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France: The Financial Markets Authority Publishes New Guidelines on Disclosure of Inside Information, with No Major Changes for Issuers Undergoing Preventive Proceedings

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Preventive Proceedings (*mandat ad hoc and conciliation*) have existed in France for many years and have contributed to numerous successful turnarounds. Their efficacy relies inter alia on the maintenance of the statutory confidentiality of such proceedings,¹ which to a certain extent conflicts with the duty imposed on listed issuers to disclose inside information, as per the General Regulation² of the Financial Markets Authority (‘General Regulation’). The author reviews recent changes in the applicable regulatory regime.

I. Past practice of the AMF – conflicting duties on an issuer

Over the last few years, the *Autorité des Marchés Financiers*, also referred to as the AMF, the French Financial Markets Authority, has taken the view that the commencement of Preventive Proceedings (i) was required to be brought to its attention,³ and (ii) would be kept confidential as per Article L 611-15 of the French Code of Commerce.⁴

The AMF, however, also took the position in 2009⁵ that issuers subject to Preventive Proceedings were required to regularly inform the public, as per Article 223-1 of the General Regulation, of ‘any significant worsening of their cash situation and of any new facts impacting its business activity’. Furthermore, in several decisions, the AMF’s Sanctions Commission ruled that the commencement of Preventive Proceedings did not preclude the issuer from its duty to inform

the public about the difficulties encountered in raising further funding, obtaining bank guarantees required under a customer agreement, or linked to the increase of its short term debt.⁶

This position and above decisions by the Sanctions Commission prompted some practitioners to question their relevance and compatibility with French pre-insolvency legislation, given the clear conflict faced by an issuer under duty to provide information about the worsening of its cash and financial positions, and its statutory duty not to inform the public that it had commenced Preventive Proceedings in attempts to address the situation with the assistance of a court appointed body (the *mandataire ad hoc*, or the *concliateur*).

Hence the interest of the recent regulatory changes.

II. The EU Market Abuse Regulation⁷ (‘MAR’)

MAR applies from 3 July 2016⁸ and provides that:

‘An issuer ... may on its own responsibility, delay disclosure to the public of inside information provided that all of the following conditions are met:

- Immediate disclosure is likely to prejudice the *legitimate interests* of the issuer...;
- Delay of the disclosure is not likely to mislead the public ;
- The issuer ... is able to ensure the confidentiality of that information.’⁹

Notes

- 1 Please refer also on this to ‘The Cassation Court Sets Ground Breaking Precedent to Preserve the Confidentiality of Pre-Insolvency Preventative Proceedings’, by the same author, in *International Corporate Rescue*, Volume 13, Issue 3, 2016.
- 2 Règlement Général de l’AMF.
- 3 Informing the AMF of the commencement of Preventive Proceedings can be organised via informal meetings with the AMF – see previous Position AMF No. 2009-4 dated 28 July 2009, which is no longer applicable.
- 4 Article L 611-15 of the Code of Commerce imposes a duty of confidentiality on the parties involved in the Preventive Proceedings, or on the persons aware of the Preventive Proceedings by virtue of their functions.
- 5 Position AMF No. 2009-14, dated 28 July 2009, amended on 1 August 2012.
- 6 AMF Sanctions Commission: 4 October 2007; 14 April 2005.
- 7 EU Regulation No. 596/2014 of the European Parliament and of the Council.
- 8 Except for some articles – see Article 19 of the Regulation.
- 9 Article 17.4.(a) and Recital 50 of MAR.

Amongst the examples of legitimate interests of the issuer to delay the disclosure of inside information, provided by the European Securities and Market Authority¹⁰ ('ESMA'), provision is made in 'the event that the financial viability of the issuer is in grave and imminent danger, although not within the scope of the applicable insolvency law ...'. This example is used in the AMF's recent Guidelines on the Permanent Information and the Management of Inside Information, dated 26 October 2016¹¹ ('New Guidelines').

III. The New Guidelines

Under its New Guidelines, the AMF recommends¹² that issuers subject to Preventive Proceedings:

- (i) Inform the AMF of the commencement of the Preventive Proceedings as soon as they are commenced – the providing of this information can be achieved by means of a meeting between the issuer's managing director, its statutory auditor(s), the *mandataire ad hoc/conciliateur* and the AMF.

The information regarding the commencement of Preventive Proceedings will remain confidential insofar as the issuer is in a position to justify that the conditions referred to under Article 17.4 (a) of MAR are fulfilled and that the issuer has a legitimate interest in delaying the disclosure of this inside information. This should not be a major problem for an issuer considering the example

used by the ESMA and reproduced in the New Guidelines.

- (ii) Remain particularly alert on the need to comply with their duty of information towards the public at the different stages of the Preventive Proceedings, for example when the issuer has secured an agreement with its main creditors.
- (iii) Be particularly diligent in their permanent and periodic communication about the evolution of their cash position and level of debt.

This recommendation, which is drafted slightly differently from the AMF's previous recommendations, nevertheless signals that the AMF's position remains globally unchanged compared to its 2009 position. An issuer subject to Preventive Proceedings thus remains bound to inform the public in the event of worsening of its cash position or of its indebtedness, which is a frequent scenario faced by companies in Preventive Proceedings.

As summarised above, the New Guidelines involve no major changes to the current requirements. The public interest, unsurprisingly, continues to take precedence over the interest of listed issuers in distress, who may wish to delay disclosure of inside information linked to the temporary worsening of their financial situation. This remains so even when issuers become subject to Preventive Proceedings, which are otherwise confidential by law and which may eventually enable the issuers to effect a turnaround of their business.

Notes

- 10 Guidelines on the Market Abuse Regulation – market soundings and delay of disclosure of inside information – 13 July 2016/ESMA/2016/1130.
- 11 Page 11 of the 'Guide de l'Information Permanente et de la Gestion de l'Information Privilégiée – Position-recommandation DOC-2016-08'.
- 12 Page 21 of the New Guidelines.