

BVI¹ position on ESMA's Consultation paper on Draft Guidelines on Outsourcing to Cloud Service Providers (CSP)

The draft guidelines contain extensive requirements, especially regarding the register, due diligence / risk analysis, contract and notification obligations. Generally, we welcome that ESMA's intention is to apply the principle of proportionality. In this context, it is important that existing supervisory practices on outsourcing and CSP at national level are sufficiently taken into account to avoid overlapping regulation (e.g. BaFin, orientation guide on outsourcing to cloud providers, https://www.bafin.de/SharedDocs/Downloads/DE/Merkblatt/BA/dl_181108_orientierungshilfe_zu_auslagerungen_an_cloud_anbieter_ba.pdf?__blob=publicationFile&v=4).

Guideline 1. Governance, oversight and documentation

Q2: Do you agree with the suggested documentation requirements? Please explain.

The register of information provides a comprehensive set of documentation on cloud outsourcing. However, regarding the scope we would like to note that the requirements for a cloud outsourcing register are particularly extensive and require process-related statements that might already be included in existing descriptions of processes such as "decision making body" or "date of the next planned risk assessment/audit" etc. It is important to avoid duplicate documentation obligations as these provide no additional value but increase the administrative burden.

Guideline 2. Pre-outsourcing analysis and due diligence

Q3: Do you agree with the suggested approach regarding the pre-outsourcing analysis and due diligence to be undertaken by a firm on its CSP? Please explain.

Yes, prior to outsourcing a pre-outsourcing analysis and due diligence should be undertaken. However, with respect to the examination the requirement to assess local insolvency and enforcement law appears to be rather far-reaching. Furthermore, depending on the actual economic situation/insurance coverage of the outsourcing company, insolvency issues might in fact only play a minor role in the evaluation. If mandatory, expert opinions and related costs on this issue might therefore be disproportionate.

Guideline 5. Exit strategies

Q6: Do you agree with the suggested approach regarding exit strategies? Please explain.

Yes, for planned and unplanned exits of cloud services there should be a plan. The exit assessment should be risk-based and demonstrate the feasibility of the plan. With regard to the testing of exit plans, we would like to note that some requirements of the exit strategy cannot be reasonably tested (such as the transfer to another CSP). We therefore recommend to allow for sub-sets of exit scenarios in the test.

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. Asset Managers 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 114 members manage assets more than 3 trillion euros for retail investors, insurance companies, pension and retirement schemes, banks, churches and foundations. With a share of 23%, Germany represents the largest fund 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.



Guideline 8. Written notification to competent authorities

Q9: Do you agree with the suggested notification requirements to competent authorities? Please explain.

While guidance on the notification requirements is generally helpful, we believe that the level of detail of the notification to competent authorities should be reconsidered. Certain notification obligations will provide limited added value for supervisory authorities but cause an increased administrative burden (e.g. information re "next contractual renewal date", "notice periods for the CSP", "date of the most recent assessment of the criticality or importance of the outsourced function" etc). Information on outsourcing controlling and random checks are regularly included in the annual audit reports and the supervisory authority may already review controlling procedures.