



European Securities and
Markets Authority

Final Report

ESMA Guidelines on enforcement of financial information

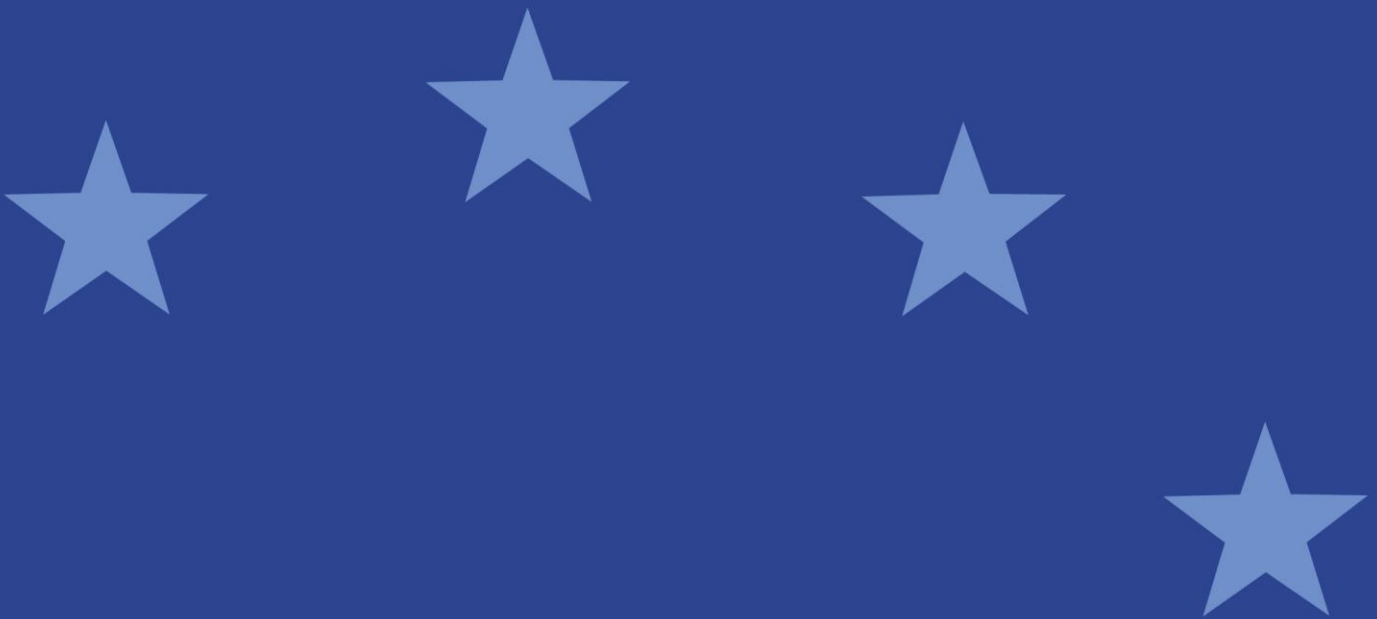


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List of abbreviations and acronyms used in this report

CP	Consultation Paper
CESR	Committee of European Securities Regulators
EC	European Commission
EEA	European Economic Area
EECS	European Enforcers Coordination Session
EU	European Union
ESMA	European Securities and Markets Authority
GAAP	Generally Accepted Accounting Principles
IASB	International Accounting Standards Board
IFRS	International Financial Reporting Standards
IFRS IC	International Financial Reporting Standards Interpretation Committee
MTF	Multilateral Trading Facilities
SMSG	Securities and Markets Stakeholder Group



Executive Summary

Reasons for publication

The European Securities and Markets Authority (ESMA) issued in July 2013 a Consultation Paper (CP) on guidelines on enforcement of financial information ('guidelines') to replace the standards on enforcement issued by the Committee of European Securities Regulators (CESR) in 2003-2004. The guidelines apply to the activities carried out by European enforcers to ensure that financial information provided by issuers in accordance with the Transparency Directive complies with the applicable financial reporting framework.

This report provides an overview of the feedback received from stakeholders and the ESMA Securities and Markets Stakeholder Group (SMSG) on issues relating to enforcement activities and convergence of supervisory practices at the European level and the ESMA response to it. The final guidelines presented in Annex IV take into account the suggestions raised by respondents.

Contents

ESMA welcomes the generally positive feedback received on the proposed guidelines, underlining the importance of a common European approach for the enforcement of financial information, which is key to achieve a proper enforcement regime and underpin investors' confidence in financial markets.

Respondents supported the need for harmonisation of enforcement activities in Europe and considered that the guidelines provide adequate principles on the work to be performed by enforcers when examining financial information. Overall, respondents agreed with the alignment of the working methodologies of the enforcers and the development of adequate selection methods.

Most of the respondents supported the use of European common enforcement priorities in order to strengthen coordination at the level of the Single Market in the European Union (EU) and improve investors' confidence in financial markets. They believed that the discussions of decisions and emerging issues improve the knowledge and experience on International Financial Reporting Standards (IFRS) enforcement matters amongst enforcers. They were also supportive of effective, timely and proportionate actions undertaken by enforcers and adequately communicated to market stakeholders.

Overall, respondents recalled the need to ensure that ESMA and European enforcers do not interfere with standard setters' role other than by regularly bringing to their attention issues in accounting standards which have come to the enforcers' attention in the course of their work. In addition, they endorsed ESMA's view that materiality for enforcement purposes should be the same as defined in the relevant reporting framework.

ESMA has taken note of the responses received and decided to adjust some terms used, such as 'unlimited scope' and 'focused' examinations in the enforcement process or the description of the actions taken by enforcers when infringements are discovered.

ESMA has also considered and addressed some criticism received from respondents, in respect to the lack of a cost-benefit analysis, data protection inconsistencies and misunderstandings over the extent of potential overlap between enforcement discussions at national and European level. As respondents provided extensive comments on whether the financial information provided in prospectuses should be in the scope of these guidelines, ESMA has decided to address this matter separately as part of its work related to the Prospectus Directive.



Next steps

Following the translation of the guidelines in Annex IV into the official languages of the EU, the final texts will be published on ESMA's website.

The guidelines will become effective two months after their publication on ESMA's website in all the official languages of the EU.

I. General remarks

1. This feedback statement provides an overview of the responses received by ESMA to the CP, describes any material changes to the guidelines set out in Annex IV of the CP (or confirms that there have been no material changes) and explains the reasons for this in the light of the feedback received.
2. The comment period closed on 31 October 2013 with 31 responses received from a broad range of stakeholders, with the majority from the following categories: preparer representatives (22%), accounting bodies (19%), audit firms (12%) and user representative bodies (16%). Other responses came from an academic, standard setters and government bodies. A detailed list of the respondents grouped by category is provided in Annex I.
3. ESMA also received the SMSG 'Advice to ESMA' on the CP, which is included in Annex III. The SMSG is a key ESMA stakeholder consultative body composed of 30 individuals from 17 Member States and representing academics, consumers, financial institution employees, financial market participants, small and medium sized enterprises as well as users of financial services. This group facilitates consultation with stakeholders in areas relevant to ESMA's tasks such as the development of technical standards and guidelines.
4. The answers received on the CP are available on ESMA's website¹. The CP included 20 questions on various sections of the proposed guidelines. ESMA is most grateful to all who took the time to bring their contribution to the consultation process. Some answers were more general, while others were very specific to the questions asked. The number of responses received on each question is included in Annex II. For each question answered in the CP, ESMA included in the feedback statement a summary of the main messages from the comments received on the guidelines and the feedback provided by ESMA.

Overall messages

5. The objective of the CP was to seek stakeholders' views on how a common European approach would best contribute in achieving a proper and rigorous enforcement regime in order to underpin investors' confidence in financial markets and to avoid regulatory arbitrage.

¹ <http://www.esma.europa.eu/consultation/Guidelines-enforcement-financial-information#responses>

6. The SMSG strongly supported and agreed with the proposed guidelines for the European enforcers and encouraged ESMA to bear an even greater role with respect to the enforcement of financial information in order to foster supervisory convergence and achieve a level playing field. Several respondents indicated that coordination under ESMA and issuance of various reports, statements and opinions help the on-going dialogue between enforcers and the accounting profession.
7. ESMA will continue to foster a common European supervisory culture in order to contribute to the strengthening of the single market. The guidelines will strengthen the European coordination by fostering common enforcement approaches through discussions of emerging issues and decisions as well as experience sharing.
8. The SMSG also suggested some areas for further attention in the guidelines. One of these suggestions is that enforcers monitor not only the compliance but also the content of the disclosed information in order to ensure that the information to investors is not misleading, while not entailing the enforcer's liability for a failure to identify communications that are incorrect or misleading. Furthermore, some SMSG members asked ESMA to assess the scope of the guidelines and to eventually also include companies admitted to trading on Multilateral Trading Facilities (MTF).
9. ESMA carefully considered the points raised by the SMSG and addressed them by ensuring appropriate consideration of ESMA's role and powers. The content of disclosed information is dealt with in paragraph 22 of the guidelines, which specify that enforcers make sure that "the market is provided with accurate information" and that enforcement applies to other disclosure requirements relating to the documents and implementing texts requested by national or EU law.
10. Regarding the inclusion of the MTF in the scope of the guidelines, ESMA would like to point out that article 1 of the Transparency Directive states that its requirements apply only to the disclosure of information about issuers admitted to trading on a regulated market. As MTFs do not have regulated market status, ESMA cannot override the provisions in the Transparency Directive and include them through these guidelines.

II. Feedback Statement

11. This section provides a summary of the responses, by identifying the main comments from the respondents and ESMA's view on those responses, together with changes to the proposed guidelines, where appropriate. When summarising the answers to the CP, ESMA used the formulation 'proposed guidelines'. All other references are made to the final guidelines included in this report.

Objective, concept and scope of enforcement

Question 1: Do you think that the proposed guidelines will improve the quality and consistency of financial reporting in Europe?

12. Based on the answers provided by 19 respondents, there was overall agreement on the merits of the guidelines on enforcement of financial information. Respondents considered that the implementation of these guidelines will foster effective enforcement and contribute to investors' protection. Some respondents from the accounting and user representative bodies considered that they will generate improvements in the long-term.
13. Three respondents considered that benefits to users will be generated when the European enforcers operate under a common principles-based enforcement and methodology approach, according to which the guidelines are flexible and not excessively detailed to allow an enforcement approach suitable to the national facts and circumstances.
14. Three auditors highlighted that the quality of financial information published by issuers has improved, as shown in successive ESMA activity reports on enforcement. They expected this trend to continue with the implementation of the guidelines on enforcement and suggested that enforcers release public statements on the overall quality of financial information.
15. The academic response confirmed the positive effect of enforcement on the quality of financial information. Even though it acknowledged the difficulty in carrying out a comprehensive analysis of the effects of the enforcement mechanism, this respondent suggested additional research to analyse the strengths and weaknesses of the enforcement system in each jurisdiction; such analysis would be useful for the design of future regulation.
16. ESMA is pleased with the overall support given by respondents to the CP with respect to the merits of the guidelines, their relevance to the further development of an effective enforcement system, the improved investor confidence in financial markets and the expected quality improvements in financial statements. ESMA welcomes further academic research on the specificities of the enforcement systems and looks forward to future academic work in this area.
17. ESMA takes note of the comments related to the excessive level of details and lengthy procedures generated by the enforcement process. However, ESMA considers that the enforcement process is thorough but efficient and the aim of the guidelines is to reach a high level of harmonisation and to ensure investor confidence in the financial reporting of companies listed in the European Economic Area (EEA). As such, these guidelines, based on improvements made to the previously applied CESR standards, have achieved the right balance on the level of details.
18. ESMA acknowledges that respondents said the enforcers' work contributes to the improved quality of financial reporting. For the time being, ESMA does not intend to comment on the overall quality of reporting, other than in the context of some specific reports, in which such comments should be read in conjunction with the objective and the content of those reports.

Question 2: Do you have any comments on the potential costs to the financial reporting community of any aspects of these proposals?

19. Most of the 12 respondents who answered this question believed that the proposed guidelines would generate a cost for the financial reporting community, six of them (preparers and auditors) considered that, in general, any additional regulatory measures automatically incur a cost to the issuers and/or market participants. Two other respondents had a different view. One auditor considered there would not be any significant incremental cost, while another auditor asked for an assessment of the potential benefit of the guidelines to investors.
20. The absence of a Cost Benefit Analysis (CBA) was criticized by five respondents who did not agree with the reasons provided by ESMA for its exemption in Annex II of the CP. Despite the fact that the guidelines are addressed to enforcers, most respondents would like to know the total cost of an effective enforcement system in Europe. Three respondents pointed out that no study on the costs and benefits of enforcement systems has been performed recently and that the publication of the guidelines would have been an excellent opportunity to undertake such analysis.
21. ESMA takes note of the concerns raised on the lack of a CBA but considers that conducting a full analysis of the cost of the enforcement system was not in the scope of this project. The enforcement function has been put in place through the implementation of the Transparency Directive and the conduct of such analysis could only be undertaken in relation to a revision of the relevant text by the European Commission (EC).
22. Furthermore, ESMA recalls that article 16 (2) of the ESMA Regulation requires an analysis of the potential costs and benefits, unless it is disproportionate in relation to the scope and impact of the decision on the regulatory policy. When proposing the enforcement guidelines, ESMA considered that such analysis was not appropriate as the basis of the principles developed in the guidelines has already been covered by the previous CESR standards and supported by the recital from the IAS Regulation².
23. Considering the application of the CESR standards by enforcers for the last ten years and the fact that only relatively limited changes to enforcement are proposed by these guidelines, ESMA believes that the effect will be limited to a potential minor increase in the administrative cost for issuers. Such cost is typically spread over all issuers through listing fees and would be minor compared to the administrative cost of the issuer of preparing financial statements in accordance with the financial reporting framework.
24. Moreover, ESMA points out that enforcement should keep pace with the developments in the European Single Market and ESMA should fulfil its duty with respect to supervisory convergence and investors' protection as provided in the ESMA Regulation.

² Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the introduction of the international accounting standards in the European Union.

Benefits

25. The enforcement activity contributes to investors' protection by examining financial information based on the consistent application of the relevant financial reporting framework and by ensuring that issuers who do not comply with the rules face consequences. Progress is generated by regularly reviewing enforcement cases at the European Enforcers Coordination Sessions (EECS) and ensuring corrective actions where infringements of the financial reporting regulation are identified. The results of those discussions allow ESMA to actively contribute to the standard setter's activities by identifying divergence in accounting practices and contributing to achieving high quality accounting standards.
26. While investors benefit from the consistent use of a single financial reporting framework through the introduction of the IAS Regulation, they also value the examination of the compliance of the financial information with that framework. Therefore, ESMA found it key to develop a harmonised approach for enforcement of financial information in the European Single Market to increase supervisory convergence and to foster investors' confidence.
27. ESMA considers that this will promote the achievement of greater confidence in financial markets by way of additional transparency, access to reliable and accurate sources of financial information, and stronger confidence in the financial information given to financial markets as well as generating a lower cost of capital.

Question 3: Do you agree that a common European approach to the monitoring and enforcement of financial information is required in order to avoid regulatory arbitrage by issuers? In this context, regulatory arbitrage refers to the position where an issuer's choice of the market on which to list its securities may be influenced by different approaches to enforcement being applied in different European jurisdictions.

28. From the 19 respondents to this question, five agreed on the existence of regulatory arbitrage and believed that a common European approach to the enforcement of financial information was necessary to avoid it. In their view, the consistent application of the financial reporting framework and the adoption of relevant enforcement measures will contribute to a level playing field within the European Single Market. Furthermore, the SMSG believed it was important to send a strong signal to market participants and to reinforce a level playing field for the protection of investors.
29. Eight respondents disagreed with the existence of regulatory arbitrage and considered that this issue was mainly theoretical and not supported by any evidence. Six other respondents considered that an issuer's decision to choose a different jurisdiction for listing its securities is based on various factors, such as the depth of the pool of, and quality of, investors, the specific requirements in terms of corporate governance and taxation, and lastly the confidence that users of financial information have in the enforcement regime of that jurisdiction. As such, the existence of regulatory arbitrage may only occur in limited circumstances.

30. Two respondents commented on the financial consequences of enforcement and believed that an emphasis on eliminating regulatory arbitrage was likely to raise the cost of raising capital without providing benefits to investors and therefore that it would be detrimental to the efficiency of capital markets.
31. Three respondents from accounting bodies encouraged ESMA to make sure all issuers of listed securities fall within the scope of enforcement of one and only one enforcer. One of those respondents considered that “Member States can choose the scope of their enforcement regime, which usually is determined by the fact that the issuer’s registered office is within the Member State, or their securities are listed on the Member State’s regulated market. Therefore, an issuer whose registered office and securities listing are located in two different Member States could be subject to two enforcement regimes. This undesired consequence should be avoided.”
32. ESMA emphasizes that it is not the aim of the guidelines to prove the existence of regulatory arbitrage. However, ESMA is aware of some situations where issuers might have chosen, where allowed, a different jurisdiction for listing their securities based on the lack of full harmonisation of enforcers’ supervisory powers and practices. Overall, ESMA believes that one of the effects of the common European enforcement approach is to help to prevent regulatory arbitrage from happening.
33. ESMA recalls that the definitions of ‘Home’ and ‘Host’ Member States are included in article 2.1 of the Transparency Directive. Moreover, this issue was addressed in recital 20 of the amended Transparency Directive, which states that “all issuers whose securities are admitted to trading on a regulated market within the Union should be supervised by a competent authority of a Member State to ensure that they comply with their obligations”. The references to the definitions of ‘Home Member State’ and ‘Host Member State’ in the Transparency Directive are recalled in the definition section of these guidelines.
34. ESMA will explore ways of setting up an operating process for a coordinated exchange of information about companies listed in a country different from the one in which they are registered. Later on, this process should be facilitated with the introduction of the European electronic access point and a centralized access to regulated information, in line with article 21 (a) of the Transparency Directive.

Question 4: Do you agree with the objective, definition and scope of enforcement set out in these paragraphs 11 to 21 of the proposed guidelines?

35. This question has been answered by 16 respondents.

Objective

36. Thirteen respondents from a broad range of backgrounds (users, auditors, regulators and accounting bodies) supported the proposed objective of enforcement and considered that it should address not only investors’ but also issuers’ needs. Some respondents suggested extending the objective to include education and support for preparers of financial information.

37. Three auditors required some clarification on the hierarchy of objectives included in the proposed Guideline No. 1. They suggested that promoting compliance should be the main goal and that consistent application of the financial reporting framework should only be a secondary objective so that it does not conflict with IFRS principles whose application requires reasonable judgment.
38. ESMA takes note of the general agreement on the objective of enforcement and recalls that this objective is to contribute to a consistent application of the relevant reporting framework. This sole objective contributes to the protection of investors and the avoidance of regulatory arbitrage and ESMA does not see the need to differentiate between compliance and consistent application of the financial reporting framework.

Concept

39. Three auditors suggested that enforcement should put greater emphasis on the quality and consistency of financial information published by issuers and proposed to clarify that enforcement targets financial information primarily relevant to investors.
40. Four respondents (accounting bodies and auditors) expressed concerns that enforcers might go beyond their remit in that they might issue specific interpretations of the IFRS. They suggested responsibilities should be clearly defined in order to avoid the risk that enforcers provide an alternative rulebook to the relevant financial reporting framework. They believed that this would either contradict the 'principle-based' approach of IFRS or close options for encouraging best practices where different accounting treatments are allowed by IFRS.
41. ESMA believes that the emphasis on quality and consistency is addressed in the section on the objective of enforcement in the guidelines and recalls that the check of the compliance of financial statements is necessary to ensure investors' protection, as mentioned in the primary legislation.
42. ESMA considers that the publication of enforcement decisions provides useful information to market participants on whether an accounting treatment is considered within the accepted range of treatments permitted by IFRS. As further explained in the answer to question 20, such publications, together with the rationale behind the decisions, contribute to promoting a consistent application of IFRS. In their decisions, enforcers only examine the compliance of the financial information with the relevant financial reporting framework and do not provide generally applicable interpretations of IFRS, as this remains the role of International Financial Reporting Standards Interpretation Committee (IFRS IC).
43. ESMA fully agrees that enforcers have neither the role to give an audit opinion on financial statements nor the intention to substitute for the work of auditors or to develop general interpretations of the financial reporting framework.

Scope

44. Five respondents supported the fact that the guidelines only apply to regulated markets. Some SMSG members recommended an extension of the scope to companies with securities listed on MTF, while some other SMSG members reiterated that this would be against the principle of

proportionality. In addition, some respondents requested clarification of the meaning of the ‘other requirements’ as specified in paragraph 20 of the proposed guidelines.

45. As previously indicated, it is not within ESMA’s remit to change the scope of the application of the Transparency Directive, and ESMA cannot amend the scope of the guidelines to include MTF securities. ESMA would also like to clarify that the term “other requirements” relates to implementing texts either in the form of national or EU law.

Question 5: Do you agree that issuers from third countries using an equivalent Generally Accepted Accounting Principles (GAAP) to IFRS should be subject to an equivalent enforcement and coordination system? Do you agree with the measures proposed to make this enforcement more efficient?

46. This question has been answered by 13 respondents, who expressed general agreement on the proposal, even though few respondents provided extensive feedback.
47. Seven respondents agreed with the need and welcomed the proposals for equivalent enforcement of and coordination systems for third country issuers. They asked ESMA to clarify whether the competent authority was the enforcer of the resident state or the enforcer of the listing state. They underlined the difficulty of such enforcement, the challenge to compare different standards and reporting regulations and to identify the occurrence of regulatory arbitrage.
48. Some respondents drew attention to paragraph 24 of the proposed guidelines and questioned whether the functioning of a centralized enforcement team would be cost effective. In case of debate on the choice of an enforcer’s jurisdiction for third country issuers, auditors suggested establishing a dedicated mechanism for the automatic appointment of either another enforcer or a centralized enforcement team.
49. ESMA recalls that in accordance with article 23 of the Transparency Directive, whenever an issuer with a registered office located in a third country applies to be admitted for listing on a European market, the enforcer of the country in which the issuer requests to be listed is responsible for ensuring that the information provided by that issuer is disclosed in accordance with the requirements of the Transparency Directive. Issuers with their registered office outside the EEA have the possibility to choose the EEA jurisdiction in which they want to list their securities.
50. ESMA believes that the proposed process in the guidelines for equivalent enforcement of financial statements prepared under third country GAAP deemed equivalent to IFRS is coherent and cost effective. Whenever necessary, a European enforcer may refer the task of examination of compliance with the relevant financial reporting framework to another enforcer or to a centralised team organized by ESMA, even though the national enforcer remains the ultimate decision taker.

European enforcers

Question 6: Do you agree that enforcers should have the powers listed in paragraph 30 of the proposed guidelines? Are there additional powers which you believe that enforcers should have?

51. This question has been answered by 17 respondents.

Powers of the enforcers

52. Almost all respondents generally agreed with the list of powers indicated in paragraph 30 of the proposed guidelines. Seven respondents highlighted that it is imperative to remain within the scope of the Transparency Directive, as the final responsibility for compliance and enforcement lies with the National Competent Authorities.
53. In order to address the concerns of some respondents regarding the competent authorities in relation to the terms 'central' and 'administrative' and further align terminology with the Transparency Directive, ESMA has amended paragraphs 30 to 32 of the guidelines as follows:
54. Paragraph 26 of the CP, renumbered 30 in the guidelines: Under the Transparency Directive, enforcement responsibilities are carried out by the competent authorities designated in each Member State and/or in some cases by other entities which have received a delegation for this purpose.
55. Paragraph 27 of the CP, renumbered 31 in the guidelines: Under the Transparency Directive, Member States shall designate a central competent administrative authority responsible for carrying out the obligations provided for in the directive and for ensuring that the provisions adopted pursuant to the directive are applied. However, when it comes to examining whether information referred to in the Transparency Directive is drawn up in accordance with the relevant reporting framework and taking appropriate measures in case of discovered infringements, the Member States may designate a competent authority other than the central competent authority.
56. Paragraph 28 of the CP, renumbered 32 in the guidelines: Member States may also allow their central competent authority to delegate tasks. The designated competent authority is responsible for enforcement, whether it carries out enforcement itself or whether it has delegated the task to another entity. Any such delegated entity should be supervised by the delegating authority and be responsible to it. The final responsibility for supervising compliance with the provisions of the Transparency Directive, including the responsibility for the establishment and maintenance of an appropriate process for enforcement remains, in any case, with the designated competent authorities of the relevant Member States.
57. Several respondents wanted to make sure that paragraph 31 of the proposed guidelines allowing enforcers to require information on persons exercising voting rights or holders of shares was not in breach of the Data Protection legislation.
58. Three other respondents suggested clarifying some of the powers of the enforcers in the examination process, as the information asked from issuers should be based on the existence of a suspicion or documented reason. Other respondents questioned the opportunity to undertake on-site inspections and believed that the word 'suspicion' was not appropriate and had a negative meaning.

59. ESMA considers that the guidelines are consistent with the relevant legislation in the area of data protection. An enforcer only processes personal data for the performance of tasks carried out in the public interest, on the basis of the relevant legislative texts. In ESMA, all processing operations of personal data are duly notified to the European Data Protection Supervisor. In line with their policies, ESMA and the European enforcers ensure that the information collected is processed and/or accessed only by the members of their staff responsible for the corresponding processing operations.
60. The powers of the enforcers are derived from the implementation of the Transparency Directive and ESMA considers that such powers are necessary to ensure an effective enforcement.

Request for information from auditors

61. Auditors expressed concerns on the requests for information from auditors in the enforcement process. They believed that requesting auditors' working papers will be in breach of auditors' duties of independence and secrecy. In order to reaffirm their independence and confidentiality obligations, they recalled that enforcers' key source of information should remain the issuer, while the issuer should be obliged to inform its auditor (s) of any enforcement activity.
62. ESMA considers that requesting information from auditors during the enforcement process is in line with article 24.4 (a)³ of the Transparency Directive, according to which such power is a viable option. Even though the usual practice is for the enforcer to initially ask the issuer, individual enforcers may have different practices and experiences. As such, direct contacts with auditors can be an effective tool for enforcement. However, the characteristics of those processes should be in line with national laws, which may allow different practices while informing the issuer or specifying the grounds for examination.

Sanctioning powers

63. Five respondents and the SMSG recalled the importance of the use of sanctions and suggested that enforcers be granted the power to take appropriate administrative or civil sanctions and measures where the requirements of the relevant reporting framework have not been complied with. They proposed that enforcers have the ability to take administrative sanctions which are then made public in order to re-affirm the usefulness of enforcement when the financial reporting process has failed.
64. ESMA takes note of the suggestion to grant an additional power regarding civil sanctions and recalls that the legislation draws a clear line in the enforcement process between actions taken to protect investors and sanctions taken to punish wrong-doers. ESMA does not deal with the latter in the guidelines, as the power to issue and use sanctions is dealt within the primary legislation (at European and national level) and falls outside of ESMA's remit. Article 28 of the amended Transparency Directive provides an adequate legal basis for ensuring appropriate sanctions in all European countries in case of breaches.

³ Each competent authority shall have all the powers to require auditors (...) to provide information and documents

Question 7: Do you agree that enforcers should have adequate independence from each of government, issuers, auditors, other market participants and regulated markets? Are the safeguards discussed in paragraphs 38 to 41 of the proposed guidelines sufficient to ensure that independence? Should other safeguards be included in the guidelines? Do you agree that market operators should not be delegated enforcement responsibilities?

65. This question has been answered by 18 respondents, who generally supported the need for the adequate independence of the enforcer. The provisions included in the proposed Guideline No. 4 (final Guideline No. 3) reached consensus among respondents, in particular with a strong support for the need for a code of ethics. Five respondents believed that members of the enforcement body should be 'highly' independent and they pointed out the importance of a code for nominations, appointment and composition of enforcer's board members. Auditors proposed a general principle in which any person connected with a party involved in a particular case should not be able to influence the process.
66. Three respondents considered that independence from government was difficult to achieve. One of those respondents suggested expanding the meaning of 'undue influence by members of the political system' while another proposed independence from government in a more open way to take account of the different administrative structures in the Member States. This respondent believed that the ESMA guidelines should not impact the administrative structures of Member States and thus, welcomed the fact that the proposed guidelines have only restricted "undue" influence from government.
67. ESMA welcomes the support of the respondents for the need for the independence of enforcers and considers the comments received as a support to such adequate independence of enforcers. Proportionate measures such as the use of codes of ethics and board composition highlighted in Guideline No. 3 will allow enforcers to achieve a higher level of independence in the performance of their mission, taking into consideration the different set ups at national level.

Delegating enforcement activities to market operators

68. Respondents had mixed views on ESMA's proposal that enforcement should not be delegated to market operators. Three respondents fully shared ESMA's view on the prohibition of the delegation of enforcement responsibilities to market operators. On the other hand, three other respondents and the SMSG expressed concerns as they believed that the prohibition of market operators from assuming delegated enforcement responsibilities was "too far reaching" and that significant issues could be raised in regulated markets having a delegation of powers from the relevant enforcer.
69. Two respondents asked ESMA to clarify the definition of 'market operators', to which paragraph 39 of the proposed guidelines prohibits delegation of enforcement responsibilities, and how this relates to Self-Regulating Organizations (SRO). They recalled Principles No. 6 and 7 of the CESR Standard No.1 which explicitly states that independence requirements are fulfilled if the relevant competent administrative authority monitors that the enforcement mechanism follows all the principles for enforcement.

70. ESMA takes note of these concerns and recalls the principles requiring that enforcers have adequate independence from market participants and market operators in order to achieve effectiveness of their enforcement activities.
71. Finally, ESMA recalls that article 4.1.13 of the MiFiD Directive defines a ‘market operator’ as ‘*a person or persons who manages and/or operates the business of a regulated market. The market operator may be the regulated market itself.*⁴

Enforcement activities

Question 8: Are you in favour of enforcers offering pre-clearance? Do you have any comments on the way the pre-clearance process is described and the pre-conditions set in paragraphs 42 to 45 of the proposed guidelines?

72. This question has been answered by 19 respondents from all categories, who expressed mixed positions on the proposed use of pre-clearance.
73. Twelve respondents considered that pre-clearance is a well-accepted practice in a number of jurisdictions, allows a useful exchange of views on complex financial reporting issues and helps issuers and investors. The SMSG expressed support for the possibility of offering pre-clearance, even though enforcers and issuers should ensure that the process is not used in a questionable manner.
74. Three other respondents disagreed with the practice of pre-clearance as they considered such process was inefficient. They feared that pre-clearance would preclude an appropriate discussion between issuers and auditors as part of the preparation and audit of the financial statements.
75. Five other respondents considered the scope of pre-clearance and suggested allowing pre-clearance only in exceptional and well-defined circumstances, as significant differences prevail in the way it is performed in the Member States. They also asked ESMA to make sure that no opportunities for arbitrage by issuers arise.
76. Two accounting bodies and one user representative organisation believed pre-clearance should only be applied to financial information included in prospectuses, while ensuring that the enforcer does not become too actively involved in the preparation of financial statements.
77. Auditors suggested ring-fencing the practice of pre-clearance. The risk of abuse of pre-clearance should be mitigated by the power of refusal when the enforcer believes the issue should be addressed by the standard setter.

7. Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments - Article 4.1.13

78. Two accounting bodies and the academic respondent considered that a formal process for pre-clearance should be established without imposing it on all enforcers as it might be inappropriate in some jurisdictions.
79. ESMA takes note that the respondents' opinions are divided on pre-clearance procedures and recalls that pre-clearance is neither an obligation nor a right. In line with Guideline No. 4, ESMA considers there is no opportunity for pre-clearance to allow arbitrage between auditors and enforcers as pre-clearance is only permitted provided that the issuer and the auditor have finalised their position on the proposed accounting treatment. Paragraph 46 of the final guidelines specifies that a decision taken as part of a pre-clearance is to be taken in a similar way as for an ex-post decision.

Question 9: Do you agree that in order to ensure investor protection, the measures included as part of a prospectus approval should be supplemented by additional measures of ex-ante enforcement in relation to financial information? If yes, could you please specify the exact nature of ex-ante enforcement that you would expect from enforcers?

80. This question has been answered by 16 respondents and some of them commented in general terms on the absence of explanatory paragraphs to the proposed Guideline No. 6. Eight respondents agreed and four conditionally agreed that a full 'ex-ante review' of financial statements and other financial information should be the normal procedure before a prospectus is approved. Some of those respondents raised the particular importance of 'ex-ante reviews' when an issuer uses IFRS for the first time and the need to increase reliance on published financial information.
81. Four respondents and the SMSG pointed out the different purposes of the approval of a prospectus and the enforcement of financial information. They indicated that approval of prospectuses focuses on compliance with the requirements of the Prospectus Directive and Prospectus Regulation and does not entail a procedure in relation to the compliance of the financial information with the relevant financial reporting framework. Furthermore, they considered that the procedures of 'review' should concentrate on other financial information included in a Prospectus, such as pro-forma financial information, profit estimates and management discussion and analysis (MD&A).
82. The SMSG considered that ex-ante 'control' of prospectuses should be allowed but that enforcers should neither be bound nor liable 'for their opinions on non-published prospectuses' (meaning positions taken on accounting treatment). The SMSG also highlighted that the enforcement of financial information included in prospectuses might be restricted by the timeframe and by the difficulty to consult other enforcers on complex accounting matters.
83. On the basis of the responses to the CP, ESMA takes note that a majority of respondents considered that the 'ex-ante review' of financial statements and other financial information should be the normal procedure. While the term 'review' is not the appropriate term to be used, the responses provide evidence of the acknowledgement of the issue and request for additional check to be provided in the context of the approval of prospectuses.

84. As shown by experience gathered informally by the NCAs, ESMA considers that there is a risk that financial information included in some prospectuses might contain inconsistencies if not prepared in accordance with the applicable reporting framework, in particular when an issuer is using IFRS for the first time. In such cases, investors would not have a proper basis for assessing the offer and the information would not be comparable with that from other issuers.

The operational process

85. Five respondents raised timing and organisational challenges to carry out the enforcement of financial information included in prospectuses. They feared that the additional time length required would slow the issuance of securities and create a disincentive to use regulated capital markets.
86. Three respondents considered that the consistency of financial information contained in prospectuses should be evaluated by the same body that conducts the review of historical financial statements. They believed that this will contribute to a more efficient process, considering that in some countries 'ex-ante' and 'ex-post' reviews are conducted by different regulatory bodies.
87. Three respondents raised the difficulty to enforce non-financial information and questioned the capacity of the enforcers and the need to have an increased number of high quality staff to fulfil this task.
88. ESMA is aware of the timing and organisational challenges raised by the respondents but aims to achieve consistency of the enforcement process. While it is accurate that prospectuses are approved by securities regulators which are not always responsible for the enforcement of financial information, local specificities should not impede a smooth and efficient process. Furthermore, ESMA considers that statutory audit does not have implications on the need for enforcement.
89. In addition, ESMA recalls paragraph 26 of the guidelines on the scope of enforcement in which it is stated that the guidelines only apply to financial information, in line with the scope of the Transparency Directive.

Legal instrument

90. Two respondents considered that an enforcement guideline was not the appropriate vehicle to introduce new requirements in relation to prospectuses and suggested dealing with this issue in the new guidelines on the Prospectus Directive. Furthermore, the SMSG believed that the approval of a prospectus and the enforcement of financial information have different purposes and that the enforcement of the financial information included in prospectuses could be dealt with in the new guidelines on the Prospectus Directive.
91. Considering the difference in the scope of the enforcers' supervisory tasks under the Prospectus Directive and the Transparency Directive, ESMA decided to address this matter separately as part of guidelines or best practices in relation to the approval of prospectuses. Consequently, Guideline No. 6 from the guidelines on enforcement of financial information has been deleted.

Question 10: Do you agree that a risk-based approach for selection methods should not be used as the only approach?

92. This question has been answered by 14 respondents who all favoured a mixed model for the selection method. 11 respondents advised continuing to rely on a combination of risk and rotation or sampling approaches, while three respondents proposed relying on a combination of risk-based and rotation approaches only.
93. In addition, the SMSG believed that the risk of errors is not greater for smaller companies than for larger ones. Therefore, the risk-based selection approach should not be based on issuers' size, but rather on the level of complexity of their activities, corporate structure, significant changes in accounting principles and the historical analysis of the compliance of the financial information previously disclosed.
94. ESMA welcomes the support received for a mixed model of selection as stated in Guideline No. 5. As indicated in paragraph 49 of the guidelines, the determination of risk is based on a combination of the probability of infringements and the impact of a potentially significant infringement on the financial markets.

Suggestions for other selection approaches

95. Five respondents suggested improving the current approach by including risks related to a sector, the relevance of the financial information to other issuers, common findings from previous examinations, complaints received, referrals by other regulatory bodies and issues raised in the press.
96. ESMA takes note that the elements of the respondents for the risk determination are already included in paragraph 49 of the guidelines, although in a more general form. As a matter of clarity, ESMA decided to replace the term 'market' by 'financial markets'.

Question 11: Do you agree that the risk-based approach should take into account both the risk of an individual misstatement and the impact of the misstatement on financial markets as a whole?

97. This question has been answered by 12 respondents, who agreed with the proposed approach. Three respondents considered that the main criterion for a risk-based approach should be the impact of a misstatement on financial markets as a whole in order to minimise the risk of serious market disruption. However, the risk of an individual misstatement should also be considered.
98. ESMA takes note that respondents agreed with the dimensions of the risk based approach of enforcement and provided positive feedback for such approach.

Question 12: Do you think that a maximum period should be set over which all issuers should have been subject to at least one full review (or to be used to determine the number of companies to be selected in sampling)?

99. This question has been answered by 13 respondents. Nine of those and the SMSG agreed with setting up a period without providing a specific timeframe. Two respondents suggested a timeframe in the range of three to five years in order to stimulate financial reporting and issuers.
100. Six respondents proposed that the maximum period be set at national level because that period will be driven by a combination of available resources, number of issuers covered by reviews, and specific assessment by the enforcer of the wider risks in the national environment.
101. Four respondents questioned the feasibility of full reviews as those processes will generate bureaucratic impediments and inconsistencies between jurisdictions. In their view, selecting for examination issuers who do not pose a risk threat would work against the objective of enforcement. Instead, those respondents proposed to concentrate full reviews whenever necessary or when a risk based approach has identified significant risks.
102. ESMA takes note that mixed views were expressed by respondents on setting a maximum period for selection for examination. ESMA recalls that a risk-based model cannot ensure the detection of all infringements and that it should be supplemented by other measures such as sampling and/or rotation. Every enforcer should consider the most appropriate means on the basis of the characteristics of its financial market as well as the size and number of issuers whose securities are traded. As such, ESMA did not modify the proposed Guideline No. 7 (final Guideline No. 5).

Question 13: What are your views with respect to the best way to take into account the common enforcement priorities established by European enforcers as part of the enforcement process?

103. This question has been answered by 16 respondents. All but one of the respondents agreed that the common enforcement priorities communicated by ESMA should be taken into account by enforcers in order to strengthen the European enforcement coordination process and believed that this will improve investors' confidence in financial markets.
104. Nine respondents pointed out the need for flexibility in taking into account the common enforcement priorities based on national constraints, industry needs or particular findings. In their view, a European enforcer should not address a particular item if that item is of no relevance to either the jurisdiction concerned or the actual level of economic development or the industry sector involved.
105. Three respondents requested that non-binding priorities take the form of recommendations and that the word 'should' be deleted in paragraph 51 of the proposed guidelines as it limits national enforcement priorities. In their view, the application of those priorities should be assessed on a case-by-case basis at national level.

106. The creation of common enforcement priorities is one of the actions ESMA has put in place in accordance with article 29 of the ESMA Regulation to foster supervisory convergence across the EU and establish a common supervisory culture. ESMA would like to clarify that establishing common enforcement priorities which enforcers consider most relevant at European level does not hinder European enforcers in supplementing them with additional priorities relevant at national level. The expression in paragraph 51 of the guidelines “to take into account common enforcement priorities” implies that those should be considered by European enforcers when carrying out their enforcement activities.
107. Common enforcement priorities are to be considered in the enforcement activities followed by European enforcers and their application assessed according to local circumstances and the level of development of the respective financial market. This accommodates the necessary priorities at national level while further promoting convergence at European level. ESMA and European enforcers monitor and assess the application of IFRS requirements relating to these priorities, while also reporting on the priorities in the yearly report on enforcement activities.

Question 14: Do you agree that the examination procedures listed in paragraph 54 of the proposed guidelines are appropriate for an enforcer to consider using? Are there other procedures which you believe should be included in the list?

108. This question has been answered by 20 respondents.

Terminology

109. Respondents asked for clarification on the terminology used, as ‘full review’ might be understood as a full audit of the financial statements, and some of them proposed replacing the term ‘full review’ by ‘focused review’ and ‘partial review’ by ‘non-focused review’.
110. ESMA understands the concerns expressed in relation to the terminology used and agrees that the terms ‘full examination’ and ‘review’ relate to the audit process. In order to avoid confusion and as a result of the consultation, ESMA believes that the terms ‘unlimited scope examination’ and ‘focused examination’ are more suited to reflect enforcers’ work and has amended the guidelines accordingly. Similar amendments were made elsewhere in the guidelines where these terms have been used. For the purpose of this Feedback Statement, the previous terminology was kept as respondents provided answers on that basis.

The examination procedures

111. Overall, respondents had divergent views on the examination procedures. On one hand, six respondents and the SMSG agreed on these procedures and believed that ‘full reviews’ should be required from enforcers in order to guarantee the compliance of financial information. However, they recalled that an enforcer does not have the same role as an auditor or a credit rating agency.
112. On the other hand, five respondents asked for further clarification and raised specific concerns on the proposed Guideline No. 8 (final Guideline No. 6). They considered that the choice between ‘full’

and ‘partial review’ should be based on a case-by-case assessment taking into account enforcement priorities, risk approaches and resources utilisation. Four respondents urged ESMA to drop the requirement in relation to performing ‘full reviews’ considering that it was in contradiction with an efficient and effective enforcement process and was creating expectations that an enforcer was not able to meet. They considered that a ‘full review’ process implied increased costs for both enforcers and issuers, and suggested to rely on ‘partial reviews’, as it is a reasonable examination procedure.

113. Three respondents suggested other examination procedures such as referral to the supervisory board or the audit committee of an issuer, where they are responsible for the audit and approval of the financial information.
114. Two respondents considered that examination procedures should only be one of the priority areas for a common European enforcement approach. They suggested reorganising this section of the proposed guidelines (paragraphs 53 to 56) to reflect the step by step nature of the work performed by enforcers, including: (i) initial discussions between the enforcer and the auditor (initial consideration), (ii) subsequent conclusion on the need for correction (formal enquiry) and (iii) final decision on the corrective action.
115. The enforcement of financial information is defined as “examining compliance of the financial information with the relevant reporting framework and taking appropriate measures where infringements are discovered”. To ensure an effective enforcement process, a number of examination procedures are available to enforcers. ESMA believes the examination procedures included in the proposed guidelines are timely, effective and relevant and in line with article 24.4 (a) of the Transparency Directive in which “competent authorities shall be given all investigative powers that are necessary for the exercise of their functions”.
116. ESMA agrees that the procedures mentioned in explanatory paragraph 54 of the guidelines are examples of examination procedures and added the additional examples suggested by respondents to the list. However, ESMA disagrees with including a hierarchy of the various examination procedures and steps of the enforcement process, as this process should be sufficiently flexible in order to be efficient and effective.

Question 15: Do you agree that, in determining materiality for enforcement purposes, materiality should be assessed according to the relevant reporting framework, e.g. IFRS? Do you agree that materiality for enforcement purposes should be determined in the same way as for reporting purposes?

117. This question has been answered by 21 respondents, who expressed general agreement on the assessment of materiality according to the relevant financial reporting framework for enforcement purposes. The answers referred in particular to IFRS and stressed the importance of the concept of materiality and its appropriate assessment within the definition of the IFRS *Conceptual Framework* and IAS 8 *Accounting policies, Changes in Accounting Estimates and Errors*. In their view, the same principles should be applied in assessing materiality for reporting and for enforcement purposes.

118. Five respondents supported ESMA's view that the responsibility for determining the concept and definition of materiality for IFRS purposes should remain with the International Accounting Standards Board (IASB), while the role of enforcers is to assess whether an error is material using the IASB definition.
119. Respondents also supported ESMA's approach in communicating material controversial issues as well as ambiguities in the financial reporting standards to the IASB and other bodies responsible for standard setting and interpretations.
120. ESMA considers that the materiality concept in relation to enforcement of IFRS financial statements is consistent with the IASB definition. ESMA performed substantial work on this issue, notably in 2011 and 2012 when it published a CP and organised a roundtable on this matter. ESMA provided the IASB with the outcome of this exercise and encouraged the IASB to address the aspects of materiality considered to be problematic, notably with regards to the relevance of disclosures and the qualitative assessment of materiality.

Definition issues

121. Five respondents raised concerns on the inconsistency between material and immaterial departures. They suggested rewording paragraphs 58 and 59 of the proposed guidelines considering that immaterial departures left intentionally uncorrected should remain immaterial and thus not be corrected, in line with IAS 8.
122. Auditors also believed that a distinction should be made between 'material' in the context of financial statements and 'significant' from the investors' perspective. They considered that the choice of enforcement action should depend on the specific circumstances, the nature, the timing, and the effect on the financial reporting, as well as the need to protect users of financial information.
123. ESMA has taken note of the concerns regarding the link between the type of action and materiality. According to paragraph 5 of IAS 8, 'omissions or misstatements of items are material if they could, individually or collectively, influence the economic decisions that users make on the basis of the financial statements'. Hence, ESMA does not find it appropriate to introduce a distinction between the term 'material' in an accounting context and 'significant' from an investor's point of view.
124. ESMA recalls that paragraph 41 of IAS 8 states that 'financial statements that contain immaterial errors made intentionally to achieve a particular presentation of an entity's financial position, financial performance or cash flows do not comply with IFRSs. ESMA has decided to keep paragraph 59 of the guidelines as it stands, using the word "departure" as it contains no inconsistencies with paragraph 41 of IAS 8, but has amended paragraph 58 of the guidelines in order to align it with IAS 8.

Question 16: What are your comments regarding enforcement actions as presented in paragraphs 57 to 67 of the proposed guidelines? Do you agree with the criteria proposed?

125. This question has been answered by 20 respondents. 12 respondents agreed with the enforcement actions specified in the proposed Guideline No. 9, although the accounting bodies only agreed “broadly” with these actions as they believed greater emphasis should be placed on the importance of enforcers taking action in a timely manner. Only one respondent disagreed with ESMA’s proposed actions.
126. Two respondents expressed concerns on the application of the criteria suggested for deciding on the type of enforcement actions, as they believed that they would interfere with the responsibilities of the enforcers and the provisions of national laws.
127. Three respondents considered that the definitions of ‘restatement’, ‘reissuance’ and ‘correction in future financial statements’ were unclear and not fully consistent with paragraphs 41 to 49 of IAS 8. As a matter of consistency with IAS 8, those respondents suggested to rename ‘restatement’ as ‘reissuance’ and ‘correction in future financial statements with adjustments of comparatives’ as ‘restatement’.
128. As enforcers may not always have the possibility to request reissuance of financial statements in some jurisdictions, some respondents suggested specifying in paragraph 57 (a) of the proposed guidelines that enforcers should only require reissuances when allowed under the company law of their jurisdiction. They proposed to include in the guidelines some provisions recalling that the existence of one of the enforcement actions (a) to (c) suffices to comply with the proposed Guideline No. 9 (final Guideline No.7).
129. Two respondents considered that enforcers should make use of the actions listed in Guideline No. 7 as a last resort and assess the costs and benefits of those actions to ensure that disproportionate measures are avoided. In their views, enforcers should look at different elements when choosing the action to take and paragraph 61 of the proposed guidelines does not include any precise criteria. They believed that enforcers should seek to minimise the number of reissuances, as too many of those are likely to undermine investors’ confidence in financial information.
130. Three respondents indicated the importance that enforcement actions are taken on a timely basis, while making enforcement decisions public as soon as practicable. Timely announcement of enforcement decisions helps other issuers to avoid misstatement of their financial statements. However, they considered that announcements should not be made until a decision is taken, as speculation might adversely impact the market and unfairly disadvantage investors.
131. ESMA welcomes the broad support from the respondents for the enforcement actions included in Guideline No. 7. ESMA is aware that that not all enforcers have the possibility to use all three listed actions due to differences in the legal powers conferred at national level and therefore enforcers select individually the action(s) to implement in their jurisdiction based on these guidelines and local legislation.

132. ESMA modified some of the terms used in Guideline No. 7 in order to align the actions enforcers can require with IAS 8 terminology and used the following: ‘reissuance’, ‘corrective note’ and ‘restatement with adjustment of comparatives, where relevant’. Similar amendments were undertaken elsewhere in the guidelines where these terms have been used.
133. ESMA considers it is highly important to take effective, timely and proportionate actions. ESMA believes that the principles for actions stated in the guidelines constitute the appropriate basis to address the concerns reflected by respondents, and that actions are taken depending on the level of departure.

Emerging issues and decisions

Question 17: Do you have any comments on the specific criteria for the submission of decisions or emerging issues to the EECS database?

134. This question has been answered by 18 respondents. Nine respondents generally agreed with the list of criteria related to the submission of decisions and emerging issues, considering them useful. Two of those respondents believed the criterion of ‘significant importance for the European regulated markets’ was crucial and should be fulfilled together with one or more of the other criteria listed in the proposed Guideline No. 14 (final Guideline No. 12).
135. Seven respondents considered that, as many criteria were proposed for emerging issues, a clarification of their respective importance was desirable. Four respondents considered that the scope derived from the use of the criteria described in the proposed Guideline No. 14 (final Guideline No. 12) was too large and would imply that all decisions would be dealt with at the EECS. They also asked to define the expression “rare circumstances” in that Guideline.
136. Seven respondents agreed to all relevant facts pertaining to a decision and the enforcer’s basis for conclusions to be included in the emerging issues and decisions, as specified in paragraph 76 of the proposed guidelines. National enforcers, especially those from the smaller European countries, may rely heavily on the database as a reference tool.
137. Three respondents concurred that accounting standards should only be developed by standard setters, as specified in the proposed guidelines. They considered that the publication of emerging issues and enforcement decisions bore the risk of contributing to case-based ‘EU IFRS’ when different accounting treatments are permitted by IFRS.
138. ESMA welcomes the support on the list of criteria included in the guidelines but does not find it opportune to insert a hierarchy of importance among those criteria, which should remain open and subject to enforcers’ judgment.
139. ESMA would like to clarify that, in addition to decisions, European enforcers have also dealt with emerging issues in the past as foreseen in CESR Standard No. 2 and the latter have increased their importance as part of EECS discussions. The aim of the submission criteria is that relevant cases are discussed in the EECS to ensure consistency in the application of IFRS in the EEA.

140. ESMA does not consider that discussions in the EECS reduce the capacity of enforcers to address issues with importance at national level. Instead, by participating in the EECS, European enforcers gain additional knowledge and experience on IFRS enforcement matters, which contributes to the efficiency of the enforcement process at national level.
141. ESMA underlines the importance of the criteria for submission of decisions in the database, by amending explanatory paragraph 78 of the proposed guidelines into Guideline No. 13, so that these main principles are inserted in black lettering.
142. Two respondents underlined the need for national enforcement bodies to remain the ultimate decision maker in enforcement procedures. They proposed to acknowledge that the final decision is the sole responsibility of the national enforcer.
143. ESMA agrees to acknowledge in Guideline No. 14 that “Irrespective of the outcome of the EECS discussion, the *final* decision is the *responsibility of the national enforcer*.”
144. Under this question, some respondents also provided comments on the role and functioning of the EECS and required more clarification of its role on emerging issues compared to decisions, as they believed that the current role of the EECS was mainly limited to an ex-post discussion of enforcement issues. They feared that an extension of this role would lead to a more complex, time-consuming and less efficient enforcement process, which would in itself reduce the incentive of countries to develop their own effective enforcement system. An accounting issue is generally submitted as an emerging issue when the enforcer judges it necessary in order to achieve proper coordination and consistency in application of the relevant framework.
145. Three respondents considered, in line with paragraph 77 of the proposed guidelines, that bringing accounting issues encountered by an enforcer to the attention of ESMA implied a discussion of all enforcement decisions and a presentation of all emerging issues and key decisions taken.
146. ESMA took note of the concerns expressed on the extent to which emerging issues are discussed at the EECS. The wording of the first intent of Guideline No. 12 was amended so that issues “of little technical merit” are not submitted as emerging issues. This was intended to tackle the concern of respondents on possible misunderstanding that almost every case should be discussed ex-ante in the EECS. Furthermore, paragraph 75 of the guidelines specifies that accounting issues “other than those when a standard is clear, the infringement obvious and on which no decision has been taken” are brought to the attention of ESMA, and therefore there is no intention to discuss all accounting issues at the EECS, but only those that are most relevant for the need of harmonization at European level. This is in line with ESMA’s mandate to foster supervisory convergence with adequate tools such as opinions, questions & answers and public statements.
147. ESMA believes that Guideline No. 14 formalizes an already functioning and effective process, and simply describes the necessary conditions for submitting emerging issues for discussion. As such, the EECS contributes to reinforcing the confidence of investors in published financial statements. Over time, ESMA considers that the efficiency of the EECS has improved to allow for more regular discussion of emerging issues. As such, effective decisions are taken and a useful knowledge sharing takes place. Enforcement decisions remain the responsibility of the European enforcers who take into account the result of EECS discussions.

European supervisory convergence

Question 18: What are in your opinion appropriate activities that ESMA should conduct that would help to achieve a high level of harmonisation of the enforcement in Europe?

148. This question has been answered by 11 respondents, who supported in general terms the activities proposed by ESMA and emphasised that an increase in the level of harmonisation would result in progressive improvements in the enforcement process. Two respondents recalled the importance of addressing urgent issues of high significance to European markets whenever they arise and encouraged ESMA to develop adequate procedures for timely co-ordination in these situations. They gave as examples ESMA's recent work on the accounting for sovereign debt and the determination of the discount rate for defined benefit post-employment plans.
149. Five respondents proposed focusing the main activities on close cooperation and dialogue in order to ensure consistency of the actions taken at national level. Two respondents proposed developing more regular discussions with standard setters, preparers and auditors to ensure that standards are appropriate, that consensus is reached on significant emerging issues and that financial reporting is neither misleading nor requiring ex-post corrective measures that markets find disruptive.
150. ESMA welcomes the general support for the coordination at European level and considers that the guidelines are well suited to address relevant issues whenever they arise. ESMA is having regular dialogue with relevant stakeholders but does not consider it suitable to add a specific guideline in that respect, as the nature of the guidelines is mainly in relation to activities related to the enforcement process.

EECS database and reporting

Question 19: Do you have any comments on the transparency, timing and frequency of the reporting done by the enforcers with respect to enforcement actions taken against issuers?

151. This question has been answered by 16 respondents, who agreed on the need to adequately communicate on enforcement activities. Three respondents underlined the need to have harmonised reporting from European enforcers in order to avoid the perception that different enforcement systems exist. They suggested that activity reports include as a minimum the number of issuers selected for examination, the misstatements identified (differentiating between those related to recognition, measurement and disclosures) and the enforcement actions taken.
152. The MSG stressed the need for effective communication of enforcement decisions in order to strengthen supervisory convergence in the EU and recommended ESMA specify the purpose of the three-month delay granted to enforcers to communicate their decisions to ESMA. The MSG believed that enforcers and ESMA should communicate on the enforcement decision so that they take into account ESMA's opinion before enforcing the decision.

153. Three respondents further underlined the risk that the EECS database becomes an interpretation of accounting standards and recommended that ESMA focus its tasks on the transparency and coordination of the enforcement process. In order to promote consistency and reduce the perception that the authoritative interpretation of the database is only available to the enforcer, two other respondents considered that more information sharing was necessary in a more extensive presentation of enforcement cases in ESMA's publications or through public access to the information contained in the EECS database.
154. Three respondents suggested reporting every three to six months instead of the yearly activity reports while one suggested that key enforcement decisions should be made public as soon as practicable outside of the regular publication of decisions.
155. ESMA considers that the current disclosure of information in the annual report and database extracts provides a fair overview of key decisions taken and strikes an appropriate balance between stakeholders' information needs and the use of ESMA's and enforcers' resources. ESMA believes that this information sharing will enhance the consistent application of the relevant financial reporting framework in the EEA, even though the database cannot be made fully available to the public for confidentiality reasons.
156. Furthermore, European enforcers report regularly at national level on the enforcement decisions taken in individual cases. Enforcement decisions should be submitted to ESMA within three months in order to ensure a smooth process while also granting sufficient time for due process, notably as decisions can be appealed at national level.

Question 20: What are your views about making public on an anonymous basis enforcement actions taken against issuers?

157. This question has been answered by 17 respondents, all of them supporting the proposed guidelines requiring enforcers to regularly inform the public about their efforts, the enforcement decisions taken and more generally their enforcement activities.

National publications

158. Publication by name attracted significant feedback from the respondents. Four of them requested anonymous publication in order to inform market participants, while two respondents requested particular care in the drafting of the publication to avoid readers inferring the name of the persons involved from the description of the case.
159. Two respondents suggested clarifying the legal basis for publishing individual information with stronger wording in paragraph 90 of the proposed guidelines, to reflect that the decision to publish measures in an anonymised form is done at the discretion of the enforcement authorities.
160. However, five respondents and the SMSG disagreed with this anonymity as they did not understand the reasoning to publish 'wrongdoers' actions on an anonymous basis. They suggested applying the

‘naming and shaming’ principle, depending on the significance of the errors and so that cases and errors identified include the underlying facts and circumstances.

161. One respondent and the SMSG considered that enforcers should also publish the administrative sanction taken as a result of an enforcement action, together with the reasoning behind such sanction. They specifically referred to recital 17 and article 29 of the amended Transparency Directive, which requires publication of every decision imposing an administrative measure or sanction for a breach of the Directive so that they have a dissuasive effect on the public.
162. ESMA recalls that it is the individual decision of the enforcer to define the publications it intends to make. The name of the infringer and data protection are specifically referred to in the provisions of article 28(c) of the amended Transparency Directive, according to which the processing of personal data collected for the exercise of enforcement shall be carried out in accordance with Directive 95/46/EC on the protection of individuals for the processing of personal data and EC Regulation 45/2001 on the protection of individuals for the processing of personal data by the Community institutions.

ESMA publications

163. Respondents considered that information sharing promotes consistency throughout different jurisdictions and strengthens the educational benefit of enforcers’ decisions.
164. ESMA recalls that, in accordance with article 29(1) of the amended Transparency Directive, the publication of every decision on sanctions and corrective measures imposed for a breach of the Transparency Directive should be published on a non-anonymous basis. However, ESMA enforcement publications are different in nature as they recall some of those decisions in additional publications. As such, ESMA considers that it does not have to publish the name of the issuers subject to infringements. This would neither incur a better protection nor have any added value for investors.
165. ESMA considers that its enforcement publications are published when decisions are considered to be useful to the users of financial information and contribute to increasing the transparency of financial information. ESMA agrees with the merit of the publication of decisions. ESMA publishes every year a selection of the most relevant cases, notably in two extract publications of the EECS database. This is a fair balance between a regular publication of decisions taken and the availability of the resources of ESMA to produce such reports.
166. Finally, the annexes to the guidelines included in the CP for illustration purposes have been deleted in the final guidelines, but are used as internal tools for the purposes of the guidelines.

Annex I – List of respondents

	Accounting Bodies
1	Austrian Chamber of Public Accountants (KWT)
2	Chamber of auditors Czech Republic (CACR)
3	Federation of European Accountants (FEE)
4	FSR - Danske revisorer
5	Institute of Chartered Accountants of England and Wales (ICAEW)
6	Institute of Public Auditors of Germany (IDW)
	User representative bodies
7	Danish shareholders Association
8	Deutsche Schutzvereinigung für Wertpapierbesitz (DSW)
9	Dutch Investors' Association (VEB)
10	Eumedion
11	Investor Relations Society
	Preparer representative bodies
12	Acteo / Afep / Medef
13	Association of German Banks
14	Austrian Federal Economic Chamber (WKO)
15	Business Europe
16	European Banking Federation
17	Swedish Enterprise Accounting Group (SEAG)
18	World Savings Bank Institute (WSBI)
	Academics
19	Goethe University Frankfurt
	Regulators and Government bodies
20	European Committee of Central Balance Sheet data Offices (ECCBSO)
21	Federal Republic of Germany
	Standard Setters
22	Accounting Standards Committee of Germany (ASCG)
23	Autorite des Normes Comptables (ANC)
24	Organismo Italiano di Contabilita (OIC)
	Auditors
25	Deloitte
26	Grant Thornton
27	KPMG
28	PricewaterhouseCoopers
	Others
29	Deutsche Aktieninstitut
30	NASDAQ OMX
31	XBRL Europe
32	ESMA's Securities and Markets Stakeholder Group

Annex II – Number of respondents by question

1. The table below lists the number of respondents to each question.
2. As noted above, there were 32 respondents to the Consultation Paper. However, some respondents did not answer all of the questions posed, while others provided only general comments.
3. Where a respondent's general comments clearly address the substance of a particular question, they are included below as having responded to that question.

Question Number	No. of Respondents
Q1	19
Q2	12
Q3	19
Q4	16
Q5	13
Q6	17
Q7	18
Q8	19
Q9	16
Q10	14
Q11	12
Q12	13
Q13	16
Q14	20
Q15	21
Q16	20
Q17	18
Q18	11
Q19	16
Q20	17

Annex III – Opinion of the Securities and Markets Stakeholder Group

I. General comments

1. The Securities Markets Stakeholder Group (“SMSG” and “the Group”) welcomes the opportunity to reply to the Consultation Paper on ESMA Guidelines on enforcement of financial information (“Guidelines”). The SMSG congratulates ESMA for its initiative to issue guidelines on this topic rather than to rely on CCSR standards, as this sends a strong signal. The compliance of issuers and prospective issuers with financial information standards and norms is central to foster investor protection and hence confidence, and as such is vital to the well-functioning of European securities markets. Ensuring that the enforcement of these norms and standards is harmonised in the EU is therefore key to level the playing field in terms of investor protection across European member states and avoid regulatory arbitrage.
2. The SMSG overall agrees with the Guidelines proposed by ESMA. The Group will not respond to each of the questions included in the Consultation paper, but will focus on what we perceive as the main issues raised by the Guidelines. In addition, the SMSG would like to make the following general comments:
3. The SMSG would encourage ESMA to emphasise, in the Guidelines, that enforcers should not only be responsible for monitoring the compliance with reporting and accounting standards of the financial information disclosed by listed companies or willing to be listed ones. Enforcers should also monitor the content of the financial information disclosed, in order to ensure that the information disclosed to investors is not misleading. To this end, and to avoid any type of confusion between enforcers’ and auditors’ and CRAs’ functions, as well as to foster greater supervisory convergence in the European Union, the SMSG encourages ESMA to specify the content requirements that enforcers should control. In addition, the Guidelines should specify that this monitoring of the content of the financial information disclosed should not entail the enforcer’s liability for a failure to catch communications that are wrong or misleading.
4. In addition, it is our understanding that the financial information requirements to which the Guidelines refer and which are provided for under the Transparency and Prospectus Directives only apply to those companies that are admitted to trading or willing to be admitted to trading on regulated markets. The companies admitted to trading only on Multilateral Trading Facilities (“MTFs”) are therefore not covered, whilst a significant proportion of publicly traded companies in Europe (most of the time small and medium size enterprises) are traded on MTFs. Whilst the SMSG agrees that a proportionate regime should apply to those companies, and that the scope of ESMA’s guidelines has been defined at the Level one of the European Union regulation, some members of the Group also believe that these companies should comply with the same overall requirements as larger companies (although adapted), notably in respect to the Transparency Directive. These members believe that this would contribute to enhance investor protection, and hence increase investor willingness to invest in SMEs that are often perceived as riskier than larger companies. As such, these members of the SMSG would encourage ESMA to further analyse the possibility for the requirements borne by companies admitted to trading (or willing to be so) on regulated markets to be applied by the national regulators on a proportionate basis to companies admitted to trading (or willing to be so) on MTFs, while recognizing that this which may entail a change of the Level 1 instruments. Other members of the Group does not support this view and find that the need to ensure proportionality for SMEs requires a flexible approach to disclosure that would not be served by extending the regime currently applicable to regulated markets to MTFs.

5. Finally, the SMSG would encourage ESMA to bear an even greater role in respect to the enforcement of the norms referred to in the Guidelines, as it would truly contribute to foster a greater level playing field across the European Union.

II. Specific comments

6. The SMSG has the following specific comments on the Guidelines proposed by ESMA:

Q7: Do you agree that enforcers should have adequate independence from each of government, issuers, auditors, other market participants and regulated markets? Are the safeguards discussed in paragraphs 38 to 41 sufficient to ensure that independence? Should other safeguards be included in the guidelines? Do you agree that market operators should not be delegated enforcement responsibilities?

7. Whilst the SMSG fully agrees with the need for enforcers to be independent in order to appropriately conduct their functions, we are concerned by the fact that requiring enforcers to be independent from regulated markets could raise significant issues in certain instances. In fact, some regulated markets in the European Union may have a delegation of power from enforcers to ensure that issuers and prospective issuers comply with the financial information requirements provided under the Transparency and Prospectus Directives. The SMSG therefore encourages ESMA to further clarify this point, in order to avoid any issues in respect to the application of the Guideline.

Q8: Are you in favour of enforcers offering pre-clearance? Do you have any comments on the way the pre-clearance process is described and the pre-conditions set in paragraphs 42 to 45?

8. The SMSG is in favour of pre-clearance as described in paragraph 42 to 45. However it should be stressed that pre-clearance should not be used as a tool to modify rules and guidelines. In addition, pre-clearance should be used with particular caution, since it can sometimes be used in a questionable manner by enforcers and by market participants, and may also lengthen the approval process for prospectuses.

Q9: Do you agree that in order to ensure investor protection, the measures included as part of a prospectus approval should be supplemented by additional measures of ex-ante enforcement in relation to financial information? If yes, could you please specify the exact nature of ex-ante enforcement that you would expect from enforcers?

9. The SMSG believes that ex-ante controls of prospectuses should be allowed but that enforcers should not be bound by nor liable for their opinions on non-published prospectuses. In other words, whilst an enforcer may approve a prospectus prior to its publication, when it controls it after its publication it should not be bound by its initial decision. It is important to clearly differentiate between the role of an auditor or a CRA and that of a regulator, by ensuring that only auditors as well as the board of the company are made responsible for the validation of accounts prior to their publication and only CRAs can be responsible for credit rating opinions. In addition, considering the fact that there is a limited period of time for the enforcer to notify its decision regarding the approval of the prospectus, the enforcement of financial information included in prospectuses may be hampered by the timeframe which is not consistent with the enforcement procedures: this may limit the enforcement activity on the financial information with an increase of the risk for investors. Moreover, while as part of the

enforcement of the recurring financial information published by issuers (according to the TD requirements) an enforcer has the possibility to consult also with other enforcer on complex accounting matters (e.g. addressing emerging issue to EECS before taking its own decision), in the case of Prospectuses, such action would be difficult to be realised due to time constraint: consequently, the SMSG believes the approval of a prospectus and the enforcement on issues relating to financial information have different purposes and that the issue of the enforcement of the financial information included in the prospectuses could be dealt with in the context of new guidelines on the Prospectus Directive. In addition, associating enforcement activities with the scrutiny of prospectus may result in unduly delay of the approval procedure, whereby the enforcer will tend to grant approval only after completion of complex enforcement actions.

Q13: What are your views with respect to the best way to take into account the common enforcement priorities established by European enforcers as part of the enforcement process?

10. The SMSG believes that enforcers should be required to control all companies falling under the scope of the Transparency and Prospectus Directives, and not only a sample as currently proposed in the Guide-lines. However, if the concept of “selection” is retained in the Guidelines, it would be crucial to ensure that the selection of companies on the basis of a risk-based approach is not done on the ground of their size but rather based on the complexity of their activity or corporate structure. This is because contrary to what is often assumed, the risk of errors is not greater for smaller companies than for larger ones. Rather, this risk is related to the complexity of the activities carried out by companies and of the financial structure of their group. In any case no entity should escape being subject to control over a given period of time.
11. In addition, the Group would recommend the methodology used to select companies falling under the scope of the Transparency Directive to be based on the historical analysis of the conformity of the financial information previously disclosed by the company, in order to identify those with the higher risks of errors based on past experience.
12. Furthermore, when reporting entities significantly change their accounting principles such as rules in respect to depreciation, consolidation or deconsolidation of subsidiaries or parent companies enforcers should pay a particular attention to those companies that will potentially be the most impacted by these changes, as they may be more prone to errors in respect to financial information disclosures.

Q14: Do you agree that the examination procedures listed in paragraph 54 are appropriate for an enforcer to consider using? Are there other procedures which you believe should be included in the list?

13. The SMSG believes that full reviews should always be required from enforcers in order to guarantee the compliance of financial information disclosed under the Transparency and Prospectus Directives, although always taking in consideration that enforcers’ role is not the role of an auditor or of a CRA.

Q 16: What are your comments regarding enforcement actions as presented in paragraphs 57 to 67? Do you agree with the criteria proposed?

14. The SMSG believes that it should be made explicit in the Guidelines that enforcers should have the ability to take administrative sanctions and that these sanctions should be made public.

Q 19: Do you have any comments on the transparency, timing and frequency of the reporting done by the enforcers with respect to enforcement actions taken against issuers?

15. The SMSG believes that the communication of enforcement decisions to ESMA is central in fostering greater supervisory convergence in the European Union. The SMSG would recommend ESMA to specify further the purpose of the three-month delay granted to enforcers to communicate their decisions to ESMA. The SMSG believes that during this period of time, enforcers and ESMA should communicate in order for enforcers to receive ESMA's opinion on their decisions prior to enforcing them. This would enhance convergence with respect to enforcement decisions in the European Union.

Q20: What are your views about making public on anonymous basis enforcement actions taken against issuers?

16. The SMSG believes that whilst not all enforcement decisions should be published, all administrative sanctions taken as a result of an enforcement action should be disclosed to the public, along with the a detailed explanation of the reasons behind such sanction and mentioning the company's name. However, the requirements for decisions to be published together with the name of the company in question should be calibrated by ESMA depending on the significance of the errors. Investors should have the ability to be informed of the name of issuers which have committed significant errors and the nature of the error committed. In addition, in order to facilitate a learning process both for other issuers and the auditor community, the publication of such sanctions and decisions should also include the merits of the case.
17. In this regard, the SMSG welcomes the adoption by the EU Parliament on 12 June 2013 of the proposal for a directive of the European Parliament and of the Council amending Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and Commission Directive 2007/14/EC (« Transparency II directive »). Article 29 of the Transparency Directive, as amended by the Transparency II directive, provides that competent authorities, when the directive is implemented in national law by the Member States at the latest in 2015, shall publish every decision on sanctions and measures imposed for a breach of this Directive without undue delay, including at least information on the type and nature of the breach and the identity of natural persons or legal entities responsible for it. The competent authority may delay publication of a decision, or may publish the decision on an anonymous basis if certain limited circumstances are in place. The SMSG calls for the Prospectus directive to be similarly modified.

Adopted 11 October 2013

Guillaume Prache

Chair

Securities and Markets Stakeholder Group

Annex IV – Guidelines on enforcement of financial information

I. Scope

Who?

1. These guidelines apply to all competent authorities of Member States of the European Union (EU) undertaking enforcement of financial information under the Transparency Directive. They are also designed to apply to competent authorities of countries from the European Economic Area (EEA), which are not EU Member States, insofar as the Transparency Directive is applicable in these countries.

What?

2. These guidelines apply in relation to the enforcement of financial information under the Transparency Directive to ensure that financial information in harmonised documents provided by issuers whose securities are admitted to trading on a regulated market comply with the requirements resulting from the Transparency Directive.
3. This includes financial information of issuers already listed on a regulated market who are subject to the Transparency Directive, as required by that Directive. As the case may be, this may also include financial information of issuers from third countries who use financial reporting frameworks which have been declared equivalent to IFRS, according to Commission Regulation no 1569/2007.
4. The competent authorities and other relevant entities may choose to follow these guidelines also when enforcing financial information based on other requirements which issuers must comply with under national law.

When?

5. These guidelines will become effective two months after their publication on ESMA's website in all the official languages of the EU.

II. References and definitions

Legislative references

Accounting Directive

Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of

	undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC ⁵
<i>Insurance annual accounts Directive</i>	Council Directive 91/674/EEC on annual accounts and consolidated accounts of insurance undertakings
<i>Banks and other financial institutions accounts Directive</i>	Council Directive 86/635/EEC on annual accounts and consolidated accounts of banks and other financial institutions
<i>IAS Regulation</i>	Regulation (EC) No 1606/ of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards
<i>ESMA Regulation</i>	Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing an European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC
<i>Markets in Financial Instruments Directive or MiFID</i>	Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC ⁶
<i>Transparency Directive</i>	Directive 2004/109/EC of the European

⁵ The Accounting Directive and the Consolidated Accounts Directive have been repealed by Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC. According to the provisions of Directive 2013/34/EU, references to the Accounting Directive shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex VII. Until the time for transposition of Directive 2013/34/EU has run out (20 July 2015) all references in these guidelines may still be read in accordance with the provisions of the Accounting Directive.

⁶ The Markets in Financial Instruments Directive or MiFID will be repealed with effect from 3 January 2017 by Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments. As from this date references to MiFID shall be construed as references to Directive 2014/65/EU or to Regulation (EU) No 6000/2014 and shall be read in accordance with the correlation table set out in Annex IV of Directive 2014/65/EU.



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/EC⁷

Abbreviations

<i>CESR</i>	Committee of European Securities Regulators
<i>EEA</i>	European Economic Area
<i>EECS</i>	European Enforcers Coordination Sessions
<i>EU</i>	European Union
<i>ESMA</i>	European Securities and Markets Authority
<i>GAAP</i>	Generally Accepted Accounting Principles
<i>IASB</i>	International Accounting Standards Board
<i>IFRS</i>	International Financial Reporting Standards
<i>IFRS IC</i>	International Financial Reporting Standards Interpretation Committee

Definitions

Unless otherwise specified, terms used and defined in the Transparency Directive have the same meaning in these guidelines. Some of the terms defined in the Transparency Directive are recalled hereunder for the ease of reference. In addition, the following definitions, legislative references and abbreviations apply:

Accounting Directives

The Accounting Directives refer to Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, Council Directive 91/674/EEC on annual accounts and consolidated accounts of insurance undertakings as well as Council Directive 86/635/EEC on annual accounts and consolidated accounts of banks and other financial institutions

Corrective note

Issuance by an enforcer or an issuer, as initiated or required by an enforcer, of a note making public a material misstatement with respect to particular item(s) included in already published financial information and, unless impracticable, the corrected information

⁷ as last amended by Directive 2013/50/EU. Insofar as relevant, until the time for transposition of Directive 2013/50/EU has run out, references to the Transparency Directive shall be read in accordance with its provisions as in force before their amendment by Directive 2013/50/EU.

Enforcement of financial information

Examining the compliance of financial information with the relevant financial reporting framework, taking appropriate measures where infringements are discovered during the enforcement process, in accordance with the rules applicable under the Transparency Directive and taking other measures relevant for the purpose of enforcement

Enforcer/European enforcer

Competent authorities or bodies acting on their behalf in the EEA in accordance with the rules applicable under the Transparency Directive

Financial statements

Annual and interim financial statements prepared in accordance with the relevant financial reporting framework as defined below

Issuer

An issuer as defined in article 2.1(d) of the Transparency Directive with the exclusion of 'natural persons'

Harmonised documents

Documents whose publication is required by the Transparency Directive

Home Member State

The home Member State as defined in article 2.1(i) of the Transparency Directive

Host Member State

The host Member State as defined in article 2.1(j) of the Transparency Directive

Market operator

A market operator as defined in article 4.1.13 of the MiFID Directive

Regulated market

A regulated market as defined in article 4.14 of the MiFID Directive

Regulated information

Regulated information as defined in the Transparency Directive, i.e. all information which the issuer, or any other person who has applied for the admission of securities to trading on a regulated market without the issuer's consent, is required to disclose under the Transparency Directive, under Article 6 of Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and

market manipulation (market abuse)⁸, or under the laws, regulations or administrative provisions of a Member State adopted under Article 3(1) of the Transparency Directive

Relevant financial reporting framework

IFRS and financial reporting frameworks deemed equivalent with IFRS based on the EC Regulation 1569/2007⁹ as well as national generally accepted accounting principles (national GAAPs) used in the EEA. This also includes requirements for management reports resulting from the Directive on the annual financial statements

Unlimited scope examination of financial information

The evaluation of the entire content of the financial information in order to identify issues / areas that need further analysis and to assess whether the financial information is compliant with the relevant financial reporting framework

Focused examination of financial information

The evaluation of pre-defined issues in the financial information and the assessment of whether the financial information is compliant with the relevant financial reporting framework in respect of those issues

III. Purpose

6. ESMA may issue guidelines under Article 16 of the ESMA Regulation in relation to the acts referred to in Article 1(2) of the ESMA Regulation, which includes the Transparency Directive, with a view to establish consistent, efficient and effective supervisory practices in relation to, and ensuring the common, uniform and consistent application of, such acts. Based notably on the objectives underlying the Transparency Directive, to ensure effective and consistent enforcement, and on the provisions requiring competent authorities to be empowered to examine that financial information published under the Transparency Directive is drawn up in accordance with the relevant reporting framework, ESMA considers that these guidelines serve such purposes.
7. More precisely, the purpose of these guidelines is to establish consistent, efficient and effective supervisory practices and to ensure the common, uniform and consistent application of Union

⁸ Directive 2003/6/EC will be repealed with effect from 3 July 2016 by Regulation(EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014. As from this date references to MiFID shall be construed as references to Regulation (EU) No 596/2014 and shall be read in accordance with the correlation table set out in Annex II to Regulation(EU) No 596/2014.

⁹ Commission Regulation (EC) No 1569/2007 of 21 December 2007 establishing a mechanism for the determination of equivalence of accounting standards applied by third country issuers of securities pursuant to Directives 2003/71/EC and 2004/109/EC of the European Parliament and of the Council, as amended by Commission Delegated Regulation No. 310/2012 of 21 December 2011

law reinforcing a common approach, as noted in recital 16 of the IAS Regulation, to the enforcement of financial information under the Transparency Directive in view of achieving a proper and rigorous enforcement regime to underpin investors' confidence in financial markets and to avoid regulatory arbitrage. These guidelines are principles-based and define enforcement of financial information and its scope under the Transparency Directive, set out what characteristics enforcers should possess, describe selection techniques that should be followed and other aspects of enforcement methodology, describe the types of enforcement actions that should be made use of by enforcers and explain how enforcement activities are coordinated within ESMA.

IV. Compliance and reporting obligations

Status of these guidelines

8. This document contains guidelines issued under Article 16 of the ESMA Regulation addressed to competent authorities. In accordance with Article 16(3) of the ESMA Regulation, competent authorities shall make every effort to comply with them.
9. Competent authorities to whom these guidelines apply should comply by incorporating them into their supervisory practices. ESMA notes that enforcement responsibilities covered by these guidelines are carried out by the competent authorities designated in each Member State or by entities which have received a delegation for this purpose¹⁰. However, final responsibility for compliance with the provisions of the Transparency Directive remains with the designated competent authority. Irrespective of the entity that in practice carries out enforcement, competent authorities remain under the obligation to make every effort to comply with these guidelines.

Reporting requirements

10. Competent authorities to whom these guidelines apply shall notify ESMA whether they comply or intend to comply with the guidelines, stating their reasons in case they do not comply or intend not to comply, within two months of the date of publication of the guidelines on ESMA's website in all the official languages of the EU, to [email address]. In the absence of a response by this deadline, competent authorities will be considered as non-compliant. A template for notifications is available on the ESMA website. Any change in the status of compliance must also be reported to ESMA.

V. Guidelines on enforcement

Background

11. Recital 16 of the IAS Regulation provides: "A proper and rigorous enforcement regime is key to underpinning investors' confidence in financial markets. Member States, by virtue of article 10 of the Treaty on European Union, are required to take appropriate measures to ensure compliance with international accounting standards. The Commission intends to liaise with Member States,

¹⁰ Article 24 of the Transparency Directive

notably through the Committee of European Securities Regulators (CESR), to develop a common approach of enforcement.”

12. To this end, CESR, the predecessor of ESMA, established the European Enforcers Coordination Sessions (EECS), a forum in which national enforcers exchange views and discuss experiences relating to the enforcement of financial reporting requirements. The EECS is a permanent working group which reports to the Corporate Reporting Standing Committee (CRSC) of ESMA.
13. As indicated in its terms of reference which were revised in 2013, the main activities of the EECS are the following:
 - Discuss emerging issues submitted by European enforcers or by ESMA
 - Discuss decisions and actions taken by European enforcers submitted to the EECS database
 - When relevant issues have been identified as not being covered by financial reporting standards or as being subject to conflicting interpretations, prepare the issues for referral to standard setting or interpretive bodies such as the IASB and the IFRS IC
 - Share and compare practical experiences in the field of enforcement such as selection, risk assessment, review methodology, contacts with issuers and auditors
 - Select and prepare communication of common enforcement priorities
 - Provide advice on enforcement issues and draft ESMA statements, opinions or guidelines,
 - Assist ESMA in conducting studies or reviews on how IFRS is applied in practice
 - Advise ESMA on the publication of selected decisions
 - Organise educational sessions for enforcers.
14. CESR developed Standards No. 1 and 2 on the enforcement of financial information in Europe in April 2003 and April 2004 respectively (CESR/03-073 and CESR/03-317c). These standards provided for a common approach by establishing principles defining enforcement, its scope, characteristics of the enforcer, the selection techniques and other enforcement methods applicable, actions and coordination of enforcement.
15. The use of the standards and discussions in the EECS on enforcement decisions and other experiences with enforcement led to the creation of a group under the CRSC to conduct a fact finding study on actions taken. This resulted in a decision taken by CRSC in June 2010 to revise the CESR Standards on Enforcement, taking into account the experiences gained through the use of the standards since 2005.
16. These guidelines are the result of this work. They are principles based with the main principles in black lettering and explanatory, elaborating and exemplifying paragraphs in grey lettering. In order to comply with these guidelines an enforcer has to comply with the guidelines as a whole, black lettering as well as grey lettering.

Objective of enforcement

17. **The objective of enforcement of financial information included in harmonised documents is to contribute to a consistent application of the relevant financial reporting framework and, thereby, to the transparency of financial information**

relevant to the decision making process of investors and other users of harmonised documents. Through enforcement of financial information, enforcers contribute to the protection of investors and the promotion of market confidence as well as to the avoidance of regulatory arbitrage.

18. In order for investors and other users of harmonised documents to be able to compare the financial information of different issuers, it is important that this information is based on a consistent application of the relevant financial reporting framework, in the sense that if facts and circumstances are similar, the recognition, presentation, measurement and/or disclosures will be similar to the extent required by that financial reporting framework.
19. To ensure that enforcement of financial information throughout the EEA is carried out in a similar way, enforcers should share the same understanding of the principles as set out in these guidelines and react in a consistent manner if departures from the relevant financial reporting framework are detected.
20. This is intended not only to promote consistent application of the relevant financial reporting framework, contributing to the efficient functioning of the internal market, which is also important for financial stability, but also to avoid regulatory arbitrage.

Concept of enforcement

21. **For the purpose of these guidelines, enforcement of financial information is defined as examining the compliance of financial information with the relevant financial reporting framework, taking appropriate measures where infringements are discovered during the enforcement process in accordance with the rules applicable under the Transparency Directive and taking other measures relevant for the purpose of enforcement.**
22. Enforcement of financial information implies the examining of financial information to assess whether it is in accordance with the relevant financial reporting framework. In order for enforcement of financial information to be effective, enforcers should also take appropriate actions in accordance with these guidelines, where departures from the relevant financial reporting framework are detected, to ensure that, whenever necessary, the market participants are provided with accurate information compliant with the relevant financial reporting framework.
23. Enforcers may also seek to encourage compliance by issuing alerts and other publications to assist issuers in preparing their financial statements in accordance with the relevant financial reporting framework.

Scope of enforcement

24. **These guidelines apply to the enforcement of financial information in harmonised documents provided by issuers. They may also be followed when enforcing financial**

information based on other requirements which issuers must comply with under national law.

25. As indicated in the introduction to these guidelines, they may apply in relation to any relevant financial reporting framework applied by EEA listed issuers because the need for protection of investors does not depend on which financial reporting framework the issuer is using. IFRS is mandatory for all issuers whose registered office is situated in the EEA in their consolidated accounts while Member States may allow or require that local GAAP is used in individual financial statements.
26. **Guideline 1: When enforcing financial information released by issuers whose registered office is situated outside the EEA (issuers from third countries) in accordance with the provisions applicable under the Transparency Directive, European enforcers should ensure that they have access to appropriately skilled resources or otherwise should coordinate the enforcement of financial information with ESMA and other European enforcers to ensure that they have the appropriate resources and expertise. European enforcers should coordinate enforcement of financial information with ESMA in order to ensure consistency of treatment of financial information of such issuers.**
27. In accordance with the Transparency Directive, financial information of issuers from third countries is subject to enforcement by the enforcer in the home Member State within the EEA. In such cases, financial information of an issuer may be prepared using, instead of IFRS as endorsed in the EU, another Generally Accepted Accounting Principles (GAAP) which has been declared equivalent according to EC Regulation No 1569/2007. These guidelines apply also to the enforcement of financial information of issuers with registered office in third countries that use financial reporting frameworks which have been declared equivalent to IFRS, according to the above mentioned Regulation and further amendments.
28. In such cases, if the European enforcer determines that it is not efficient or possible to carry out the enforcement of financial information itself, the enforcer may by agreement refer the task of examination of compliance with the relevant financial reporting framework by agreement to another enforcer or to a centralised team to be organised by ESMA at the request of enforcers. Nevertheless, the responsibility for the enforcement decision always remains with the enforcer of the home Member State within the EEA.
29. According to the Transparency Directive¹¹ Member States may conclude cooperation agreements providing for the exchange of information with the competent authorities of third countries enabled by their respective legislation to carry out any of the tasks assigned by the Directive.

¹¹ See Article 25(4)

European enforcers

30. Under the Transparency Directive, enforcement responsibilities are carried out by the competent authorities designated in each Member State and/or in some cases by other entities which have received a delegation for this purpose.
31. Under the Transparency Directive, Member States shall designate a central competent administrative authority responsible for carrying out the obligations provided for in the directive and for ensuring that the provisions adopted pursuant to the directive are applied. However, when it comes to examining whether information referred to in the Transparency Directive is drawn up in accordance with the relevant reporting framework and taking appropriate measures in case of discovered infringements, the Member States may designate a competent authority other than the central competent authority.
32. Member States may also allow their central competent authority to delegate tasks. The designated competent authority is responsible for enforcement, whether it carries out enforcement itself or whether it has delegated the task to another entity. Any such delegated entity should be supervised by the delegating authority and be responsible to it. The final responsibility for supervising compliance with the provisions of the Transparency Directive, including the responsibility for the establishment and maintenance of an appropriate process for enforcement remains, in any case, with the designated competent authorities of the relevant Member States.
33. Under the Transparency Directive¹², powers at the disposal of an enforcer for the enforcement of financial information include at least:
 - a) the power to examine compliance of financial information in the harmonised documents with the relevant financial reporting framework,
 - b) the right to require any information and documentation from issuers and their auditors,
 - c) the ability to carry out on-site inspections; and
 - d) the power to ensure that investors are informed of material infringements discovered and provided with timely corrected information.
34. In order to ensure that all relevant information can be obtained as part of the enforcement process, when performing their functions, enforcers have, in accordance with the Transparency Directive, the power to require information from the holders of shares or other persons exercising voting rights over an issuer and the persons that control them or are controlled by them.
35. In performing their function, enforcers should require necessary information irrespective of whether an indication exists or not in relation to the non-compliance of financial information with the relevant financial reporting framework.
36. **Guideline 2: Enforcers should ensure the effectiveness of the enforcement of financial information. In order to do so, they should have sufficient human and financial resources to carry out their activities in an effective manner. The**

¹² See Article 24(4) of the Transparency Directive

manpower should be professionally skilled, experienced with the relevant financial reporting frameworks and sufficient in number, taking into account the number of issuers subject to enforcement of financial information, their characteristics, the complexity of their financial statements and their ability to apply the relevant financial reporting framework.

37. To ensure effective enforcement of financial information, enforcers should have sufficient resources. When considering the level of manpower required, the number of issuers within the scope of enforcement, the complexity of the financial information as well as the ability of those who prepare the financial information and of the auditors to apply the relevant financial reporting framework play important roles. The probability of being selected for examination and the degree to which this examination is performed should be such that it is not restricted because of lack of resources, creating the conditions for regulatory arbitrage.
38. There should be sufficient financial resources to ensure that the necessary amount of manpower and services can be used in enforcement of financial information. The financial resources should also be sufficient to ensure that the manpower is professionally skilled and experienced.
39. **Guideline 3: Enforcers should ensure adequate independence from government, issuers, auditors, other market participants and regulated markets operators. Independence from government implies that government cannot unduly influence the decisions taken by enforcers. Independence from issuers and auditors should, amongst other things, be achieved through codes of ethics and through the composition of the Board of the enforcer.**
40. In order to ensure appropriate investor protection and avoid regulatory arbitrage, it is important that the enforcer is not unduly influenced either by members of the political system or by issuers and their auditors. Enforcement responsibilities should not be delegated to market operators as this would create conflict of interest issues because the issuers subject to enforcement are at the same time customers of the market operators.
41. Enforcers should not be unduly influenced by government when taking decisions as part of the enforcement process, be it in relation to ex-ante or ex-post enforcement of financial information. In addition, it should not be possible to change the composition of the board or other decision-making bodies of the enforcer through government intervention before the end of the period for which its members have been appointed, unless there are exceptional circumstances which require such actions, as this may make the enforcement process less independent.
42. In relation to the independence from issuers and auditors, enforcers should take the required actions to ensure adequate independence, including, but not limited to: the establishment of codes of ethics for those involved in the enforcement process, cooling off periods and requiring assurance that staff involved in the enforcement of financial information do not breach any independence requirements because of relationships with either the issuer or the audit firm involved. Representatives of issuers and auditors should not be able, together or individually, to have a majority of votes in the decision making bodies of enforcers.

Pre-clearance

43. **Guideline 4: Where pre-clearance is permitted, it should be part of a formal process, and provided only after the issuer and its auditor have finalised their position on the accounting treatment concerned.**
44. Enforcement of financial information normally takes published financial information as its starting point. Hence, by nature, it is an ex-post activity which is carried out according to the examination procedures indicated in these guidelines and applied to the financial information selected based on the criteria set out in the selection methods indicated in these guidelines.
45. However, some enforcers have a well-developed pre-clearance system where issuers are able to secure an enforcement decision ex-ante, i.e. before they publish the relevant financial information. These guidelines provide that certain conditions should be in place when enforcers are using pre-clearance. In particular, the issuer and its auditor should have determined the accounting treatment to be applied based on all specific facts and circumstances as this will enable pre-clearance decision to be based on the same level of information as an ex-post decision. This will avoid pre-clearance decisions becoming general interpretations.
46. Pre-clearance should be part of a formal process, meaning that a proper decision is taken by the enforcer in a way similar to that in which ex-post decisions are taken. This implies that the enforcer should not be able to reverse its position after the financial information has been published unless facts and circumstances have changed between the date the enforcer expressed its position and the date the financial information is issued, or there are other substantial grounds for doing so. This does not preclude other discussions between enforcers and issuers and their auditors on accounting matters as long as the outcome does not constitute a decision.

Selection methods

47. **Guideline 5: Enforcement normally uses selection. The selection model should be based on a mixed model whereby a risk based approach is combined with a sampling and/or a rotation approach. A risk based approach should consider the risk of a misstatement as well as the impact of a misstatement on the financial markets.**
48. Selection should be based on a combination of a risk based approach and either random sampling or rotation or both. A pure risk based approach would mean that those issuers not fulfilling the risk criteria determined by the enforcer would never be subject to enforcement. There should always be a possibility of an issuer being selected for review. A pure random system could mean that issuers with high risk are not selected on a timely basis. The same would apply to a pure rotation system and, in addition, there would be a possibility that an issuer would be able to estimate when its financial statements were likely to be selected.
49. Determination of risk should be based on the combination of the probability of infringements and the potential impact of an infringement on the financial markets. The complexity of the financial statements should be taken into account. Characteristics such as the risk profile of the issuer and its management, ethical standards and experience of the management and their ability or

willingness to apply the relevant financial reporting framework correctly, as well as the level of experience of the issuers' auditors with the relevant financial reporting framework should, as far as possible, be taken into consideration. While larger issuers are typically faced with more complex accounting issues, fewer resources and less experience in applying the accounting standards could be more prevalent among smaller and /or new issuers. Hence, not only the number but also the characteristics of issuers are relevant factors.

50. Indications from the auditors of misstatements, whether in their reports or otherwise, will normally trigger a selection of the financial information in question for examination. Indications of misstatements provided by auditors or regulatory bodies as well as grounded complaints should be considered for enforcement examinations. On the other hand, an unqualified opinion from an auditor should not be considered as proving the absence of risk of a misstatement. Enforcement examinations should be considered where, after preliminary scrutiny, a complaint received appears reliable and relevant for a possible enforcement examination.
51. In order to ensure European supervisory convergence, when applying the relevant criteria for selection, enforcers should take into account the common enforcement priorities identified by enforcers together with ESMA.
52. Selection models should comply with ESMA's supervisory briefing on selection. Such criteria are not public in particular in relation to the fact that issuers might identify the time when they become subject to examination. Enforcers should communicate factors used as part of their national selection method and potential subsequent amendments to ESMA for information. ESMA will ensure confidentiality of such information in accordance with the provisions of the ESMA Regulation. Such information will serve as a basis for any further potential developments that may be envisaged in relation to the criteria used for the selection methods.

Examination procedures

53. **Guideline 6: As part of the enforcement process, European enforcers should identify the most effective way for enforcement of financial information. As part of the ex-post enforcement activities, enforcers can either use unlimited scope examination or a combination of unlimited scope and focused examinations of financial information of issuers selected for enforcement. The sole use of focused examination should not be considered as satisfactory for enforcement purposes.**
54. Examples of examination procedures of an issuer's financial information include the following:
 - a) Scrutinising the annual and interim (consolidated) financial reports, including any financial report published subsequently;
 - b) Asking questions of the issuer, usually in writing, in order to better understand: the areas of the issuer involving significant risks, the significant accounting issues which arose in the year under review, how the issuer treated the significant accounting issues, and how the issuer's chosen accounting treatment complies with the relevant reporting framework;
 - c) Posing questions to or having meetings with the auditors of the issuer to discuss complex issues or issues of interest, depending on the needs of the examination process;

- d) Referring matters to the bodies responsible for the audit and/or approval of financial information, such as a supervisory board or audit committee;
- e) Identifying accounting issues inherent in the issuer's industry, available, for example, from the EECS database;
- f) Engaging external experts, where considered necessary, to assist in providing industry or other specialist knowledge;
- g) Exchanging information concerning the issuer with other departments within the enforcer, for example, where the issues may concern market abuse, takeovers or major voting rights;
- h) Engaging in on-site inspections.

Further examples of procedures considered relevant as part of the examination process include:

- a) Reviewing other relevant financial information made available by the issuer;
 - b) Reviewing recent press articles and accounting commentaries concerning the issuer and its industry;
 - c) Comparing the issuer's financial reports to those of its competitors;
 - d) Comparing key financial relationships and trends within the issuer's financial reports, both in the year under review and for prior periods.
55. Enforcers should ensure that examination procedures undertaken are sufficient in order to achieve an effective enforcement process and that the examination techniques used and the related conclusions of the review of the financial information of issuers selected as part of the enforcement process are documented appropriately.
56. The conclusions of an enforcer following the examination procedures can take one of the following forms:
- a) A decision that no further examination is needed
 - b) A decision whereby an enforcer accepts that a specific accounting treatment is in accordance with the relevant financial reporting framework and no enforcement action is required
 - c) A decision whereby an enforcer finds that a specific accounting treatment is not in accordance with the relevant financial reporting framework, whether it constitutes a material misstatement or an immaterial departure and whether an enforcement action is required.

Enforcement actions

57. **Guideline 7: An enforcer should use the actions indicated below, at the enforcer's initiative. Whenever a material misstatement is detected, the enforcer should in a timely manner take at least one of the following actions according to the considerations described in paragraph 61:**
- a) **require a reissuance of the financial statements,**
 - b) **require a corrective note, or**

- c) require a correction in future financial statements with restatement of comparatives, where relevant.**
- 58. Where an immaterial departure from the financial reporting framework is left intentionally uncorrected to achieve a particular presentation of an issuer's financial position, financial performance or cash flows, the enforcer should take appropriate action as if it was material.**
- 59. Where an immaterial departure from the financial reporting framework is detected but there is a significant risk that it might become material in the future, the enforcer should inform the issuer about the departure.**
- 60. Similar actions should be used where similar infringements are detected, after consideration has been taken of materiality.**
61. When deciding between the type of action to be applied, enforcers should take into account the following considerations:
- a) Subject to the existing powers of the enforcer, when deciding between requiring a reissuance of the financial statements or a corrective note, the final objective is that investors should be provided with the best possible information and an assessment should be made whether the original financial statements and a corrective note provide users with sufficient clarity necessary for taking decisions or whether a reissuance of the financial statements is the best solution;
 - b) When deciding to require either a correction in future financial statements or the publication of a corrective note or reissuance of the financial statements at an earlier moment, different factors should be considered, namely:
 - the timing of the decision: for instance, where the decision is very close to the date of the publication of the financial statements, a correction in future financial statements might be appropriate;
 - the nature of the decision and the surrounding circumstances:
 - where the market is sufficiently informed at the moment the decision is taken, the enforcer could opt for a correction in future financial statements;
 - where the decision relates merely to the way information was presented in the financial statements rather than to the substance (e.g. information is clearly presented in the notes whereas the relevant accounting framework requires the presentation on the face of the primary financial statements), the enforcer could also opt for a correction in future financial statements.

The reason for the publication in future financial statements should be stated clearly in the decision.

62. **Guideline 8: When determining materiality for the purpose of enforcement of financial information, this should be assessed according to the relevant financial reporting framework used for the preparation of the financial information as of its reporting date.**
63. For instance under IFRS, omissions or misstatements of items are material if they could, individually or collectively, influence the economic decisions that users make on the basis of the financial statements. Materiality depends on the size and nature of the omission or misstatement judged in the surrounding circumstances. The size or nature of the item, or a combination of both, could be the determining factor.
64. **Guideline 9: Enforcers should ensure that actions taken are appropriately acted on by the issuers against which the actions were taken.**
65. As material misstatements could, by definition, have an impact on the decisions of investors and other users of harmonised documents, it is important that these are not only informed that there is a misstatement but are also provided with the corrected information, unless impracticable, on a timely basis. Therefore, when actions mentioned in Guidelines 7 a) or b) are taken, the relevant financial information and the action taken should be made available, unless impracticable, either directly by the issuer and/or by the enforcer to market participants.

European coordination

66. **Guideline 10: In order to achieve a high level of harmonisation in enforcement, European enforcers should discuss and share experience on the application and enforcement of the relevant financial reporting framework, mainly IFRS, during meetings of the EECS. In addition, European enforcers under ESMA coordination should identify common enforcement priorities on a yearly basis.**
67. In order to achieve a high level of harmonisation in enforcement, ESMA has set-up regular meetings of the EECS in which all European enforcers are represented and should participate.
68. To promote supervisory convergence, enforcers under ESMA coordination should identify common accounting matters for enforcement of financial information in the EEA which should be made public sufficiently in advance of the end of the reporting period. While most of the areas should be common, some of them might not be relevant for all countries or are specific to some industries. Definition of areas should be done sufficiently in advance in order to allow enforcers to include these in their enforcement programme as areas for examination.
69. **Guideline 11: Although the responsibility for enforcement rests with national enforcers, in order to promote harmonisation of enforcement practices and to ensure a consistent approach among enforcers to the application of the relevant financial reporting framework, coordination on ex-ante and ex-post decisions should take place in the EECS. European enforcers under ESMA coordination should also identify accounting matters and provide technical advice for the preparation of ESMA statements and/or opinions.**

70. Although actions are taken at national level, the creation of a single securities market implies the existence of similar investor protection in all Member States. Consistent enforcement of financial information in the EEA requires coordination and a high level of harmonisation of actions among enforcers. In order to ensure proper and rigorous enforcement of financial information and avoid regulatory arbitrage, ESMA will promote harmonisation of enforcement approaches through coordination on ex-ante and ex-post decisions taken by enforcers.
71. The issuance of accounting standards and interpretations of their application is reserved to standard setters. Therefore ESMA and enforcers do not issue any general IFRS application guidance to issuers. Nevertheless, as part of the enforcement activities, enforcers apply their judgement in order to determine whether accounting practices are considered as being within the accepted range as permitted by the relevant financial reporting frameworks.
72. When IFRS are applied, material controversial accounting issues, as well as ambiguities and any lack of specific guidance, discovered during the enforcement process will be conveyed by ESMA to the bodies responsible for standard setting and interpretation (namely, the IASB and IFRS IC). This is also the case for any other issues identified which create enforceability constraints during the enforcement process.

Emerging issues and decisions

73. **Guideline 12: Discussion of cases at the EECS can take place on either an ex-ante (emerging issues) or an ex-post (decisions) basis. Except in rare circumstances where the deadline imposed on an enforcer makes it impossible to prepare, present and discuss with the EECS before a decision is taken, an accounting issue should be submitted as an emerging issue in any of the following situations:**
 - **Where no prior decision has yet been taken by an enforcer or where there has been no prior discussion on a particular accounting issue. This does not apply to matters presenting little technical merit or where the accounting standard is clear and where the infringement is obvious;**
 - **Where the financial reporting issues are identified by European enforcers or ESMA as of significant importance for the internal market;**
 - **Where the enforcer disagrees with an earlier decision on the same accounting issue; or**
 - **Where the enforcer identifies a risk of significantly different treatments between issuers across Europe.**

Enforcement decisions taken on the basis of an emerging issue should take into account the outcome of the discussion in the EECS.

74. An accounting issue can be presented as an emerging issue where the enforcer is looking for further guidance from other enforcers because of the complex nature of the accounting issue or where the enforcer is looking for further guidance because the issue might raise an enforceability issue.

75. Accounting issues encountered by an enforcer, other than those when a standard is clear, the infringement obvious and on which no decision has yet been taken, should be brought to the attention of ESMA and discussed in the EECS to ensure that a consistent enforcement approach is taken. In order to do so, enforcers should present such issues for discussion before they take a decision and take into account the outcome of the discussion in the EECS. The outcome should also be taken into account by other enforcers. ESMA may also bring emerging issues to the EECS in case financial reporting issues are of significant importance to the internal market.
76. **Guideline 13: A decision should be submitted to the EECS if the decision fulfils one or more of the following criteria:**
- **The decision refers to accounting matters with technical merit;**
 - **The decision has been discussed as an emerging issue, unless it was decided otherwise during the discussion in the EECS meeting;**
 - **The decision will be of interest for other reasons to other European enforcers (this judgement is likely to be informed by EECS discussions);**
 - **The decision indicates to an enforcer that there is a risk of significantly different accounting treatments being applied by issuers ;**
 - **The decision is likely to have a significant impact on other issuers;**
 - **The decision is taken on the basis of a provision not covered by a specific accounting standard;**
 - **The decision has been overruled by an appeals committee or Court; or**
 - **The decision is apparently in contradiction with an earlier decision on the same or a similar accounting issue.**
77. Emerging issues and decisions discussed in the EECS normally refer to IFRS financial statements but could also cover, for instance, financial reporting prepared under a GAAP deemed equivalent with IFRS as endorsed in the EU.
78. To ensure effective and efficient discussions, emerging issues and decisions should be clear and concise yet include all relevant facts, issuer's arguments, the basis for the enforcer's rationale and the conclusion.
79. **Guideline 14: Enforcement decisions by enforcers should take into account earlier decisions on the same accounting issue where similar facts and circumstances apply. Enforcement decisions include both ex-ante and ex-post decisions, as well as the outcome of discussions at the EECS on a decision on whether or not an accounting treatment is in accordance with the relevant financial reporting framework and the action related to it. Irrespective of the outcome of the EECS discussion, the final decision is the responsibility of the national enforcer.**
80. In order to ensure a consistent enforcement regime throughout the EEA, enforcers should, before taking an enforcement decision, look for decisions taken by other European enforcers on the EECS database and take them into account, as they should take into account the enforcer's own earlier decisions on the same accounting issue. This is the case irrespective of whether the decision is taken as a pre-clearance or as a decision based on published financial statements.

81. If an enforcer intends to take a decision which apparently is not in accordance with an earlier decision or with the outcome of a discussion of an emerging issue on the same or a similar accounting issue, the enforcer should present it as an emerging issue. This is in order to establish whether differences in facts and circumstances justify a decision which is different from the precedent.

Reporting

82. **Guideline 15: All emerging issues that meet any of the submission criteria as mentioned in Guideline 12 should be submitted to ESMA with the relevant details normally within two weeks before the EECS meeting in which it is going to be discussed.**
83. **Guideline 16: All enforcement decisions that meet any of the submission criteria, as mentioned in Guideline 13, should be submitted to ESMA with the relevant details normally within three months of the decision being taken.**
84. Coordination in the EECS should be facilitated by the existence of a database. The objective of the database is to constitute a platform for sharing information on a continuous basis. The time frame for submission is set to avoid too many situations where already taken decisions that should have been taken into account in relation to later decisions are not known to other enforcers. ESMA will review all submissions for internal consistency, sufficiency of information and use of correct terminology and may require resubmission or the provision of additional information. After a completed review, ESMA logs the enforcement decision into the database.
85. The EECS database contains the outcome of the discussion that took place during the meeting. The data management ensures that decisions which become outdated because of changes to accounting standards are moved into a separate section and that decisions which are considered as being without technical merit are also classified in a separate section. ESMA is responsible for maintaining the database.
86. **Guideline 17: In order to promote consistency of IFRS application, European enforcers within ESMA should decide on which decisions included in the database can be subject to publication on an anonymous basis.**
87. A selection of IFRS enforcement decisions to be published should be made by enforcers under ESMA coordination. The decisions selected for publication should fulfil one or more of the following criteria:
- The decision refers to a complex accounting issue or an issue that could lead to different applications of IFRS; or
 - The decision relates to a relatively widespread issue among issuers or in a certain type of business and, thereby, may be of interest to other enforcers or third parties ; or
 - The decision is on an issue on which there is no experience or on which enforcers have inconsistent experiences; or
 - The decision has been taken on the basis of a provision not covered by a specific accounting standard.

- 88. Guideline 18: European enforcers should report periodically on the enforcement activities at national level and provide ESMA with the necessary information for the reporting and coordination of the enforcement activities carried out at European level.**
89. Enforcers should periodically report to the public on the enforcement policies adopted and decisions taken in individual cases including accounting and disclosure matters. It is up to the enforcer whether to report on an anonymous or a non-anonymous basis on these matters.
90. European enforcers should report to ESMA findings and enforcement decisions relating to the common enforcement priorities, as identified in accordance with Guideline No. 10. These, together with other activities relevant to the European coordination, are published by ESMA in its activity report on enforcement.