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Steven Maijoor
Chairman
European Securities and Markets Authority
103 Rue de Grenelle
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Berlin, 16 May 2014

Dear Mr Maijoor,

ESMA Consultation Paper – *Guidelines on Alternative Performance Measures*

On behalf of the Accounting Standards Committee of Germany (ASCG), I am writing to comment on the ESMA Consultation Paper – *Guidelines on Alternative Performance Measures* issued on 13 February 2014. The ASCG welcomes the opportunity to contribute to the discussion about efforts that aim to promote the effective and consistent application of the European legislation with respect to financial reporting with the overall objective to ensure that users are provided with high quality financial information that enables them to make informed decisions.

Generally we are supportive of efforts addressing financial reporting issues where companies convey additional alternative performance measures as a form of substitute to defined GAAP measures bearing the risk of misleading users. In our view it is useful to have a debate whether new or extended guidelines are necessary to address this issue.

However, we strongly believe that before finalising any APM guideline, ESMA should consult and coordinate the corresponding efforts more closely with the IASB, with the European accounting standard-setters and with members of IOSCO. The coordinated efforts are indispensable and should address our concerns and questions regarding the proposed APM guidelines as explained hereafter.

Definition of APMs

The Consultation Paper proposes that all quantitative information with linkage to the financial position, comprehensive income or cash flow shall be considered as APMs. ESMA highlights that only a measure defined by the applicable financial reporting framework is not considered



an APM. Furthermore, the Consultation Paper proposes that if there are doubts, “[...] issuers should assume a particular measure is included in this definition”. ESMA justifies this broad approach, and in our view all-inclusive approach, to “[...] avoid controversy over which measures should be included or not”.

We think the definition of APMs should be narrowed and supplemented with illustrative examples. The proposed definition of APMs would lead to the highly questionable assumption that nearly all numeric formats of information reported under a financial reporting framework with principle-based requirements shall be considered APMs. We do not agree that such a broad approach would result in less controversy. Instead we believe the proposed broad definition in the Consultation Paper would result in many questions, especially regarding the implications of APM guidelines to existing European accounting legislation.

For example, IFRS 8 *Operating Segments* requires disclosure of measures but does not explicitly define those measures in light of the underlying management approach. It is not clear to us whether reported segment information in accordance with the requirements in IFRS 8.25 are considered by ESMA classifying as APM information. Similar questions arise for other presentation and disclosures in IFRS. By way of another example IAS 1 *Presentation of Financial Statements* lists minimum line items for financial statements but also requires additional line items in financial statements when it is necessary to understand the financial position and financial performance of the reporting entity, ie additional information is required but not explicitly defined in IFRS. We cannot derive a clear conclusion whether ESMA considers this information to be part of APMs.

Furthermore, the Consultation Paper highlights that the drafted guidelines “[...] are not to be applied to APMs that are disclosed in accordance with other applicable law that sets out specific requirements governing the determination of such measures.” The key question arises for us whether the disclosures regarding key performance indicators (KPIs) as required and enforced in Germany in accordance with the German Accounting Standard (GAS) 20 *Group Management Report* would in ESMA’s view be subject to the exception or not. GAS 20 reflects the requirements of Chapter 5 *Management Report* of the EU Accounting Directive (2013/34/EU) and its transposition into the German Commercial Code and does not define specific KPIs as they may differ from reporting entity to reporting entity. Nevertheless, GAS 20 lists possible examples of KPIs that are also targeted in the proposed ESMA guidelines as APMs such as EBIT, EBITDA, EVA and others. Reconciliations and other disclosure requirements for those KPIs, including the way in which they are calculated, are covered more principle-based in GAS 20.



We suggest narrowing the definition of an APM as a financial measure reported as an alternative or modification of specific GAAP measures. Typical examples of APMs would in our view be “adjusted revenue”, “revenue on non-GAAP basis”, “adjusted profit or loss”, “underlying profit or loss”.

Financial ratios and KPIs, such as EBIT, operating income, ROCE etc., should not be considered as an “alternative” performance measure if they are reported in accordance with (group) management report and underlying disclosure requirements. In our view the term *Alternative Performance Measure* would be misleading for those measures. They should be considered supplementary performance information.

Scope of guidelines

ESMA highlights in the Consultation Paper that the proposed guidelines shall apply to APMs disclosed by issuers in all documents containing regulated information made publicly available. ESMA also highlights that “regulated information” include 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 the Market Abuse Directive, or under the laws, regulations or administrative provisions of a Member State adopted under Article 3(1) of the Transparency Directive (transposition of the Transparency Directive).

We foresee difficulties determining whether specific disclosures should be considered “regulated information”. The definition used in the Consultation Paper already implies that regulated information may be different in each Member State due to the transposition of the Transparency Directive. Hence, we think it would be necessary for NCAs to provide a clear overview of publications and other forms of disclosure requirements in accordance with national law to be considered within the scope of the APM guidelines. For example, it is not entirely clear to us, whether various forms of combined and carve out financial statements should be considered “regulated information” in light of the definition proposed in the ESMA Consultation Paper.

Furthermore, it should be borne in mind that there is no common regulation across European jurisdictions for some types of publications listed by ESMA as examples for the application of APM guidelines. We consider approaches trying to regulate few fragments being problematic because it may create onerous complexity in the regulatory framework. Furthermore, we think that if the APM guidelines will be considered not being part of national law, NCAs may not be in a position to enforce such guidelines.



Compliance and reporting obligations

Reconciliation and explanation disclosures

We are of the view that it is useful for users, and therefore necessary for preparers, to provide sufficient information to understand the composition of reported amounts and other measures in financial reports. However, we do not share the ESMA's view that the reporting of each numerical information not defined by the applicable financial reporting framework should result in additional, in our view excessive, disclosure requirements. For example we do not support a general requirement to explain the use of each APM together with a statement of the reasons why the APM provides useful information. We consider a clear definition and reconciliation, where possible, sufficient. Furthermore, in our view it is sufficient to provide this information on an annual basis. The information is only necessary in interim reporting of financial statements and (group) management report if the composition/definition has changed compared to the last report. We also hold the view that it would not be necessary to attach the information as an appendix to any document containing regulated information.

The proposed guidelines indicate in paragraph 6 in Annex III of the Consultation Paper the possibility to replace required disclosure requirements with cross-reference to another document which contains these disclosures and is readily and easily accessible to users. However, paragraph 19 of the proposed guidelines requires a list of definitions of all APMs used in an appendix to be included in each document containing regulated information. It is not clear to us which paragraph takes priority over the other paragraph. As mentioned above, we believe such a list of, sometimes unavoidable complex definitions, is in our view unreasonably and should not be attached to each document containing regulated information. Such an attached list may be considered as boilerplate and could distract the user from the core of information in the document itself. Therefore we support the possibility of cross-referencing.

Within the context of the proposed reconciliation of APMs to the most relevant amount presented in the financial statements the term "most relevant" is not clear and in our view unhelpfully ambiguous. Similarly, we do not entirely understand how the requirement of calculation disclosures for a reconciliation item that cannot be extracted directly from the financial statements items should be implemented by an issuer (paragraph 23 in Annex III).

Furthermore, within the context of the reconciliation disclosure proposals ESMA acknowledges in the Consultation Paper that there may be some APMs that cannot be not derived from the financial statements directly, as they may represent future projections or forecasts. In this case reconciliation would not be mandatory. However, in our view not only forecasts but a number of other numeric information relating to financial performance, eg order book/backlog disclosure, growth rates of sales adjusted for foreign exchange effects and portfolio effects, are not derived from financial statements directly. Additionally, ESMA proposes in such cases disclosure about the consistency of those APMs that are not derived



directly from financial statements. We think such disclosure would be excessive and information is only necessary in case of changes of the definition or calculations of APMs.

Prominence of APMs

We have concerns regarding the proposal to present APMs with less prominence. For example if KPIs in accordance with GAS 20 as part of the (group) management report should be considered as APMs, we believe the ESMA proposal to display this financial information with less prominence, emphasis or authority than measures directly stemming from financial statements is inconsistent with EU Accounting Directive (2013/34/EU) and German legislation regarding management reporting.

However, if ESMA follows our proposal above to narrow the definition of APMs, we are more inclined to agree with ESMA that APMs should be presented with less prominence. Nevertheless, we would still see the issue how to operationalise this proposal. For example the comprehensive disclosures for APMs as proposed by ESMA - that we consider would go beyond disclosure requirements of GAAP measures - may shift the prominence of APMs compared to GAAP measures and related disclosures. We generally believe it would be more appropriate to highlight that APMs should not be displayed with undue prominence.

Comparability and consistency

The proposed guidelines indicate in paragraph 34 in Annex III of the Consultation Paper that only in „exceptional circumstances“ an issuer can decide to redefine or no longer use an APM, together with disclosure about the reasons why the changes would provide more reliable and more relevant information.

ESMA's wording seems to set a very high hurdle for potential changes to the reporting of an APM. In other words, depending on ESMA's interpretation of "exceptional", management may not be able to change an APM. Once again, we have concerns that the proposed wording would go beyond the existing general requirements for consistency of information reported in financial statements and (group) management reports.

If you would like to discuss our comments and views further, please do not hesitate to contact me.

Yours sincerely,

Liesel Knorr

President