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## Stellungnahme zum Entwurf einer Verordnung zur Stärkung der europäischen Aufsichtsbehörden (ESA)

Die WPK hat mit Schreiben vom 23. Januar 2018 gegenüber dem Europäischen Parlament und dem Europäischen Rat zu dem Entwurf einer Verordnung zur Stärkung der europäischen Aufsichtsbehörden (ESA) wie nachfolgend wiedergegebene Stellung genommen.

WPK, the German Chamber of Public Accountants, welcomes the opportunity to comment on the proposal for a regulation amending amongst others the EBA-, the EIOPA- and the ESMA-Regulations. We would like to provide you with our comments in this context restricted to audit related issues.

1. The draft regulation includes new **disclosure obligations for auditors** and others to provide information to ESMA in specific situations. However in cases where information or documents are subject to *legal privilege* these disclosure obligations are limited.
  - The Amendments to **Regulation (EU) No 600/2014 on markets in financial instruments** (Article 6 of the draft regulation) urge the auditor and advisor of '*approved publication arrangements (APA), consolidated tape provider (CTP), approved reporting mechanisms (ARM) and investment firms of market operators operating a trading venue to operate the data reporting services on an APA, CTP, ARM and the persons that control them or are controlled by them*' to provide ESMA all information about their audit clients necessary to carry out ESMA's duties (Article 38b). Furthermore ESMA shall also be empowered to examine any records, data, procedures and any other material relevant to the execution of ESMA's task, take or obtain certified copies, summon, ask and interview representatives and staff and request records of telephone and data traffic (Article 38c). Finally ESMA may conduct on-site inspections at the auditor's premise (Article 38d).

In this context Article 38a provides that the above listed disclosure rights of ESMA shall not be used to require the disclosure of information or documents which are subject to *legal privilege*.

- The Amendments to **Regulation (EU) No 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market** (Article 9 of the draft regulation) impose in Articles 43b, 43c and 43d disclosure obligations on auditors similar to those mentioned above. In this case auditors of *'issuers, offerors or persons asking for admission to trading on a regulated market, and the persons that control them or are controlled by them'* are affected.

Also Article 43a restricts the powers conferred to ESMA in that they shall not be used to require the disclosure of information or documents which are subject to *legal privilege*.

As far as we know, the term *legal privilege* is neither defined in the draft regulation (COM(2017)536) nor in the underlying regulations 2017/1129 and 600/2014. Accordingly there is a risk that different understandings about the scope and meaning of the term *legal privilege* exist across different EU member states and between the parties involved. Against this background we recommend a clarification of the term *legal privilege* in the draft regulation.

Auditors in Germany for example have to comply with strict legal secrecy obligations regarding all matters of the client-auditor-relationship. In this context German auditors have the legal right to refuse to give evidence in legal proceedings and documents, data, other material of the auditor are prohibited from confiscation. From our understanding, the German legal secrecy obligations for the audit profession fall under the term legal privilege in the draft regulation.

2. Furthermore, the Amendments to **Regulation (EU) No 600/2014 on markets in financial instruments** (Article 6 of the draft regulation) contain additional new **disclosure obligations for auditors**.

Article 54b requires auditors of *data reporting services providers* to report promptly to ESMA any fact or decision concerning that undertaking of which the auditor has become aware during the audit and which is liable to:

- (a) constitute a material infringement of the laws, regulations or administrative provisions which lay down the conditions governing authorisation or which specifically govern pursuit of the activities of data reporting services provider;
- (b) affect the continuous functioning of the data reporting services provider;
- (c) lead to refusal to certify the accounts or to the expression of reservations.

The EU Audit Regulation (Regulation (EU) No 537/2014), which came into force in June 2016, requires in Article 12 the auditor of *public interest entities* to report information of which the auditor has become aware during the audit and which may result in:

- (a) a material breach of laws and regulations or administrative provisions which lay down the conditions governing authorisation or which specifically govern pursuit of the activities of such public-interest entity,
- (b) a material threat or doubt concerning the continuous functioning of the public-interest entity, or
- (c) a refusal to issue an audit opinion on the financial statements or the issuing of an adverse or qualified opinion.

According to Article 12 of the EU Audit Regulation the information of the auditor shall be submitted to the competent authorities supervising that public-interest entity on national level or, where so determined by the Member State concerned, to the competent authority responsible for the oversight of the statutory auditor on national level.

The EU Audit Regulation stipulates reporting requirements for the auditor towards the national authorities, which are competent for supervising either the public interest entity or the corresponding auditor. Direct reporting of the auditor to the ESMA is in contrast to the approach of the EU Audit Regulation. Accordingly ESMA's information and disclosure rights should be directed towards the competent national authorities. This might also avoid duplicate reporting requirements of the auditor.

Additionally, the use of different terminology in Article 54b (Regulation (EU) No 600/2014) and Article 12 (Regulation (EU) No 537/2014) for obviously the same requirements may cause confusion and should be avoided. We therefore recommend sticking to the professional terminology used in Art. 12 of Regulation (EU) No 537/2014.

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We hope that our comments will be of assistance to you.

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