European Securities and Markets Authority (ESMA)  
CS 60747  
103 rue de Grenelle  
75345 Paris Cedex 07, France  

15 October 2013

Dear Sirs,

Re: Consultation Paper: ESMA Guidelines on enforcement of financial information

BUSINESSEUROPE appreciates having the opportunity to provide comments on the Consultation Paper.

We would like to make it clear that we support the objective of harmonising the approaches of regulators to enforcement across Europe. In our view, this is an essential condition for the achievement of a sustainable European capital market. While we are not convinced that companies do actually take advantage of any current perceived differences in regulatory strictness, we think that differences in the approach to enforcement are detrimental to the efficient functioning of capital markets.

We make the following suggestions of guiding principles that could be used in this area.

A level playing-field across Europe based on IFRS disclosures

We believe that some regulators today ask for more information than what is required in IFRS. On the other hand, some individual regulators hold the view that information required by IFRS is unreasonable, because it concerns commercially sensitive information or information unnecessarily onerous to produce or communicate. Given those differences in the approach from different regulators BUSINESSEUROPE believes that an agreement must be reached on what is the level of compulsory disclosure acceptable in Europe. No individual country or group of countries should be exposed to requirements which could place its companies at a disadvantage compared to others in Europe. The harmonisation of the approaches of the different regulators should be based on the principle that the level of disclosures required by current IFRS standards (which is, in our opinion, too extensive and detailed at present) represents the most detailed level of disclosure that any regulator can require.

No disadvantage to European companies in the global markets

Many European companies compete for capital across the globe. Compared with IFRS, many reporting frameworks, such as US GAAP, do not require disclosure of commercially sensitive information to the same extent as IFRS. Even in the case of standards which are theoretically converged, such as IFRS 8, we perceive a difference in application. It is the role of the European regulator to ensure that European companies are not placed at a disadvantage compared with other companies in the
global market. We think that this should also be taken into consideration by ESMA in its work towards harmonisation of enforcement approaches.

Harmonisation of regulators’ approaches without becoming the European IFRS Interpretations authority

IFRSs are interpreted and applied differently by different entities in different jurisdictions. These different approaches can nonetheless be in compliance with IFRS and therefore be acceptable. There is a risk that in harmonising approaches to enforcement ESMA may be tempted to harmonise interpretation and application of IFRS across Europe. In our understanding, ESMA’s role is to enforce compliance with IFRS in Europe and to impose a unified interpretation and application of IFRS would be outside this remit. As a corollary to this, we think that ESMA must make it clear, therefore, that the findings and rulings recorded in its “enforcement database” do not have the force of an Interpretation of IFRS and are not intended to have such a status.

Disclosure overload

In its development of a harmonised approach to enforcement, ESMA should, in our view, always bear in mind that both users and preparers alike seem to agree that the volume of disclosure required under IFRS has reached a level where it is detrimental to the clarity of the notes and an unacceptable burden to preparers. This situation brings with it not only the risk that the user finds it almost impossible to identify crucial information in the mass of data (one does no longer “see the wood for the trees”), but also that the preparer finds it difficult to assure the quality of the information provided on a timely basis. An emphasis from ESMA on the importance of pursuing only material omissions in enforcement actions would help to curb this problem.

Harmonisation should allow for enough flexibility in national implementation

Although harmonised, new guidelines should allow Member States to choose among the best fitting enforcement systems for them. For some market situations the enforcement structure might be better based on a two-stage system (such as Germany and Austria – implementation of an independent association as a stage before checks through the financial authority) rather than on a one-stage system (via a stock exchange or a financial authority). The guidelines should continue to allow a certain degree of flexibility for implementation on the national level.

We have made specific comments to some of the questions raised in the Consultation Paper in the Appendix to this letter.

Please do not hesitate to contact us should you wish to discuss these issues further.

Yours sincerely,

Jérôme P. Chauvin
Director
Legal Affairs Department
Internal Market Department
APPENDIX

Question 1

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

We find the question difficult to answer since few references are made to the EU legislation that forms the starting point for the proposed guidelines as well as to the current CESR Standards. A table of concordance would have been helpful to assess what amendments that are proposed.

Having said that, we strongly support efforts to ensure an efficient enforcement in all Member States carried out in a similar way, thereby ensuring a level playing field for all preparers.

Question 2

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

We find the question difficult to answer. We also find it surprising that no cost-benefit analysis has been performed based on the argument that the guidelines are not addressed to financial market participants. This assessment is erroneous since it is preparers that are the target for enforcement and those will of course bear a cost (implicit or explicit) for enforcement. The issue is what total cost is for an effective European enforcement system that secures a level playing field and what the benefits are.

Question 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 be applied in different European jurisdictions.

In the further discussion about the need for harmonisation it should be noted that in any future scenario, enforcement must not be dealt with from one central European authority. In our opinion, it is highly relevant that national enforcement institutions deal with national enforcement within Member States. ESMA shall have the role of a coordinating agent and have the competence for the harmonisation of standards, but not the role of a direct supervisor of Member States’ listed companies.

In the draft numerous references are made to regulatory arbitrage. We quite frankly wonder if ESMA has detected any such cases and if so, how many. To us it seems like a theoretical problem. We ask for evidence regarding this phenomenon that we suspect cannot really be a big issue in the European markets. We therefore suggest to delete the reference to regulatory arbitrage from article 1 (purpose) of the draft Guidelines and the other articles where this reference is made, unless ESMA can present evidence that such arbitrage has been a significant problem.
Question 4

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

We do not agree with the scope of enforcement as specified in the paragraph 23 of the draft guidelines since we believe they fail to reflect the current situation in the Member States. Some Member States also applies enforcement rules upon non-home country EU companies. Austria for example, in its recently passed enforcement law (Rechnungslegungskontrollgesetz, 2012), specifies that all companies that are active in the Austrian market (second listing) are subject to the enforcement regulation. Hence, also non-Austrian companies whose home-market is not in Austria will fall under the enforcement rules. We believe that ESMA should address also this situation.

Question 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?*

Yes, we agree that issuers from third countries using an equivalent GAAP to IFRS should be subject to an equivalent enforcement and coordination system.

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?*

The powers listed in paragraph 30 are reiterated from the Transparency Directive and thus not subject to comment or change in this process. We believe that they could be further clarified in the Guidelines, which is partly done in paragraph 54 concerning examination procedures. Please refer to our answer to question 14 for comments connected to the right to require any information and documentation relevant for enforcement from the auditors of the examined issuer.

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?*

We agree that it is important that enforcers have adequate independence from various stakeholders. The proposal to prohibit market operators from assuming delegated enforcement responsibilities is according to our understanding only going to affect a few member states in the EU, e.g. Sweden. Our understanding is that independence has not been an issue with this set-up in Sweden. Adding to this, the market operators are under supervision from financial market authorities. We are not aware of any independence problems that have been raised or addressed by the authorities. Our conclusion is therefore that a prohibition might be too far-reaching.
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 paragraph 42 to 45 are described?

To our knowledge there is no extensive demand for pre-clearance among companies. However, this is a useful facility which regulators should be encouraged to offer. Use of such a facility should not be obligatory, neither for regulators nor for issuers.

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?

N/A.

Question 10
Do you agree that a risk-based approach to selection should not be used as the only approach as this could mean that the accounts of some issuers would potentially never be selected for review?

Yes, we agree that a risk-based approach should be combined with a rolling scheme to capture all issuers over a certain time period.

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?

Yes, we agree.

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)?

We object to the proposal of a “full review” since this would work contrary to the preventive objective of the enforcement.

As for a possible maximum period of future full reviews: yes. See also our answer to question 10.

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?

Generally, we believe that common enforcement priorities should have the legal character of recommendations. Their application shall be decided at the national level based on plausibility.
We disagree with what is stated in article 52 of the draft guidelines. We believe contrary to ESMA that selection models should be made public and we do not understand the argument that they should be kept secret "because of their nature". We believe that enforcement activities are aiming to influence behavior. Therefore also selection models and what areas enforcers are targeting should be made public.

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?

We understand that an enforcer could have an interest to contact the auditor regarding certain accounting matters. We also acknowledge that it may be common for certain issuers to involve the auditor in a discussion with the enforcer. This should always be on the initiative of the issuer. We strongly object to a possibility for the enforcer to turn directly to the auditor without involving the issuer. We therefore ask ESMA to clarify the power of the enforcer in paragraph 54 c) in accordance with this view.

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?

We believe that the definition of materiality is not among the tasks of ESMA. However, in the national enforcement, it is important to assess materiality according to the relevant financial reporting framework.

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?

Some Member States might have chosen to define sanctions for the breach of the relevant laws already on a national level. Thus, national implementation of the proposed guidelines might be contradictory to modes already established in the Member States.

Question 17

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

N/A.

Question 18

What are in your opinion appropriate activities that would help to achieve a high level of harmonisation of the enforcement in Europe?

It is important to allow the Member States a choice of how the guidelines should be implemented. A sensitive approach towards different capital market situations by ESMA is necessary. Substantial enforcement decisions shall by all means be made at the level of the concerned capital market and thus remain a competence of the Member State.
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?

N/A.

Question 20

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

We support a continued process of making public enforcement actions taken against issuers on an anonymous basis. We appreciate that the cases are described in detail as such presentation mitigates the risk for misinterpretations. The actions made public should not contain any interpretation of the standards that goes beyond what can be read out in the IFRSs themselves or accompanying conclusions published by the IASB. It is of utmost importance that the roles of standard-setting and enforcement are kept apart.

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