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ESMA Proposes Improvements to the Transparency Directive

Background

On 03 March 2021, the European Securities and Markets Authority ("ESMA") published its [Letter \(the "Letter"\)¹ to the European Commission \("EC"\)](#) including proposals to improve the Transparency Directive (the "Directive")² following the Wirecard case.

In the Letter, ESMA highlights the importance of timely and effective enforcement of financial information, whilst noting that the respective current principles in the Directive allow for significant divergence upon transposition into national law. As ESMA continues to push for convergence in the implementation of the Guidelines on enforcement of financial information ("GLEFI")³, it has identified provisions in the Directive that require modifications. Other ESMA observations relate to ensuring that the Directive remains fit for purpose, including with regards to non-financial information and digital developments.

ESMA's Proposals

ESMA's proposals to improve the Directive are comprised of four main areas, with four main aims as summarised below:

1. Enhance cooperation between authorities across the EU

Especially relevant in jurisdictions where different authorities are responsible for supervision of different pieces of financial sectorial legislation, ESMA outlines the importance of cooperation and exchange of information between the respective authorities. Therefore, ESMA recommends that provisions are included in the Directive to eliminate, to the extent possible, confidentiality impediments that might hinder cooperation between different authorities. Moreover, ESMA suggests that a mandate is included for itself and/or the three European Supervisory Authorities ("ESAs") to develop Regulatory Technical Standards ("RTS") on information sharing and cooperation.

2. Enhance coordination and governance on a national level

Article 24 of the Directive states that examinations related to enforcement of financial information may be delegated. In this respect, ESMA is proposing that the Directive is modified

¹ ESMA Letter to EC on next steps following the Wirecard case, ESMA32-51-818, dated 26 February 2021.

² Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC

³ Guidelines on enforcement of financial information, ESMA32-50-218, dated 04 February 2020.

to require national transposition measures to clarify the respective responsibilities and obligations. Moreover, clauses regarding delegation and designation models should be reviewed on a regular basis.

3. **Strengthen independence of the National Competent Authorities (“NCAs”)**

Actual as well as perceived independence of NCAs is considered crucial. Hence, ESMA is suggesting that the Directive is amended to include provisions not to allow outsourcing of the task of regular examination of financial information to audit firms. Additionally, it is suggested that modifications to the Directive include a provision to ensure that relevant parties involved in examining financial information are independent from market participants, whilst also performing their tasks independently from Governments.

4. **Strengthen harmonised supervision of information across the EU**

Different national setups and transposition of the Directive lead to divergence in enforcement of financial information, including the power to require information and remedy the relevant issues. Therefore, ESMA recommends that the Directive is modified to ensure harmonisation of powers of accounting enforcers across the EU. Other suggestions by ESMA relate to supplementing the NCAs' powers, including, but not limited to, to require an independent second audit and carry out on-site inspections or investigations as applicable. ESMA also proposes that financial reporting is raised from Article 1 (3) to Article 1 (2) of the ESMA Regulation. Furthermore, ESMA aims to strengthen consistent application and enforcement of disclosures related to Alternative Performance Measures.

Contacts

Should you have any queries relating to the above, kindly contact the Authority on transparency@mfsa.mt.