Comments

of the German Insurance Association (GDV)*
ID Number 6437280268-55

on the Consultation Paper on

ESMA's draft guidelines on the Market Abuse Regulation (ESMA/2016/162)

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*) The Berlin-based German Insurance Association (GDV) is the federation of private insurers in Germany. Its about 460 member companies offer comprehensive coverage and retirement provisions to private house-holds, trade, industry and public institutions, through 427 million insurance contracts. The German insurance industry stands for risk cover, security and financial precautions in all areas of private and public life. It makes risks calculable and bearable for individuals and it is an indispensable basis for economic activity. The insurance industry moreover provides gainful employment for 529,000 persons either as employees with insurers and in the intermediation business or as self-employed insurance intermediaries and advisers.

Executive summary

The German insurance industry appreciates the opportunity to contribute to ESMA's Consultation Paper on draft guidelines on the Market Abuse Regulation (MAR). With total assets of about 1.4 trillion euros, the German insurance industry is a major institutional investor at international capital markets. We therefore welcome the MAR aims of enhancing market integrity and investor protection.

Before addressing selected issues in detail, we would like to highlight our main comments:

- The planned guidelines for the delay of disclosure of inside information must sufficiently take into account the role and the functioning of the supervisory body in a mandatory two-tier-system. Therefore the provisions in 78 lit. c) and 78 lit. d) are unpractical and should be deleted;
- It should be clarified that the time to clarify and ascertain the inside information should not qualify as a legitimate reason to delay disclosure under Article 17 (4) MAR. This time is needed in every case and should therefore qualify as necessary time before the delay of disclosure and not fall into the scope of Article 17 (4) MAR;
- The right to delay disclosure in Article 17 (4) lit a) MAR should be interpreted in an adequate way.

1. Introduction

The German insurance industry welcomes the approach of a non-exhaustive indicative list of legitimate interests of the issuer to delay disclosure of inside information in principle.

At the same time, we have several concerns and comments regarding the examples and elements of section 3.2. *Legitimate interests of the issuer that are likely to be prejudiced by immediate disclosure of inside information*, which will be elaborated below.

2. Comments

The provisions on delay of disclosure of inside information must sufficiently take into account the role and the functioning of the supervisory body in a two-tier-system
(Section 3.2. Numbers 60, 69, 78, 82, 86-88)

The planned guidelines for the delay of disclosure of inside information do not sufficiently take into account the role and the functioning of the supervisory body in a mandatory two-tier-system. In Germany for example the German Stock Corporation Act provides a separation between the management body (Vorstand) and the supervisory body (Aufsichtsrat) of a stock listed company. The supervisory body takes its decisions in periodical meetings and when appropriate (with necessary preparation) but is practically not able to give his approval for the disclosure within one day.

Therefore, the provisions in 78 lit. c) according to which a delay of disclosure should only be possible if the approval of the supervisory body takes place "within the same day" is too narrow, unpractical and should be deleted. The same applies to 78 lit. d) since in the stated cases a delay of the disclosure prevents market turbulences more effectively than contradictory disclosures that would be necessary in case of an unexpected decision of the supervisory body. From our point of view, this narrow interpretation of exemptions related to the disclosure of inside information (69) is too far reaching. This also applies to the overly severe requirement in 86 to 88 according to which the conclusion of a transaction has to be "very likely to fail" because of the disclosure of inside information.

It should be clarified in 60 lit. b) that an outstanding approval by the supervisory body must lead to a delay of the disclosure because the public is usually not able to fully understand such a preliminary disclosure even if it refers explicitly to the missing approval by the supervisory body. 78 lit. a) is also based on this applicable assumption. Therefore, 82 should also be

replaced and the proposed clarification should be anchored as a “general rule”.

It should be clarified that the necessary time to clarify and ascertain the inside information should not qualify as a legitimate reason to delay disclosure under Article 17 (4) MAR
(Section 3.2 Numbers 64 and 67)

The time needed for the parent company to check the accounting information received by a subsidiary (64) as well as for an issuer to clarify the situation in case of an unexpected and significant event and ascertain the inside information (67) should not qualify as a legitimate reason to delay disclosure under Article 17 (4) MAR. We welcome this clarification. The parent company and issuer need adequate time to assess the relevant facts. This time has to qualify as necessary time before the delay of disclosure.

The right to delay disclosure to the public in Article 17 (4) MAR should not be interpreted too narrowly
(Section 3.2 Numbers 65 and 66)

The statement in Article 17 (4) lit. a) MAR according to which *immediate disclosure is likely to prejudice the legitimate interests of the issuer or emission allowance market participant* should be interpreted in an adequate way. A mere probability that a detriment may occur should be sufficient for the right to delay disclosure to become applicable. This refers only to the first condition in Article 17 (4) lit. a) MAR. We agree with ESMA that additionally all other conditions in Article 17 (4) MAR must be met.

Berlin, 31 March 2016