

# Disclosure Requirements on COVID-19 Impact for Issuers in Europe

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## European Securities and Markets Authority and National Supervisory Authorities Underline Certain Disclosure Rules that Apply to Issuers in the Context of the COVID-19 Outbreak

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### SUMMARY

In light of the COVID-19 pandemic, the European Securities and Markets Authority (“ESMA”), the French Financial Market Authority (*Autorité des marchés financiers*) (“AMF”), the United Kingdom (“UK”) Financial Conduct Authority (“FCA”) and Financial Reporting Council (“FRC”) as well as the German Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht*) (“BaFin”) recently reminded market participants of their disclosure and other transparency obligations under applicable European and national laws.

In this regard, the European authorities particularly stressed the importance of the timely disclosure of inside information in accordance with Regulation (EU) No 596/2014 of the European Parliament and the Council of 16 April 2014 on market abuse (as amended, the “Market Abuse Regulation”). However, in light of the current circumstances, ESMA and the other European supervisory authorities have provided certain facilitations with respect to the forthcoming publication of the annual and half-yearly financial statements and reports. While partially focusing on different special topics, European regulators, based on harmonized European capital markets laws, are generally very consistent in their guidance to market participants.

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### DISCLOSURE REQUIREMENTS ON COVID-19 IMPACT

In view of the continuing impact of the COVID-19 outbreak on financial markets and issuers’ business activities, financial position and economic performance in Europe, ESMA and national supervisory authorities in Europe have reminded issuers of their disclosure requirements under applicable European and national regulations.

#### 1. Ad Hoc Disclosure of Inside Information

Pursuant to Art. 17 of the Market Abuse Regulation, issuers are required to inform the public as soon as possible of inside information – *i.e.*, precise, non-public information relating, directly or indirectly, to

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one or more issuers or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of their financial instruments.<sup>1</sup>

### **ESMA: Importance of the Disclosure Rules Regarding Inside Information in the Context of the COVID-19 Outbreak**

On March 11, 2020, ESMA emphasized the importance of such ad hoc disclosure rules in light of the current crisis.<sup>2</sup> Whereas the COVID-19 pandemic is a well-known crisis which has an impact on all sectors of the economy, the specific measures taken by each issuer to cope with the crisis or the specific impact of the crisis on the issuer could be considered as inside information if such information is price sensitive, *i.e.*, it might have a significant impact on the price of financial instruments issued by such issuer. Against this background, ESMA reminded issuers to particularly disclose as soon as possible any significant impact of the COVID-19 outbreak on their “*fundamentals, prospects or financial situation.*”

Similar statements, stressing the overall importance of the disclosure rules in times of crisis, have been issued by other national supervisory authorities in Europe. For example, the AMF made similar recommendations to ESMA on February 28, 2020, at a time when COVID-19 had just begun to spread across Europe, asking issuers to disclose without delay, through the publication of an ad hoc release, “*any knowledge of the epidemic’s significant impact on the activity, performance or prospects of the issuer*”<sup>3</sup>. Also, the FCA reminded issuers of their obligation to comply with their obligations under the Market Abuse Regulation and related FCA rules in a market bulletin published on March 17, 2020.<sup>4</sup>

### **Specific Guidance by National Supervisory Authorities**

In addition to this rather generic advice, the BaFin, the AMF and the FCA have published more specific advice relating to the disclosure of inside information:

- **Guidance by the BaFin:** In FAQs published on its website on March 20, 2020, the BaFin pointed out that changes of forecasts due to the COVID-19 crisis only have to be disclosed “*if they are sufficiently probable*”<sup>5</sup> and, given recent uncertainties, issuers:
  - are entitled to maintain their previous forecasts as long as they cannot predict the actual impact of the COVID-19 crisis;
  - should withdraw their previously announced forecasts through the publication of an ad hoc release without providing new guidance in case there is a sufficient degree of likelihood that the actual results will significantly fall short of the previously announced forecasts, even if they are unable to provide a new detailed forecast; and
  - have to disclose the new forecast in the form of an ad hoc disclosure once they can provide a sufficiently detailed forecast.<sup>6</sup>

With respect to the upcoming publication of quarterly financial figures, the BaFin highlighted that it is aware of current market volatility and the associated difficulties when determining if the difference between the actual figures and market expectations has a significant effect on the prices of the related financial instrument, and would therefore need to be regarded as inside information and published as soon as possible within the meaning of the Market Abuse Regulation.<sup>7</sup>

In this regard, the BaFin pointed out that – in contrast to its usual practice pursuant to which market expectations have to be determined on the basis of the mean value (arithmetical mean) of current analyst estimates – other means of determining market expectations “*on the basis of*

*plausible information*” are permissible in case the mean value cannot be determined (e.g., because there are not enough estimates available).<sup>8</sup> Furthermore, the BaFin indicated that “*on an exceptional basis*” it might also be justifiable to adjust existing consensus estimates if they are “*clearly no longer up-to-date and do not take into account the current situation.*”<sup>9</sup>

The BaFin also stated that the mere postponement of an issuer’s annual general meeting and the associated postponement of the resolution on the distribution of profits does not in and of itself constitute inside information. However, if the issuer plans to change its dividend policy (e.g., as a result of the recommendation made by the European Central Bank to banks to not pay any dividends) or if other resolutions material to the issuer (e.g., relating to capital measures) will be postponed, such information could be regarded as inside information subject to an ad hoc disclosure obligation under the Market Abuse Regulation.<sup>10</sup>

- **Guidance by the AMF:** The AMF recommended that issuers periodically re-assess the known or anticipated impact of the COVID-19 pandemic on the issuer’s activity, performance or prospects with respect to the materiality and/or amount of such impact.<sup>11</sup> In this regard, the AMF also indicated, on March 23, 2020, that where a significant impact of the COVID-19 outbreak is known or anticipated, previously announced guidance that did not include an assumption regarding the potential impact of COVID-19 must be restated and disclosed by way of a press release from the issuer and published in accordance with the *Règlement général* of the AMF.<sup>12</sup> To date, several issuers of the French CAC40 index have issued ad hoc press releases withdrawing their previously announced forecasts without providing new guidance.<sup>13</sup>
- **Guidance by the FCA:** In addition to the points raised by the BaFin and the AMF, the FCA has also stated<sup>14</sup> that it appreciated, that, in the short term, there may be slight delays in making required disclosures as new processes are put in place to assess the situation. While there is no guidance on what is an acceptable length of delay, past cases suggest that “short” really means very short. (For example, in relation to Marconi,<sup>15</sup> the Financial Services Authority (as the FCA was then known) stated that a reasonable delay of the announcement of materially reduced expected financial performance would have been no more than 24 hours rather than the three days that it actually was taken.)

## 2. Yearly and Half-Yearly Financial Statements and Reports

Pursuant to 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 (as amended, the “Transparency Directive”), issuers have to publish their financial reports (including audited financial statements and management report), at the latest, four months after the end of each financial year – *i.e.*, issuers that closed their accounts on December 31, 2019 have to publish their financial reports on or prior to April 30, 2020.<sup>16</sup> In addition, issuers must also publish a half-yearly financial report, as soon as possible after the end of the relevant period.<sup>17</sup>

In France, the aforementioned deadlines were transposed to national law by Art. L. 451-1-2 of the French Monetary and Financial Code (*Code monétaire et financier*), in Germany by Sections 114 and 115 of the German Securities Trading Act (*Wertpapierhandelsgesetz*) and in the UK by a regulatory statement by the FCA.

### **ESMA: No Priority of Supervisory Actions Against Issuers Failing to Meet Deadlines**

In a statement published on March 27, 2020, ESMA acknowledged the difficulties encountered by issuers in preparing financial reports and the challenges faced by auditors in carrying out timely audits of accounts due to the COVID-19 pandemic, which may impair the ability of issuers to publish within

the legislative deadlines. In this regard, ESMA announced that it expected national supervisory authorities not to prioritize supervisory actions against issuers in respect of the upcoming deadlines to publish their annual and half-yearly financial reports for two-month and one-month periods, respectively, after the deadlines set out by in the Transparency Directive.<sup>18</sup>

### **Specific Guidance by National Supervisory Authorities**

Whereas the BaFin has not issued any additional guidance with respect to the deadlines and the preparation of the financial reports,<sup>19</sup> the national supervisory authorities in France and the UK have issued further guidance as summarized below:

- **Guidance by the AMF:** The AMF has advised issuers that information regarding the main risks and uncertainties to which they are exposed as a result of the COVID-19 pandemic should be provided in their annual financial reports, including their management reports.<sup>20</sup> For issuers that closed their accounts on December 31, 2019, those risks and uncertainties are those that the issuer faces on the date of publication of its annual financial report (*i.e.*, on or prior to April 30, 2020). In addition, the AMF notes that the actual and potential impacts of the COVID-19 outbreak could also be considered as post-closing events requiring disclosure in issuers' year-end 2019 financial statements.<sup>21</sup> For those issuers that have already finalized and published their 2019 year-end financial reports, information regarding the impacts of the COVID-19 outbreak will need to be provided in their interim financial reporting disclosures. The AMF has also granted issuers a two-month extension to publish their annual financial reports (for issuers that have a financial year ending between December 31 and March 31) and a one-month extension to publish the half-year financial reports which would have normally been published during that same period.<sup>22</sup>
- **Guidance by the FCA:** The FCA has granted issuers a temporary two-month extension, to the four months from the end of their financial year they normally have, to publish their audited annual financial reports.<sup>23</sup> The FCA confirmed that it will not take normal regulatory action against issuers who avail themselves of this extension. However, the FCA reserves the right to take this action if necessary for other reasons. The FCA has also published a Q&A document providing additional information on the duration, scope and applicability of the temporary relief. Among other things, this confirms that:
  - The FCA will also give temporary relief from taking action against issuers with a UK listing that are not required to comply with the Transparency Directive, but are subject to the requirement to publish annual financial reports via other UK listing requirements.
  - The temporary relief does not extend to half-yearly financial reports which should be published within three months of the half-year end.
- **Guidance by the FRC:** In addition to the measures taken by the FCA, the FRC has issued further guidance<sup>24</sup> for UK companies preparing financial statements in the current uncertain environment. The guidance addresses the following topics:
  - **Capital maintenance.** Boards are required to pay attention to capital maintenance, ensuring that sufficient reserves are available when the dividend is made, not just when it is proposed. Relevant considerations when assessing whether a dividend is appropriate should include current and likely operational and capital needs, contingency planning and the directors' legal duties, both in statute and common law.
  - **Forward-looking statements.** The guidance also addresses the current difficulties in making forward-looking judgments in financial statements, including the company's strategic reports and viability statements, and aims to help boards to focus on areas of reporting of most interest to investors, and to encourage them to provide clarity on the use of key forward-looking judgments. The guidance covers in particular:
    - The need for narrative reporting to provide forward-looking information that is specific to the entity and which provides insights into the board's assessment

of business viability and the methods and assumptions underlying that assessment.

- Going concern and any associated material uncertainties, the basis of any significant judgements and the matters to consider when confirming the preparation of the financial statements on a going-concern basis.

### 3. Universal Registration Documents: Risk Factors and Financial Guidance

Another topic, which was predominantly addressed by the AMF in a statement published on March 23, 2020, is the impact of the COVID-19 pandemic on the description of the business, financial situation and outlook in the universal registration document (“URD”) of an issuer.<sup>25</sup> In accordance with Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market (as amended, the “Prospectus Regulation”), the persons responsible for the prospectus must declare that, to the best of their knowledge, the information contained in the prospectus is “*in accordance with the facts*” and that “*the prospectus makes no omission likely to affect its import.*”<sup>26</sup> In this regard, the AMF stated, with respect to risk factors and financial guidance, the following:

- **Risk Factors:** In its March 23, 2020 communication, the AMF highlighted that the “Risk Factors” section of URDs and prospectuses should be up-to-date regarding COVID-19 upon filing of the URD or prospectus. The risk factors included in this section should be limited to risks which are material and specific to the issuer and its securities, as corroborated by the content of the URD or prospectus.<sup>27</sup> As regards the specificity of the risk factors, and in accordance with the relevant guidelines published by ESMA,<sup>28</sup> the AMF invited market participants to describe, where possible, the impact of the COVID-19 pandemic on their businesses and/or their main customers’ and suppliers’ specific uncertainties resulting from their businesses or geographical areas. Since the materiality and potential impact of the risk factor should be clear from the disclosure, the AMF also asked issuers to disclose any significant known or anticipated impact of the COVID-19 outbreak, along with their underlying assumptions.
- **Financial Guidance:** As regards forward-looking statements made by issuers, the AMF noted that those statements should be re-assessed in light of the current COVID-19 crisis, and the relevant disclosure included in the URD should be revised accordingly, in particular the information provided with respect to (i) item 5.4 “Strategy and objectives,” which includes a description of the issuer’s business strategy and objectives, taking into account its future challenges and prospects, and (ii) item 11 “Profit forecasts or estimates,” which should describe the issuer’s profit forecast or profit estimates, if any, and set out the principal assumptions upon which the issuer has based its forecast or estimate.

The AMF reminded issuers that where a profit forecast or estimate has been published by the issuer but is no longer valid, issuers must provide a statement to that effect in the URD along with an appropriate explanation, in accordance with Commission Delegated Regulation (EU) 2019/980 of 14 March 2019 supplementing Regulation (EU) 2017/1129 of the European Parliament and of the Council as regards the format, content, scrutiny and approval of the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market (as amended, the “Commission Delegated Regulation”).<sup>29</sup> Given the limited visibility due to the evolving COVID-19 situation, issuers may decide to withdraw their outstanding profit forecast without disclosing a new forecast to the market and to further indicate that a new forecast cannot be provided at this stage given the uncertainty resulting from the current COVID-19 situation. This AFM guidance is in line with the corresponding BaFin FAQ (see above).

## Conclusion

In their guidance, ESMA and the national supervisory authorities of France, Germany and the UK demonstrated that they are aware of the challenges faced by issuers in the context of the COVID-19 outbreak. Although they reminded issuers to adhere strictly to the ad hoc disclosure rules pursuant to the Market Abuse Regulation, ESMA and the other European supervisory authorities have eased the regulatory burden on issuers by providing certain facilitations with respect to the forthcoming publication of the annual and half-yearly financial statements and reports. Given the level of harmonization of European capital markets law, it can be noted that all European regulators, while partially focusing on different special topics, are generally very consistent in their guidance to market participants and are thereby able to increase legal certainty in a time of great economic and financial uncertainty.

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## ENDNOTES

- 1 See Market Abuse Regulation, Art. 17(1).
- 2 See ESMA's press release, dated March 11, 2020, <https://www.esma.europa.eu/press-news/esma-news/esma-recommends-action-financial-market-participants-covid-19-impact>.
- 3 See AMF's press release, dated February 28, 2020, <https://www.amf-france.org/fr/actualites-publications/communiqués/communiqués-de-lamf/lautorite-des-marchés-financiers-rappelle-certaines-regles-dinformation-qui-sappliquent-aux-sociétés>.
- 4 FCA 27<sup>th</sup> Primary Market Bulletin, dated March 17, 2020, <https://www.fca.org.uk/publications/newsletters/primary-market-bulletin-issue-no-27-coronavirus-update>.
- 5 See BaFin's FAQs, available at [https://www.bafin.de/EN/Aufsicht/CoronaVirus/CoronaVirus\\_node\\_en.html](https://www.bafin.de/EN/Aufsicht/CoronaVirus/CoronaVirus_node_en.html).
- 6 See, for example, the ad hoc releases of Infineon Technologies AG, dated March 26, 2020, <https://www.infineon.com/cms/en/about-infineon/investor/news/adhoc/>, and of Thyssenkrupp AG, dated March 23, 2020, <https://www.thyssenkrupp.com/en/newsroom/press-releases/disclosure-of-an-inside-information-according-to-article-17-mar--reliable-assessment-of-the-business-development-in-the-2019-2020-financial-year-currently-not-possible-20032.html>.
- 7 See BaFin's FAQs, available at [https://www.bafin.de/EN/Aufsicht/CoronaVirus/CoronaVirus\\_node\\_en.html](https://www.bafin.de/EN/Aufsicht/CoronaVirus/CoronaVirus_node_en.html).
- 8 See BaFin's FAQs, available at [https://www.bafin.de/EN/Aufsicht/CoronaVirus/CoronaVirus\\_node\\_en.html](https://www.bafin.de/EN/Aufsicht/CoronaVirus/CoronaVirus_node_en.html).
- 9 See BaFin's FAQs, available at [https://www.bafin.de/EN/Aufsicht/CoronaVirus/CoronaVirus\\_node\\_en.html](https://www.bafin.de/EN/Aufsicht/CoronaVirus/CoronaVirus_node_en.html).
- 10 See, for example, the ad hoc releases of Commerzbank Aktiengesellschaft, dated March 30, 2020, [https://www.commerzbank.com/en/hauptnavigation/aktionaere/service/archive/ir-nachrichten\\_1/2019\\_1/ir\\_nachrichten\\_detail\\_19\\_87818.html](https://www.commerzbank.com/en/hauptnavigation/aktionaere/service/archive/ir-nachrichten_1/2019_1/ir_nachrichten_detail_19_87818.html), and of Deutsche Lufthansa Aktiengesellschaft, dated March 13, 2020, <https://investor-relations.lufthansagroup.com/en/news/ad-hoc-releases/investor-relations-ad-hoc-releases/date/2020/03/13/lufthansa-executive-board-proposes-to-suspend-the-dividend-payment-and-decides-on-further-measures-t.html>.
- 11 See AMF's press release, dated February 28, 2020, <https://www.amf-france.org/fr/actualites-publications/communiqués/communiqués-de-lamf/lautorite-des-marchés-financiers-rappelle-certaines-regles-dinformation-qui-sappliquent-aux-sociétés>.
- 12 See AMF's press release, dated March 23, 2020, <https://www.amf-france.org/fr/actualites-publications/actualites/depots-des-documents-denregistrement-universels-et-regles-dinformation-permanente-dans-le-contexte>.
- 13 See Saint-Gobain's press release, dated March 23, 2020, [https://www.saint-gobain.com/sites/sgcom.master/files/20200323\\_coronavirus\\_update\\_va.pdf](https://www.saint-gobain.com/sites/sgcom.master/files/20200323_coronavirus_update_va.pdf); Vinci's press release, dated March 23, 2020, <https://www.vinci.com/vinci.nsf/en/press-releases/pages/20200323-0800.htm>; Schneider Electric's press release, dated March 23, 2020, <https://www.se.com/ww/en/assets/564/document/125784/release-schneider-covid-update.pdf>; and Airbus' press release, dated March 23, 2020, <https://www.airbus.com/newsroom/press-releases/en/2020/03/airbus-announces-measures-to-bolster-liquidity-and-balance-sheet-in-response-to-covid19.html>.
- 14 See FCA statement of Policy: Delaying annual company accounts during the corona virus crisis dated March 26, 2020, <https://www.fca.org.uk/news/statements/delaying-annual-company-accounts-coronavirus>.
- 15 FSA Final Notice Marconi plc: dated April 11, 2003, [https://www.fca.org.uk/publication/final-notice/marconi\\_11apr03.pdf](https://www.fca.org.uk/publication/final-notice/marconi_11apr03.pdf).
- 16 See Transparency Directive, Art. 4(1).
- 17 See Transparency Directive, Art. 5(1).

ENDNOTES (CONTINUED)

- 18 See ESMA's press release, dated March 27, 2020, <https://www.esma.europa.eu/press-news/esma-news/esma-issues-guidance-financial-reporting-deadlines-in-light-covid-19>.
- 19 See BaFin press release, dated March 27, 2020, [https://www.bafin.de/SharedDocs/Veroeffentlichungen/DE/Meldung/2020\\_Corona\\_andereBehoerden/meldung\\_2020\\_03\\_27\\_corona\\_virus18\\_ESMA\\_Finanzberichte.html](https://www.bafin.de/SharedDocs/Veroeffentlichungen/DE/Meldung/2020_Corona_andereBehoerden/meldung_2020_03_27_corona_virus18_ESMA_Finanzberichte.html).
- 20 See AMF's press release, dated February 28, 2020, <https://www.amf-france.org/fr/actualites-publications/communiqués/communiqués-de-lamf/lautorite-des-marchés-financiers-rappelle-certaines-regles-dinformation-qui-sappliquent-aux-sociétés>, and French *Code de commerce*, Art. L. 225-100-1.
- 21 See AMF's press release, dated February 28, 2020, <https://www.amf-france.org/fr/actualites-publications/communiqués/communiqués-de-lamf/lautorite-des-marchés-financiers-rappelle-certaines-regles-dinformation-qui-sappliquent-aux-sociétés>.
- 22 See AMF's press release, dated March 30, 2020, <https://www.amf-france.org/fr/actualites-publications/actualites/continuïte-de-linformation-periodique-dans-le-contexte-depidemie-de-coronavirus>.
- 23 See FCA statement of Policy: Delaying annual company accounts during the corona virus crisis dated March 26, 2020, <https://www.fca.org.uk/news/statements/delaying-annual-company-accounts-coronavirus>.
- 24 FRC Guidance for Companies COVID 19 March update, [https://www.frc.org.uk/about-the-frc/covid-19/company-guidance-update-march-2020-\(covid-19\)](https://www.frc.org.uk/about-the-frc/covid-19/company-guidance-update-march-2020-(covid-19)).
- 25 See AMF's press release, dated March 23, 2020, <https://www.amf-france.org/fr/actualites-publications/actualites/depôts-des-documents-denregistrement-universels-et-regles-dinformation-permanente-dans-le-contexte>.
- 26 See Prospectus Regulation, Art. 11(1).
- 27 See Prospectus Regulation, Art. 16(1).
- 28 See ESMA, Guidelines on Risk Factors under the Prospectus Regulation, dated October 1, 2019, [https://www.esma.europa.eu/sites/default/files/library/esma31-62-1293\\_guidelines\\_on\\_risk\\_factors\\_under\\_the\\_prospectus\\_regulation.pdf](https://www.esma.europa.eu/sites/default/files/library/esma31-62-1293_guidelines_on_risk_factors_under_the_prospectus_regulation.pdf).
- 29 See Commission Delegated Regulation, Annex I, Item 11.1.



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