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IFRS-FA – öffentliche SITZUNGSUNTERLAGE

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ESMA Guidelines on enforcement of financial information

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1. Executive Summary

- ESMA is of the view that in order to achieve a proper and rigorous enforcement regime to underpin investors' confidence in financial markets and to avoid regulatory arbitrage by issuers in the EU Single Market, there is a need for a common European approach to the requirements in the Transparency Directive on the enforcement of financial information
- Therefore ESMA has decided to review the previous CESR Standards on enforcement (CESR/03-073 and CESR/ 03-317c) and to propose guidelines on the enforcement of financial Information based experience gained by their use since 2005



1. Executive Summary

- ESMA plans to transform the CESR standards' principles into ESMA guidelines thus ensuring that enforcers of financial information will comply with them or report in a clear and detailed way the reasons for their non-compliance
- Therefore ESMA has launched a consultation on Guidelines on the enforcement of financial information published by listed entities in the European Union
- The Guidelines aim to strengthen and promote greater supervisory convergence in existing enforcement practices amongst EU national authorities, thereby ensuring the proper and rigorous enforcement of financial information disclosure practices in the EU



1. Executive Summary

- The Guidelines establish the principles to be followed in the enforcement process, by clearly defining :
 - enforcement and its scope;
 - expected characteristics of the enforcer;
 - acceptable selection techniques and other aspects of enforcement methodology;
 - the types of enforcement actions that may be available to enforcers;
and
 - how enforcement activities are coordinated within ESMA



1. Executive Summary

- The Guidelines also propose that the coordination of European enforcers by ESMA should involve the development of coordinated views on accounting matters prior to national enforcement actions, the identification of common enforcement priorities and common responses to the accounting standard setter to ensure consistent application of the financial reporting framework
- The proposed Guidelines apply to all competent authorities and any other bodies from the EU undertaking enforcement responsibilities under the Transparency Directive, and IFRS Regulation



2. Draft Guidelines - Scope

Who:

- The guidelines apply to all competent authorities and any other bodies from the European Union undertaking enforcement responsibilities under the Transparency Directive, Prospectus Directive and IFRS Regulation
- They also apply to countries from the European Economic Area who agreed to comply with the above mentioned legislation



2. Draft Guidelines - Scope

What:

- The guidelines apply in relation to the enforcement activities set out under Transparency Directive and Prospectus Directive to ensure that financial information in harmonised documents provided by issuers whose securities are admitted to trading, and by issuers who have applied for admission to trading of their securities, on a regulated market comply with applicable requirements
- This includes:
- Financial information of issuers already listed on a regulated market who are subject to the Transparency Directive, as required by that Directive;
- Financial information included in prospectuses by issuers applying for admission on a regulated market, as required by the Prospectus Directive
- Financial information of issuers from third countries who use reporting frameworks which have been declared equivalent to IFRS, according to Commission Regulation no 1569/2007



2. Draft Guidelines - Scope

When:

- The guidelines will become effective from one month from the publication of the adoption of the decision by the Board of Supervisory on the ESMA's website



3. Guidelines

Questions

1. Do you think that these guidelines will improve the quality and consistency of financial reporting in Europe?
2. Do you have any comments on the potential costs to the financial reporting community of any aspects of these proposals?
3. Do you agree that a common European approach to the 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.



3. Guidelines

Objective of enforcement - Guideline 1:

- The objective of enforcement of financial information included in harmonised documents is to contribute to a consistent application of the relevant reporting framework and, thereby, to the transparency of financial information relevant to investors' and other users' decision making process
- Enforcement contributes to the protection of investors and promotion of market confidence as well as to the avoidance of regulatory arbitrage in the EU regulated financial markets



3. Guidelines

Scope of enforcement - Guideline 2:

- When supervising and enforcing financial information from third countries, European enforcers should ensure that they have access to appropriately skilled resources or otherwise should coordinate with ESMA and other European enforcers to ensure having the right resources and expertise
- European enforcers within ESMA should coordinate enforcement in order to ensure consistency of treatment of financial information prepared by issuers from third countries



3. Guidelines

Questions

4. Do you agree with the objective, definition scope of enforcement?
5. Do you agree that issuers from third countries using an equivalent 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?



3. Guidelines

European enforcers - Guideline 3:

- Enforcers should ensure the effectiveness of enforcement activities
- In order to do so, they should have sufficient human and financial resources to carry out their activities in an effective manner
- The manpower should be professionally skilled, experienced with the relevant reporting frameworks and sufficient in number, taking into account the number of issuers subject to enforcement, their characteristics, the complexity of their financial statements and their ability to apply the relevant financial reporting framework



3. Guidelines

European enforcers - Guideline 4:

- Enforcers should have adequate independence from government, issuers and auditors, other markets participants and regulated markets operators
- Independence from government should imply that government cannot unduly influence the decisions taken by enforcers
- Independence from issuers and auditors should be achieved through codes of ethics and through the composition of the board of the enforcer



3. Guidelines

Questions

6. Do you agree that enforcers should have the powers listed in paragraph 30?
Are there additional powers which you believe that enforcers should have?
- Enforcers in all Member States shall have all necessary powers, which shall at least include:
- 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 relevant for enforcement at least 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



3. Guidelines

Questions

7. Do you agree that enforcers should have adequate independence from each of government, issuers, auditors, other market participants and regulated markets? Are the discussed safeguards 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?



3. Guidelines

Enforcement activities - Guideline 5:

- For financial information other than that contained in prospectuses, ex-post enforcement is the usual procedure
- Pre-clearance, if part of a formal process, is also permitted provided that the issuer has finalised its position on the accounting treatment concerned



3. Guidelines

Questions

8. Are you in favour of enforcers offering pre-clearance? Do you have any comments on the way the pre-clearance process is described?



3. Guidelines

Enforcement activities - Guideline 6:

- For Prospectuses ex-ante approval is the normal procedure as specified by the Prospectus Directive, which also identify the nature of the approval
- Ex-post enforcement of financial information provided in prospectuses is possible as a supplementary measure after publication



3. Guidelines

Questions

9. Do you agree that in order to ensure investors 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?



3. Guidelines

Selection methods - Guideline 7:

- Enforcement is normally based on 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 market



3. Guidelines

Questions

10. Do you agree that a risk-based approach for selection methods should not be used as the only approach?
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?
12. Do you think that a maximum period should be set subject to at least one full review (or to be used to determine the number of companies to be selected in sampling)?
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?



3. Guidelines

Examination procedures - Guideline 8:

- As a 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 full reviews or a combination of full reviews and partial reviews of financial information of issuers selected for enforcement
- Use of only partial reviews should not be considered as being satisfactory for enforcement purposes



3. Guidelines

Questions

14. 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?
- Examination procedures of an issuer's financial statement could include the following:
- a) Scutinising the annual and interim (consolidated) financial reports, including any financial report published subsequently
 - b) Asking questions to the issuer, usually in writing, in order to better understand: the significant risky areas of the issuers treated the significant accounting issues, and how the issuer's chosen accounting treatment complies with the relevant reporting framework



3. Guidelines

Questions

- c) Posing questions to or having meetings with the auditors of the issuers to discuss complex issues or issues of interest, depending on the needs of the examination process
- d) Identifying accounting issues inherent in the issuer's industry, available, for example, from the EECS database
- e) Engaging external experts, where considered necessary, to assist in providing industry or other specialist knowledge
- f) Exchanging information concerning the issuers with other departments within the enforcer, for example, where the issues may concern market abuse, takeovers or major voting rights
- g) Engaging in on-site inspections



3. Guidelines

Questions

Also the following procedures could be relevant as part of the examination process:

- a) Reviewing other relevant financial information made by the issuers
- b) Reviewing recent press articles and accounting commentaries concerning the issuers 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



3. Guidelines

Enforcement actions - Guideline 9:

- An enforcer should be able to use the actions indicated below, which should be enforceable at the enforcer's initiative
- Whenever a material misstatement is detected, the enforcer should in a timely manner take one of the following actions
 - a) require a restatement
 - b) require a corrective note, or
 - c) require correction in future financial statements with adjustments of comparatives, where relevant.



3. Guidelines

Enforcement actions - Guideline 9:

- Where an immaterial departure is left intentionally uncorrected by an issuer to achieve a particular presentation of an entity's financial position, financial performance or cash flows, the enforcer should require for its correction
- Where an immaterial departure from the 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 and where appropriate, based on the nature of the item, require a change in the accounting treatment in the future financial statements without adjustment of comparatives
- Similar actions should be used where similar infringements are detected, after consideration has been taken of materiality



3. Guidelines

Enforcement actions - Guideline 10:

- When determining materiality for enforcement, this should be assessed according to the relevant reporting framework used for the preparation of the financial information as of its reporting date



3. Guidelines

Enforcement actions - Guideline 11:

- Enforcers should ensure that actions taken are appropriately acted on by the issuers against which they were taken



3. Guidelines

Questions

15. Do you agree that, in determining materiality for enforcement purposes, materiality should be assessed according to the relevant reporting framework, e.g. IFRS?
16. What are your comments regarding enforcement actions?



3. Guidelines

European coordination - Guideline 12:

- 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, and mainly IFRS, during organised meetings of the European Enforcers Coordination Sessions



3. Guidelines

European coordination - Guideline 13:

- 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 taken should take place in EECS
- European enforcers under ESMA coordination should also identify accounting matters and provide technical advice for the preparation of ESMA Statements and/or opinions



3. Guidelines

Discussion of emerging issues and decisions - Guideline 14:

- Discussion of cases can take place either an ex-ante (emerging issues) or an ex-post (decisions) basis
- Except in rare circumstances where the deadline imposed to an enforcer makes it impossible to prepare, present and discuss with 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 on a particular accounting issue. This does not apply to matters where the standard is clear and where the infringement is equally obvious;
 - Where the financial reporting issues are identified by European enforcers or ESMA as of significant importance for the European regulated markets;
 - Where the enforcer disagree with an earlier decision on the same accounting issue; or
 - Where there is a risk of significant different treatments between issuers across Europe



3. Guidelines

Discussion of emerging issues and decisions - Guideline 16:

- Enforcement decisions taken by enforcers should take into account earlier decisions on the same accounting issue, considering that similar facts and circumstances apply
- Enforcement decisions include both ex-ante and ex-post decisions, as well as the outcome of discussions at EECS on decision on whether or not an accounting treatment is in accordance with the relevant reporting framework and the action related to it
- Irrespective of the outcome of the discussion, the decision stands



3. Guidelines

Questions

17. Do you have any comments on the specific criteria for submission of decisions or emerging issues to the EECS database?
18. What are in your opinion appropriate activities that would help to achieve a high level of harmonisation of the enforcement in Europe?



3. Guidelines

EECS database and reporting - Guideline 17:

- Coordination in EECS shall 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



3. Guidelines

EECS database and reporting - Guideline 18:

- 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
- In addition to that, European enforcers under ESMA coordination should identify common enforcement priorities on a yearly basis



3. Guidelines

EECS database and reporting - Guideline 19:

- European enforcers should report periodically on the enforcement activities and their coordination in Europe



3. Guidelines

Questions

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



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