Deutsches Rechnungslegungs Standards Committee e.V.
Accounting Standards Committee of Germany ® IFRS-Fachausschuss

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Ms Roxana Damianov
Senior Officer, Corporate Reporting
European Securities and Markets Authority
103 Rue de Grenelle
F-75007 Paris

Dear Ms Damianov

ESMA Consultation Paper 'ESMA Guidelines on enforcement of financial information'

The ASCG appreciates the opportunity to comment on ESMA's draft Guidelines on enforcement of financial information.
When the IAS regulation was put into place, recital 16 mentioned that a proper and rigorous enforcement regime is key to underpinning investors' confidence in financial markets. A common approach to enforcement was meant to be developed notably through CESR.
When subsequently the Transparency Directive further developed the requirements for competent authorities and their powers, the foundation for the current structure was laid down.
While we appreciate ESMA's decision to review the previous CESR Standards on enforcement and to propose guidelines under its powers under the ESMA Regulation, we would like to point out that the proposed guidelines have to take account of the variations in structures and remits of the competent authorities of the Member States as put into place in accordance with the Transparency Directive.
Please find our comments on those questions that are most relevant to our expertise in the field of standard-setting appended to this letter. Should you have any questions or wish to discuss any of our observations, please do not hesitate to contact me.

With kind regards

Liesel Knorr
President

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 being applied in different European jurisdictions.

While we agree that a common European approach would help mitigating regulatory arbitrage, one has to bear in mind that the competent authorities vary in their organisation and mission from Member State to Member State, e.g. the German two-tier enforcement structure vs. the one-tier structure in place in many EU Member States. This reflects the differing legal environments which have to be taken into account in organising enforcement.
Supporting a common approach by sponsoring the cooperation between the national European enforcement authorities is seen as the prime role of ESMA.

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?

We welcome the new objective of enforcement, i.e. going beyond mere investor protection and improving public confidence in financial reporting.
As to the scope, the inclusion of prospectuses seems to go beyond current practice in several Member States. A legal basis for such action would have to be put into place.

Question 6

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

The current structure of competent enforcement authorities is based on the transformation of the Transparency Directive's requirements into national law. The proposed guidelines cannot override those provisions.
We do believe that enforcers should not have any powers in addition to those listed in paragraph 30.

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?

We appreciate the possibility of issuers to seek pre-clearance for the financial reporting treatment of certain transactions or events. However, pre-clearance processes need to be ring-fenced for the following reasons:

- There should be no opportunity for arbitrage between the opinion of the auditor and the enforcer;
- The enforcer should not take over standard-setting by agreeing to treatments clearly overriding a given requirement.

If the financial reporting issue cannot be solved by the reporting entity, its auditor and the enforcer, the issue should be brought to the attention of the IASB/IFRS IC for their consideration.

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?

Currently prospectus information is reviewed under the Prospectus Directive for completeness, including the consistency of the information given. In several EU countries (e.g. Germany), financial statement information in prospectuses is not subject to an enforcement review.
Introducing ex-ante enforcement of prospectuses would have consequences such as the need for introducing legislation – on an EU level as the basis.

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?

Setting common enforcement priorities by European enforcers will undoubtedly improve the common ground of European securities markets. However, there should be room for flexibility for national enforcers by allowing them to add additional national priorities as well as to not to deal with a particular item if that item is of no relevance in the jurisdiction concerned.

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 have concerns that the use of only partial reviews should not be considered as being satisfactory for enforcement purposes. Full reviews on the one hand create an expectation the enforcement authorities will unlikely be able to meet. Bearing in mind global groups with more than 1,000 entities spread all over the world this would create an activity level of a second audit.
Full reviews contradict setting priorities; common priorities, such as e.g. goodwill impairment, serve the purpose of enforcement much more than full reviews.

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?

With reference to our comment letter on the ESMA Consultation Paper dated 13 March 2012 we would like to reiterate that we deem the IASB to be in the appropriate position to promulgate any additional guidance in this area, impacting the entire IFRS constituency.

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?

While we appreciate that a coordination of enforcement actions would help mitigating regulatory arbitrage, enforcement actions for the time being are subject to legal definition at national level. The guidelines can become common practice only to the extent the legal definitions at national level support that.
More specifically, as IAS 8.41-49 contains requirements for the correction of errors: what is the relation between these paragraphs and the proposed enforcement actions in paragraph 57 b) and c)? To our understanding, the requirements of IAS 8 for correcting errors are exhaustive; enforcement actions cannot and should not override them. There is only room for how and when publication should take place.

Question 17

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

While we appreciate the positive effects of discussing emerging issues on a European level, requiring national authorities to submit and discuss those issues would make the process much more elaborate and, therefore, more time-consuming. Furthermore, this would interfere significantly with the independent responsibilities of national authorities.

Question19

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?

The transparency, timing and frequency of reporting seem to vary widely. Coordinating the reporting in these respects would help to dispel myths about differing quality of enforcement. However, the extent of coordination might be limited by differing remits and legal environments in the EU Member States.

Question 20

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

While we can appreciate interest in making public enforcement actions, we would like to point out that the legal basis for publishing enforcement actions varies from jurisdiction to jurisdiction. It would be helpful if the basis for publishing selective enforcement actions was clarified so as to avoid the perception that the published actions are the most prevalent or the most important ones.