that additional criteria should be taken into account? Please also state the reasons for your answer.

We refer to our answer to question 6.

Q8: Do you believe that further guidance is needed to clarify how firms should address the potential conflicts arising from the combination of the complaints management function with the compliance function? What practical solution could be envisaged?

No further guidance is needed.

Q9: Do you believe that further topics/areas should be included in the compliance function reports?

No further guidance is needed.

Advisory and assistance obligations of the compliance function

Q10: Do you agree with the approach taken for the review of guideline 4? Do you believe that guideline 4 should be amended and/or supplemented further? Please also state the reasons for your answer.

We agree with the approach taken for the review of guideline 4. However, we suggest amending the supporting guidelines under **paragraph 38** that the objective of the regulation not only includes investor protection. It is important to add also financial market integrity and the competitiveness of European companies in addition to investor protection in terms of engaging with staff and improving compliance culture within the firm.

Organisational requirements of the compliance function
Effectiveness of the compliance function

Q11: Do you believe that guideline 5 should be amended and/or supplemented further? Please also state the reasons for your answer.

Paragraph 54 requires a new process to put in place necessary arrangements to ensure an effective information exchange between the compliance function and other control functions. Such an approach is reasonable and supports internal communication. However, no further guidance is needed.

Skills, knowledge, expertise and authority of the compliance function

Q12: Do you agree with the creation of a new guideline solely focused on the skills, knowledge, expertise and authority of the compliance function? Please also state the reasons for your answer.

New guideline 6: We agree that a compliance officer should have skills in addition to its knowledge and expertise. However, it is completely unclear how a compliance offer can demonstrate its '*high professional ethical standard and personal integrity*'. These skills, of course, are important and should be expected by such a person. However, as long as there is no binding or clear understanding how to demonstrate such skills, the last sentence of the new guideline 6 should be deleted.

Q13: Do you agree with the additions to guideline 6 (formerly part of guideline 5)?

With regard to **paragraph 56** of the supporting guidelines of guideline 6, we welcome that national competent authorities may use different options to demonstrate the necessary level of knowledge and/or of experience because they are able to assess the specific market circumstances and regulations applying in each country. In particular, imposing the responsibility for the assessment of the compliance officer's qualification solely on the senior management of the firm has proven to be successful in Germany.

Permanence of the compliance function

Q14: Do you believe that guideline 7 should be further amended and/or supplemented? Please also state the reasons for your answer.

No further guidance is needed.

Independence of the compliance function

Q15: Do you believe that guideline 8 should be further amended and/or supplemented? Please also state the reasons for your answer.

No further guidance is needed.

Proportionality with regard to the effectiveness of the compliance function

Q16: Do you believe that guideline 9 should be further amended and/or supplemented? Please also state the reasons for your answer.

No further guidance is needed.

Combining the compliance function with other internal control functions

Q17: Do you agree that, subject to the proportionality principle, a firm should consider establishing and maintaining a core team of compliance staff whose sole area of responsibility is MiFID II? Please also state the reasons for your answer.

We recognise that fulfilling MiFID II compliance is one of the main tasks of a compliance function. But the organisational autonomy which of the staff members or teams are responsible for must not be restricted. We therefore strongly disagree with the proposal under the new **paragraph 78** that the firm should establish and maintain a core team within the compliance function staff members whose sole area of responsibility is MiFID compliance.

Even though that proposal shall depend on the proportionality principle, it significantly affects the responsibilities of a firm and the right to organise its own affairs. This applies all the more for the largest and most complex firms for those ESMA clearly anticipates the creation of MiFID-only dedicated compliance staff. These firms are those most likely to have created specialised, functional compliance structures to mirror the complexities of the firm. Costs/charges is an example where, in a large firm providing portfolio management, compliance expertise at a European level must cover additional requirements such as PRIIPs, the UCITS Directive and AIFMD alongside MiFID II. It is more efficient for the same compliance person(s) to cover all aspects of different frameworks (for instance with regard to interests of conflicts) than to split the compliance function (arbitrarily) along regulatory lines.

Moreover, the proposed approach with a core team conflicts with guideline 9, after which the firm should decide which measures, including organisational measures and the level of resources, are best suited to ensuring the effectiveness of the compliance function in the firm's particular circumstances.

Q18: Do you believe that guideline 10 should be further amended and/or supplemented? Please also state the reasons for your answer.

No further guidance is needed.

Outsourcing of the compliance function

Q19: Do you agree with the amendments made to guideline 11? Please also state the reasons for your answer.

We agree with the amendments made to guideline 11 with regard to outsourcing of the compliance functions. We welcome maintaining the current approach that tasks and functions of the compliance function may continue to be outsourced. In particular, small-sized firms often use services of third parties in supporting activities of the compliance function. Therefore, the clarification is very helpful that only the responsibility of the compliance function must remain with the firm, but not the tasks or functions.

Q20: Do you believe that guideline 11 should be further amended and/or supplemented? Please also state the reasons for your answer.

No further guidance is needed.

Competent authority review of the compliance function

Q21: Do you agree with the amendments made to guideline 12? Please also state the reasons for your answer.

Q22: Do you believe that guideline 12 should be further amended and/or supplemented? Please also state the reasons for your answer

We agree with the amendments made to guideline 12. In particular, we welcome that different options may be foreseen at national level in the Member States because the national competent authorities are able to assess the specific market circumstances and regulations applying in each country.

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