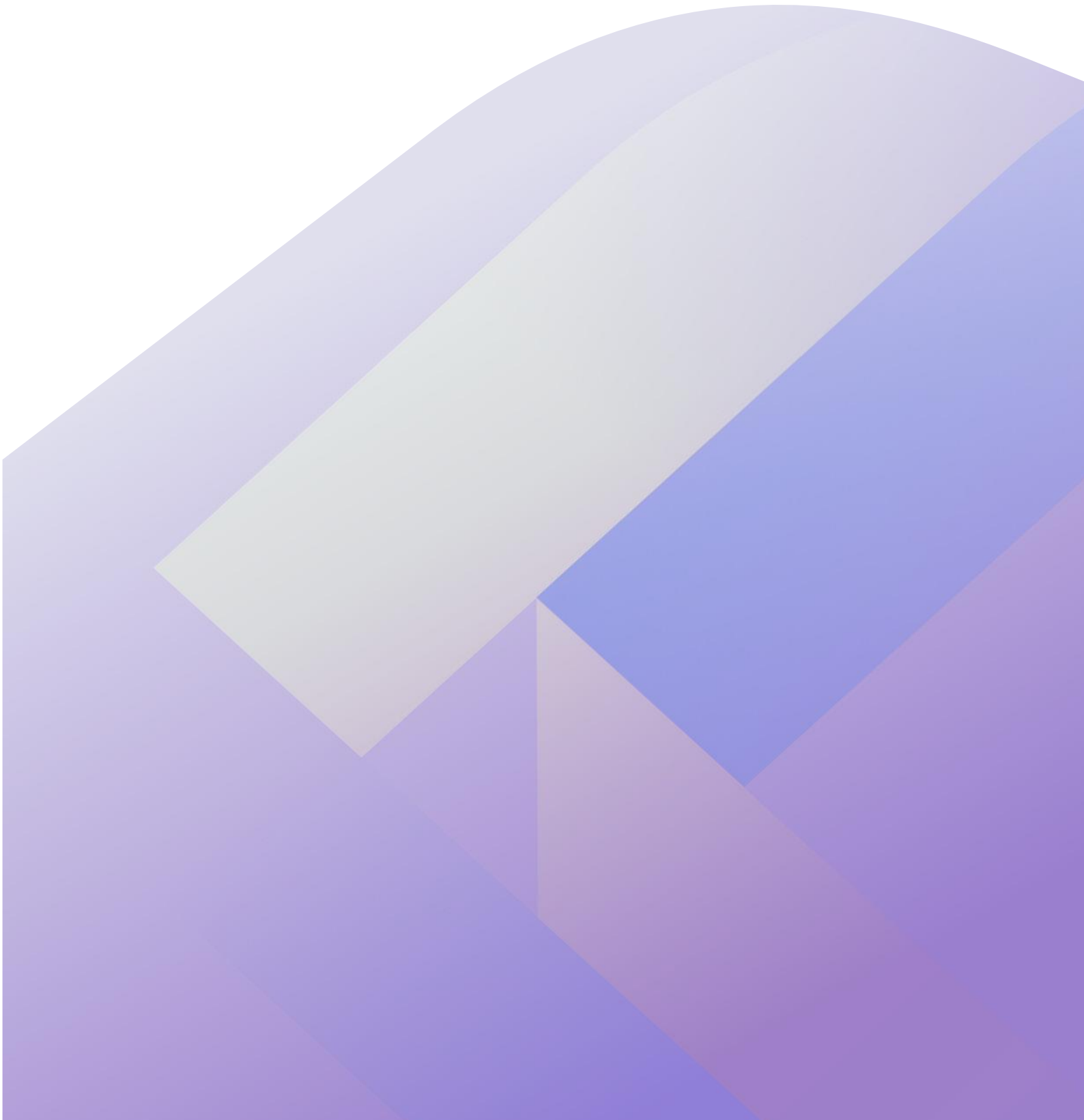


Consultation Paper

Draft Guidelines on Enforcement of Sustainability Information



Responding to this paper

ESMA invites comments on all matters in this paper and in particular on the specific questions summarised in Annex III. Comments are most helpful if they:

- respond to the question stated;
- contain a clear rationale; and
- describe any alternatives ESMA should consider.

ESMA will consider all comments received by 15 March 2024.

All contributions should be submitted online at www.esma.europa.eu under the heading 'Your input - Consultations'.

Publication of responses

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publicly disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with ESMA's rules on access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by ESMA's Board of Appeal and the European Ombudsman.

Data protection

Information on data protection can be found at www.esma.europa.eu under the heading '[Data protection](#)'.

Who should read this paper?

This consultation paper will be of interest to listed undertakings required to publish sustainability information by the Corporate Sustainability Reporting Directive and Article 8 of the Taxonomy Regulation, to investors and other users of sustainability information and to auditors and independent assurance services providers.

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1 Executive summary

Reasons for publication

The Corporate Sustainability Reporting Directive (CSRD), published in the Official Journal of the European Union on 16 December 2022, expands the scope of undertakings who must report sustainability information and requires the European Commission to adopt mandatory European Sustainability Reporting Standards as delegated acts.

To promote convergent supervision of sustainability reporting by issuers subject to the Transparency Directive, the CSRD mandates ESMA to issue guidelines on the supervision of sustainability reporting by national competent authorities. The present paper has the purpose of consulting the public on a first draft of the guidelines which ESMA has prepared in response to this mandate; the Guidelines on Enforcement of Sustainability Information (GLES I).

Contents

Section 2 of the paper explains the background of the GLESI, including the close link with ESMA's existing Guidelines on Enforcement of Financial Information (GLEFI).

Section 3 establishes the GLESI's scope (3.1), legislative references, abbreviations, definitions (3.2), purpose (3.3) and compliance and reporting obligations (3.4). It then goes on to present each of the proposed guidelines within the GLESI, organised into topical chapters: basic concepts (3.5.1), enforcers' internal organisation (3.5.2), selection of issuers whose sustainability information will be examined (3.5.3), examination of sustainability information (3.5.4), enforcement actions in case an infringement is discovered during the examination (3.5.5) and European coordination of enforcement (3.5.6).

Section 4 contains four annexes which present ESMA's legislative mandate to issue the GLESI (Annex I), a draft cost-benefit analysis of the GLESI (Annex II), a list of consultation questions for respondents to consider (Annex III) and, finally, the draft GLESI in their complete form (Annex IV).

Next steps

ESMA will consider the feedback it receives to this consultation by the deadline on 15 March 2024. ESMA expects to publish the final GLESI by Q3 2024.

2 Background

2.1 Shift from NFRD to CSRD / ESRS

1. On 16 December 2022, the Corporate Sustainability Reporting Directive¹ (CSRD) was published in the Official Journal of the European Union. The CSRD introduced a number of notable changes to the EU rules on reporting of non-financial – now referred to as sustainability – matters. Among these changes were an expansion of the scope of undertakings who will be required to provide sustainability reporting and a mandate for the European Commission to adopt delegated acts setting out detailed sustainability reporting standards. The first such delegated act – enacting an amended version of the first European Sustainability Reporting Standards (ESRS) delivered by the European Financial Reporting Advisory Group (EFRAG) in November 2022 – was adopted by the European Commission on 31 July 2023 and is expected to be published in the Official Journal of the European Union by the end of 2023.
2. Member States must transpose the CSRD into national legislation by 6 July 2024 and a phased application of the CSRD and the ESRS will commence on 1 January 2025 when the first undertakings start publishing sustainability statements (covering financial year 2024) under the new regime. The CSRD will replace the current Non-Financial Reporting Directive² (NFRD).

2.2 Legal mandate

3. The CSRD introduces a new Article 28d in the Transparency Directive³ which obliges ESMA to issue guidelines, in accordance with Article 16 of the ESMA Regulation⁴, on the supervision of sustainability reporting by national competent authorities. The guidelines should apply to the supervision of undertakings whose securities are admitted to trading on a regulated market in the European Union. This mandate forms the legal basis⁵ for the Guidelines on Enforcement of Sustainability Information (GLES I) which ESMA has developed and upon which it is consulting with this paper.

¹ Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting, OJ L 322, 16.12.2022, p. 15–80.

² Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, OJ L 330, 15.11.2014, p. 1–9.

³ Directive 2004/109/EC of the European 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/EC, OJ L 390, 31.12.2004, p. 38–57.

⁴ Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC, OJ L 331, 15.12.2010, p. 84–119.

⁵ Along with Article 16 of the ESMA Regulation, as explained in paragraph 29 of this paper.

4. Before issuing the GLESI, Article 28d of the Transparency Directive requires ESMA to consult the European Environment Agency (EEA) and the European Union Agency for Fundamental Rights (EU FRA). In agreement with the EEA and the EU FRA, ESMA has invited both agencies to submit a response to the public consultation conducted with the present consultation paper. ESMA will take the responses from the EEA and the EU FRA into account when it analyses feedback to the consultation and will keep the EEA and the EU FRA informed of changes to the GLESI which may be of interest to their respective remits.

2.3 Drafting approach

Using ESMA's GLEFI as a basis

5. The CSRD aims to make the status of sustainability information comparable to that of financial information (CSRD Recital 37). ESMA considers that enforcement of sustainability information by national competent authorities plays an important role in reaching this goal. In addition, as the CSRD aims at supporting connectivity between financial and sustainability information (CSRD Recitals 57 and 61), it is important to ensure a consistent supervisory approach across the annual financial report within which both the financial statements and the sustainability statement will sit.
6. Since 2014, ESMA has had its Guidelines on Enforcement of Financial Information⁶ (GLEFI) in place, and the GLEFI are by now well-implemented and well-known by national competent authorities and by issuers under enforcement. The GLEFI cover the key steps of the enforcement process – how to select the issuers whose information should be examined, how to examine that information and how to determine which enforcement action to apply in case of an infringement. In addition, they cover how national competent authorities should organise the enforcement task internally and how national competent authorities and ESMA should jointly ensure European coordination of the enforcement work.
7. The content of the GLEFI is largely relevant also to the supervision (from here on out, reference is made to *enforcement* in this paper in order to ensure consistency with the GLEFI) of sustainability information. As such, in preparing the GLESI, ESMA has aimed to align them as closely as possible with the GLEFI to ensure that enforcement of sustainability information is consistent with enforcement of financial information and as such to contribute to bringing sustainability information on a par with financial information. In reading the present consultation paper, it may therefore be helpful to have the GLEFI at hand for reference (accessible via the hyperlink in footnote 6).

⁶ [ESMA32-50-218](#) Guidelines on enforcement of financial information, 4 February 2020.

8. While having modelled the GLESI on the GLEFI, ESMA is mindful that the requirements of the sustainability information framework⁷ are newer than the requirements of the financial reporting framework, and there may be a learning curve for all parties in the first years of reporting. ESMA acknowledges that this may particularly be the case for those issuers preparing sustainability information for the very first time and that enforcers may play a role in accompanying issuers in the implementation process.

Adapting the content of the GLEFI to reflect specificities of sustainability information

9. Notwithstanding the overall goal of aligning the GLESI with the GLEFI, ESMA has evaluated all parts of the GLEFI text to assess whether it could be carried over to the GLESI directly or whether adaptations were needed to reflect specificities of sustainability information. This has at times led to additions or changes to the GLEFI text when it was carried over to the GLESI while at other times, ESMA has found that no changes are needed. ESMA's considerations regarding whether additions / changes to the GLEFI text are needed as it is carried over to the GLESI are presented throughout the consultation paper in the relevant chapters.

Adapting terminology to sustainability information and increasing consistency in wording

10. Further to additions / changes to reflect specificities in substance of sustainability information, in carrying over the GLEFI text to the GLESI, ESMA has adapted the wording of the GLEFI, so it uses the terminology of sustainability information rather than that of financial information, for example:
- i. Changing references to “financial information” in the GLEFI to “sustainability information” in the GLESI.
 - ii. Changing references to “the relevant financial reporting framework” in the GLEFI to “the sustainability information framework” in the GLESI and adding a definition of “sustainability information framework” in section 2.3 of the GLESI.
 - iii. Changing references to “the auditor” in the GLEFI to “the auditor / the independent assurance services provider” in the GLESI to reflect the fact that the Accounting Directive⁸ as amended by the CSRD permits Member States to allow the opinion on the compliance of the sustainability reporting with the requirements of the Directive to be expressed by either an auditor *or* an independent assurance services provider.

⁷ Articles 19a, 29a and 29d of the Accounting Directive along with the European Sustainability Reporting Standards and Article 8 of the Taxonomy Regulation along with the Disclosures Delegated Act, as defined in section 2.3 of the GLESI.

⁸ 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, OJ L 182, 29.6.2013, p. 19–76.

11. Moreover, to enhance consistency ESMA has made a limited number of wording adjustments in carrying over the GLEFI text to the GLESI. For example:
 - i. As the GLEFI sometimes use the term “misstatement”, sometimes “material infringement”, sometimes “departures” and sometimes “infringement”, ESMA has opted to consistently use the term “infringement” in the GLESI to cover material omissions and material misstatements, and a definition of this has been included in section 2.3 of the GLESI. Omissions and misstatements which are not material are referred to as “immaterial departures” and have also been defined in section 2.3 of the GLESI.
 - ii. As the GLEFI use both “enforcers”, “national enforcers”, “European enforcers” and “enforcers within ESMA”, ESMA has chosen to consistently use the short version “enforcers” in the GLESI which in all cases refers to national competent authorities, as also defined in section 2.3.
12. Lastly, in carrying over the GLEFI text to the GLESI a small number of changes has been made to align with ESMA’s template for guidelines which has been updated since the development of the GLEFI.

3 Proposed guidelines

13. This section of the consultation paper presents the proposed GLESI chapter by chapter. For each chapter, there is an explanation of ESMA’s reasoning behind the proposed GLESI text which is followed by a text box which presents the actual proposed text. Each chapter ends with questions on which ESMA would welcome feedback from stakeholders. The complete proposed wording of the GLESI is available in Annex IV while the full list of consultation questions is available in Annex III.

3.1 Scope

Explanations

14. Under *Who?*, the draft chapter on the scope of the GLESI establishes that the GLESI apply to national competent authorities that undertake enforcement of sustainability information under the Transparency Directive – i.e., the GLESI apply to *enforcers*, as defined in section 2.3 of the draft GLESI.
15. Under *What?*, it is established that the GLESI apply to enforcement of sustainability information by issuers with securities admitted to trading on a regulated market who are required to publish sustainability information under the Accounting Directive, to ensure that this information is drawn up in accordance with the requirements of the Transparency Directive. The enforcement in scope of the GLESI relates to both:

- i. the sustainability information required by the Accounting Directive along with the ESRS
 - and
 - ii. the sustainability information required by Article 8 of the Taxonomy Regulation⁹ along with the Disclosures Delegated Act¹⁰.
16. The text, together with the definition of *sustainability information* in section 2.3 of the draft GLESI, also establishes that the enforcement in scope of the GLESI covers both:
 - i. sustainability information published by EU issuers with securities admitted to trading on a regulated market
 - and
 - ii. sustainability information published by third country issuers with securities admitted to trading on a regulated market.
17. In relation to point ii. of the previous paragraph, the draft text further clarifies that this reporting may be done in accordance with sustainability reporting requirements which have been declared equivalent to the ESRS.
18. The reference to *issuers with securities admitted to trading on a regulated market* clarifies that the undertakings within the scope of enforcement under the GLESI is narrower than the total scope of entities that have to provide sustainability information under the Accounting Directive and the Taxonomy Regulation, as only the enforcement of listed issuers is in scope of the guidelines, whereas the enforcement of large unlisted undertakings is not in scope. The reference to *required to publish sustainability information under the Accounting Directive* clarifies that listed micro-undertakings are not in scope of the guidelines since they are not required to publish sustainability information under the Accounting Directive.
19. Though it is not mentioned under *What?*, it applies equally to the GLESI as it does to the GLEFI that enforcers, as well as other entities, may voluntarily use the guidelines as the basis for enforcement of sustainability information from undertakings within their enforcement remit whose sustainability information is not in scope of the GLESI (for example, some jurisdictions have national legislation which requires the enforcer to also enforce the sustainability information of large unlisted issuers).

⁹ Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088, OJ L 198, 22.6.2020, p. 13–43.

¹⁰ Commission Delegated Regulation (EU) 2021/2178 of 6 July 2021 supplementing Regulation (EU) 2020/852 of the European Parliament and of the Council by specifying the content and presentation of information to be disclosed by undertakings subject to Articles 19a or 29a of Directive 2013/34/EU concerning environmentally sustainable economic activities, and specifying the methodology to comply with that disclosure obligation, OJ L 443, 10.12.2021, p. 9–67.

20. The section on *What?* lastly establishes that the guidelines are principles-based.
21. Under *When?*, it is clarified that enforcers should start applying the GLESI to enforcement of sustainability information published from 1 January 2025. ESMA suggests that it is important to apply the GLESI from the first year in which enforcers will examine sustainability statements drawn up under the ESRS to ensure a convergent enforcement approach from year 1.
22. ESMA notes that different enforcers commence their annual enforcement cycle at different points during the year, and that enforcers should comply with the GLESI when they commence their enforcement cycle in 2025.
23. Making the GLESI applicable to the 2025 enforcement cycle will require enforcers to notify ESMA of their compliance status before they have carried out a full enforcement cycle of sustainability information under the ESRS. ESMA acknowledges that this will bring certain challenges for enforcers, as 2025 is the first year in which they will enforce sustainability statements drawn up in accordance with the ESRS and as there will be a level of uncertainty connected with preparing the enforcement process (how exactly to set up processes, which staff is needed (skills, number), etc.). In other words, enforcers have to prepare their GLESI compliance notifications to ESMA in relation to 2025 on an ex-ante basis, before they have full experience with enforcing the new requirements. The compliance statements will therefore have to be based on enforcers setting up the processes and acquiring the resources – by the beginning of their individual 2025 enforcement cycle – that they deem necessary to comply with the GLESI. As such, through the compliance statements enforcers will express their commitment to comply with the GLESI during the 2025 enforcement cycle whereas ESMA acknowledges that only practical experience with enforcing the ESRS will allow enforcers to refine their processes and resources.

Proposed text for the guidelines

1 Scope

Who?

- 1) These guidelines apply to all competent authorities undertaking supervision (referred to as enforcement in these guidelines, see section 2.3 *Definitions*) of sustainability information under the Transparency Directive.

What?

- 2) These guidelines apply in relation to the enforcement of sustainability information under Article 24(4) of the Transparency Directive to ensure that sustainability information provided by issuers, who have securities admitted to trading on a regulated market and who are required to publish sustainability information under

the Accounting Directive, complies with the requirements of the Transparency Directive.

- 3) This means sustainability information of issuers already listed on a regulated market. It includes issuers from third countries using the European Sustainability Reporting Standards as well as issuers from third countries using sustainability reporting requirements which have been declared equivalent to the European Sustainability Reporting Standards.
- 4) The guidelines are principles-based and define enforcement of sustainability 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 enforcers should make use of and explain how enforcement activities are coordinated within ESMA.

When?

- 5) These guidelines apply to enforcement of sustainability information published from 1 January 2025.

Consultation questions

- 1 Do you have comments on the proposed scope of the GLESI? If yes, please explain your views and provide alternative suggestions where needed.

3.2 Legislative references, abbreviations and definitions

Explanations

Legislative references

24. ESMA proposes to include references to all the pieces of legislation which are mentioned in the draft GLESI.

Abbreviations

25. ESMA proposes to include all the abbreviations which are mentioned in the draft GLESI.

Definitions

26. The definitions which ESMA proposes to include in the GLESI are based on the definitions in the corresponding section of the GLEFI with some adjustments to adapt the wording from financial to sustainability terminology. Definitions of certain terms have not been carried over from the GLEFI as these terms are not used in the GLESI, whereas definitions of other terms which are used in the GLESI but not in the GLEFI have been added, such as *sustainability information* and *sustainability information framework*.

These two concepts are central to the GLESI, and it is therefore important to establish a clear and shared understanding of them. As such, the proposed definition of *sustainability information framework* clarifies that this refers to both the sustainability reporting requirements stemming from the Accounting Directive and the ESRS and to the reporting requirements stemming from Article 8 of the Taxonomy Regulation and the related Disclosures Delegated Act. The definition of *sustainability information* is closely linked and establishes that sustainability information is the information required by the sustainability information framework.

27. ESMA also suggests to add definitions of *infringements* and of *immaterial departures*, two key concepts which cover, respectively, material omissions and misstatements and immaterial omissions and misstatements in the sustainability information.
28. Furthermore, ESMA proposes to add definitions of the three types of selection (risk-based, rotation-based and randomised selection) and of the two types of case discussions (emerging issues and decisions) to ensure a clear and common interpretation of these concepts.

Proposed text for the guidelines

2 Legislative references, abbreviations and definitions

- 6) Unless otherwise specified, terms used and defined in the Transparency Directive, the Accounting Directive and the Taxonomy Regulation 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:

2.1 Legislative references

<i>Transparency Directive</i>	Directive 2004/109/EC of the European 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/EC ¹¹
<i>Accounting Directive</i>	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 ¹²

¹¹ OJ L 390, 31.12.2004, p. 38–57.

¹² OJ L 182, 29.6.2013, p. 19–76.

<i>European Sustainability Reporting Standards</i>	Commission Delegated Regulation (EU) .../...of XXX supplementing Directive 2013/34/EU of the European Parliament and of the Council as regards sustainability reporting standards ¹³
<i>Taxonomy Regulation</i>	Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 ¹⁴
<i>Disclosures Delegated Act</i>	Commission Delegated Regulation (EU) 2021/2178 of 6 July 2021 supplementing Regulation (EU) 2020/852 of the European Parliament and of the Council by specifying the content and presentation of information to be disclosed by undertakings subject to Articles 19a or 29a of Directive 2013/34/EU concerning environmentally sustainable economic activities, and specifying the methodology to comply with that disclosure obligation ¹⁵
<i>Markets in Financial Instruments Directive II</i>	Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU ¹⁶
<i>ESMA Regulation</i>	Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC ¹⁷
<i>Corporate Sustainability Reporting Directive</i>	Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting ¹⁸
<i>Non-Financial Reporting Directive</i>	Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups ¹⁹

¹³ The adopted delegated act is available [here](#) (not in force until it is published in the Official Journal).

¹⁴ OJ L 198, 22.6.2020, p. 13–43.

¹⁵ OJ L 443, 10.12.2021, p. 9–67.

¹⁶ OJ L 173, 12.6.2014, p. 349–496.

¹⁷ OJ L 331, 15.12.2010, p. 84–119.

¹⁸ OJ L 322, 16.12.2022, p. 15–80.

¹⁹ OJ L 330, 15.11.2014, p. 1–9.

2.2 Abbreviations

<i>ESMA</i>	European Securities and Markets Authority
<i>SRWG</i>	Sustainability Reporting Working Group
<i>EU</i>	European Union

2.3 Definitions

<i>Enforcement of sustainability information</i>	Supervision of sustainability information, including sustainability reporting as referred to in Article 28d of the Transparency Directive. In particular, enforcement of sustainability information consists of examining whether sustainability information is prepared in accordance with the sustainability information 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. These guidelines refer to ‘enforcement’ instead of ‘supervision’, as referenced in Article 28d of the Transparency Directive, to ensure consistency with the wording used in ESMA’s Guidelines on Enforcement of Financial Information ²⁰ .
<i>Sustainability information</i>	Information required by the sustainability information framework
<i>Issuer</i>	An issuer as defined in Article 2(1)(d) of the Transparency Directive with the exclusion of ‘natural persons’
<i>Regulated market</i>	A regulated market as defined in Article 4(1), point (21) of the Markets in Financial Instruments Directive II
<i>Enforcer</i>	National competent authority
<i>Sustainability information framework</i>	Articles 19a, 29a and 29d of the Accounting Directive along with the European Sustainability Reporting Standards and Article 8 of the Taxonomy Regulation along with the Disclosures Delegated Act
<i>Infringement</i>	A material omission or a material misstatement in an issuer’s sustainability information

²⁰ [ESMA32-50-218](#) Guidelines on enforcement of financial information, 4 February 2020.

<i>Home Member State</i>	The home Member State as defined in Article 2(1)(i) of the Transparency Directive
<i>Market operator</i>	A market operator as defined in Article 4(1), point (18) of the Markets in Financial Instruments Directive II
<i>Immaterial departure</i>	An immaterial omission or an immaterial misstatement in an issuer's sustainability information
<i>Corrective note</i>	Issuance by an enforcer or an issuer, as initiated or required by an enforcer, of a note making public an infringement with respect to particular item(s) included in already published sustainability information and, unless impracticable, the corrected information
Types of selection	
<i>Risk-based selection</i>	When an enforcer identifies issuers whose sustainability information meets certain risk criteria and subjects the sustainability information of all or some of those issuers to examination
<i>Rotation-based selection</i>	When an enforcer selects an issuer's sustainability information for examination once within a specific period
<i>Randomised selection</i>	When an enforcer selects an issuer's sustainability information for examination from a wider group of issuers without reference to the risk profile of the sustainability information or to when the issuer's sustainability information was last examined, so that all issuers have an equal chance of being selected
Types of examination	
<i>Interactive unlimited examination of sustainability information</i>	An enforcer's evaluation of the entire content of an issuer's sustainability information in order to identify issues / areas that, in the enforcer's opinion, need further analysis, and the enforcer's subsequent assessment of whether the sustainability information regarding those issues / areas is in accordance with the sustainability information framework. The interactive unlimited examination entails an interaction between the enforcer and the issuer. Based on the examination procedures it has undertaken and the information it has received from the issuer, the enforcer concludes whether it has discovered infringements in relation to the issues / areas it has analysed.

<i>Interactive focused examination of sustainability information</i>	An enforcer's assessment of whether pre-defined issues / areas in an issuer's sustainability information are in accordance with the sustainability information framework. The interactive focused examination entails an interaction between the enforcer and the issuer. Based on the examination procedures it has undertaken and the information it has received from the issuer, the enforcer concludes whether it has discovered infringements in relation to the pre-defined issues / areas it has analysed.
<i>Desktop unlimited examination of sustainability information</i>	An enforcer's evaluation of the entire content of an issuer's sustainability information in order to identify issues / areas that, in the enforcer's opinion, need further analysis, and the enforcer's subsequent assessment of whether the sustainability information regarding those issues / areas is in accordance with the sustainability information framework. The desktop unlimited examination does not entail any interaction between the enforcer and the issuer. Based on the examination procedures it has undertaken, the enforcer concludes whether there are indications that infringements exist in relation to the sustainability information it has analysed.
<i>Desktop focused examination of sustainability information</i>	An enforcer's assessment of whether pre-defined issues / areas in an issuer's sustainability information are in accordance with the sustainability information framework. The desktop focused examination does not entail any interaction between the enforcer and the issuer. Based on the examination procedures it has undertaken, the enforcer concludes whether there are indications that infringements exist in relation to the pre-defined issues / areas it has analysed.
Types of case discussion	
<i>Decision</i>	When an enforcement case is discussed in the SRWG after the enforcer has taken a decision in the case
<i>Emerging issue</i>	When an enforcement case is discussed in the SRWG before the enforcer takes a decision in the case

Consultation questions

- 2 Should any further legislative references be added to section 2.1 of the GLESI? If yes, please explain which ones and why.
- 3 Should any other abbreviations be added to section 2.2 of the GLESI? If yes, please explain which ones and why.

- 4 Do you agree with the definitions ESMA proposes for inclusion in section 2.3 of the GLESI? Has ESMA covered all the concepts that need to be defined? If not, please explain your concerns and propose how to address them.

3.3 Purpose

Explanations

29. The draft purpose of the GLESI references the legal basis of the guidelines, which has two parts. Firstly, Article 28d of the Transparency Directive which presents ESMA's mandate to issue the GLESI and covers sustainability reporting (i.e., reporting of information related to sustainability matters in accordance with Articles 19a, 29a and 29d of the Accounting Directive). Secondly, Article 16 of the ESMA Regulation which ESMA has applied to ensure that the GLESI also cover enforcement of disclosures under Article 8 of the Taxonomy Regulation (information on how and to what extent an undertaking's activities are associated with environmentally sustainable economic activities). As the Taxonomy Regulation Article 8 disclosure will sit in the sustainability statement alongside the sustainability reporting required by Articles 19a, 29a and 29d of the Accounting Directive, ESMA considers it crucial that enforcement of both types of disclosure should be covered by the GLESI.
30. The Draft purpose furthermore explains that the GLESI aim to support converged supervisory practices and a harmonised application of Article 24(4) of the Transparency Directive in relation to the requirement for issuers who have securities admitted to trading on a regulated market and who are required to publish sustainability information under the Accounting Directive to include sustainability information in the management report. Lastly, the draft purpose mentions that the GLESI will help enforcers discover potential infringements in the sustainability information, for example possible greenwashing issues.

Proposed text for the guidelines

3 Purpose

- 7) These guidelines are based on Article 28d of the Transparency Directive and on Article 16 of the ESMA Regulation. The objectives of the guidelines are to establish consistent, efficient and effective supervisory practices in relation to, and ensuring the common, uniform and consistent application of, Article 24(4) of the Transparency Directive in relation to the inclusion of a sustainability statement within the management report (Article 4(1) and 4(2), point b of the Transparency Directive) of issuers who have securities admitted to trading on a regulated market and are required to publish sustainability information under the Accounting Directive. In particular, the guidelines aim to ensure that enforcers carry out the enforcement of sustainability information in a converged manner and to make sure that this enforcement also closely resembles the enforcement which is undertaken in relation

to financial information. The guidelines also assist enforcers in discovering potential infringements within issuers' sustainability information, for example in relation to greenwashing²¹.

Consultation questions

- 5 Do you agree with the proposed purpose of the GLESI? If not, please explain why and make a proposal for what should change.

3.4 Compliance and reporting obligations

Explanations

31. This part of the GLESI establishes the formal requirements surrounding how enforcers should comply with the guidelines and notify ESMA of their compliance.

Proposed text for the guidelines

4 Compliance and reporting obligations

4.1 Status of the guidelines

- 8) In accordance with Article 16(3) of the ESMA Regulation, competent authorities must make every effort to comply with these guidelines.
- 9) Competent authorities to which these guidelines apply should comply by incorporating them into their national legal and / or supervisory frameworks, as appropriate.

4.2 Reporting requirements

- 10) Within two months of the date of publication of the guidelines on ESMA's website in all EU official languages, competent authorities to which these guidelines apply must notify ESMA whether they (i) comply, (ii) do not comply, but intend to comply, or (iii) do not comply and do not intend to comply with the guidelines.
- 11) In case of non-compliance, competent authorities must also notify ESMA within two months of the date of publication of the guidelines on ESMA's website in all EU official languages of their reasons for not complying with the guidelines.

²¹ According to [ESMA30-1668416927-2498](#) Progress Report on Greenwashing – Response to the European Commission's request for input on "greenwashing risks and the supervision of sustainable finance policies", 31 May 2023, paragraph 13, the European Supervisory Authorities understand greenwashing as a "practice where sustainability-related statements, declarations, actions, or communications do not clearly and fairly reflect the underlying sustainability profile of an entity, a financial product, or financial services. This practice may be misleading to consumers, investors, or other market participants."

- 12) A template for notifications is available on ESMA's website. Once the template has been filled in, it shall be transmitted to ESMA.

Consultation questions

- 6 Do you have any remarks on the compliance and reporting obligations?

3.5 Guidelines on Enforcement of Sustainability Information

3.5.1 Basic concepts

Explanations

Guideline 1: Objective of enforcement

32. Draft Guideline 1 establishes the objective of enforcement of sustainability information which is ultimately to contribute to the consistent application of the sustainability information framework. The draft guideline is based on paragraphs 22-28 of the GLEFI (“Objective of enforcement” and “Concept of enforcement”) with some adjustments to adapt the text from financial information to sustainability information. Compared to the GLEFI text, ESMA proposes to insert an additional sentence in the bold part of the draft guideline to state that enforcement aims to help make the status of sustainability information comparable to the status of financial information²².
33. The draft guideline further explains that consistent application of the sustainability information framework is needed to ensure that sustainability information published by different issuers is comparable. To this end, enforcers need to share a common understanding of the principles presented in the GLESI.
34. The draft guideline then specifies the main differences between enforcement and assurance of sustainability information. As such, the draft guideline clarifies that an enforcer’s examination differs from the work of the auditor / independent assurance services provider on both scope and objective. As regards scope, in contrast to assurance, an enforcer’s examination is a priority-based examination in which, based on screening the published sustainability information as well as monitoring the respective issuers and markets, certain topics are selected for further examination. As regards objective, an enforcer’s examination does not result in an opinion where a positive or negative assurance is provided on the sustainability information (this matter is further addressed in draft Guideline 9). Furthermore, the enforcer bases most of its examinations – except pre-clearance for those enforcers who offer that – on information which has already been subject to limited or reasonable assurance and published whereas the auditor / independent assurance services provider examines the

²² This ambition is also clearly stated in Recital 37 of the CSRD.

sustainability information when it is being prepared for publication. These explanations are an addition compared to the GLEFI text and have the purpose of clarifying expectations to the work of the enforcer vis-à-vis the work of the auditor / the independent assurance services provider.

35. The draft guideline then goes on to require that for enforcement to be effective, enforcers should take appropriate enforcement actions when they detect an infringement of the sustainability information framework and that enforcement actions should be used in a consistent way. Lastly, the draft guideline clarifies that enforcers can encourage compliance with the sustainability information framework in other ways, such as making various kinds of publications available to assist issuers in their preparation of sustainability information.
36. While the draft guideline replicates the GLEFI text to a large extent, to avoid repetition ESMA has not carried over the definition of enforcement from the GLEFI as this is also included in section 2.3 on definitions.

Proposed guideline

37. This leads to the following proposed guidelines on basic concepts:

5.1 Basic concepts

Guideline 1: Objective of enforcement

- 13) **The objective of enforcement of sustainability information is to contribute to a consistent application of the sustainability information framework and, thereby, to the transparency of sustainability information. This will help make the status of sustainability information comparable to that of financial information. Through enforcement of sustainability information, enforcers contribute to the protection of investors and the promotion of market confidence as well as to the avoidance of regulatory arbitrage.**
- 14) To enable a comparison of the sustainability information of different issuers, it is important that this information is based on a consistent application of the sustainability information framework, in the sense that if facts and circumstances are similar, the disclosures will be similar to the extent required by the sustainability information framework.
- 15) To ensure that enforcement of sustainability information throughout the Union is carried out in a similar way, enforcers should share the same understanding of the principles set out in these guidelines.
- 16) Enforcement of sustainability information implies the examination of sustainability information to assess whether it is in accordance with the sustainability information framework. An enforcer's work differs from assurance on scope as the enforcer

performs a priority-based examination in which, based on screening the sustainability information and monitoring issuers and markets, it chooses certain topics for further examination. An enforcer's work also differs from assurance on objective as the enforcer does not issue an opinion with a positive or negative assurance on the sustainability information. Instead, the enforcer should, based on the information gathered and the examination procedures undertaken in accordance with Guidelines 8 and 9, be able to conclude whether infringements of the sustainability information framework were discovered in relation to the issues / areas which it has assessed. Furthermore, the enforcer largely examines information that has already been subject to (limited or reasonable) assurance and published, while the auditor / independent assurance services provider examines the sustainability information when it is prepared for publication.

- 17) In order for enforcement of sustainability information to be effective, enforcers should take appropriate actions in accordance with these guidelines, where infringements of the sustainability information framework are detected, to ensure that, whenever necessary, information prepared in accordance with the sustainability information framework is provided. Enforcers should react in a consistent manner if infringements of the sustainability information framework are detected.
- 18) This is intended not only to promote consistent application of the sustainability information framework, contributing to the efficient functioning of the internal market, which is also important for financial stability, but also to avoid regulatory arbitrage.
- 19) Enforcers may also seek to encourage compliance by issuing alerts and other publications to assist issuers in preparing their sustainability statement in accordance with the sustainability information framework.

Consultation questions

- 7 Do you agree with the proposed objective of the enforcement of sustainability information? If not, please explain why and provide suggestions for amendments.

3.5.2 Enforcers' internal organisation

Explanations

Guideline 2: Ensuring an effective enforcement process

38. Draft Guideline 2 aims to ensure an effective enforcement process by establishing conditions for the human and financial resources that enforcers should have available to lift the task of enforcement of sustainability information. Notably, it establishes that the team which works on enforcement of sustainability information should be professionally skilled, experienced with the sustainability information framework, able to assess the

interactions between sustainability and financial information (an aspect which has been added compared to the GLEFI to reflect this important part of examining sustainability information) and sufficient in number to robustly cover the issuers within the enforcer's enforcement remit who publish sustainability information. This last element is to ensure that an issuer's likelihood of being selected for examination is not restricted because of a lack of resources within the enforcer.

39. The draft guideline is based on GLEFI Guideline 2 and has had its wording adjusted to sustainability reporting. It contains a footnote which clarifies that the human resources which enforcers will need to fulfil the enforcement task will evolve over the first years of application of the GLESI. More concretely, the human resources needed to enforce sustainability information in 2025 are likely to be less than in subsequent years and to gradually increase as the full scope of issuers covered by the CSRD becomes applicable and as the full range of ESRS disclosure requirements are phased in. The footnote equally acknowledges that enforcers may adjust their assessment of the human resources they need as they gain experience with enforcement of sustainability information; a circumstance that may particularly – but not exclusively – apply to those enforcers who do not currently have enforcement powers under the NFRD but who will be empowered to enforce sustainability information under the CSRD.
40. Furthermore, draft Guideline 2 establishes that enforcers should have the necessary powers, in accordance with Article 24(4) of the Transparency Directive, to effectively carry out their enforcement tasks (an element carried over from paragraphs 39-40 of the GLEFI). Lastly, the draft guideline clarifies that when enforcers decide to delegate parts of the enforcement of sustainability information to another entity, they should supervise that entity as they retain the ultimate responsibility for the enforcement, in accordance with Article 24(2) of the Transparency Directive (this element is carried over from GLEFI paragraph 38).

Guideline 3: Sustainability information prepared under equivalent third country sustainability reporting requirements

41. Draft Guideline 3 clarifies that the GLESI cover enforcement of sustainability information prepared by third country issuers under third country sustainability reporting requirements deemed equivalent to the ESRS. The draft guideline establishes that enforcers should have sufficient resources and expertise to examine such sustainability information and that, if they are unable to ensure this, they should either cooperate with other enforcers or with ESMA to carry out the examination, though the ultimate responsibility for the enforcement decision always remains with the enforcer of the third country issuer's home Member State. The draft guideline is based on GLEFI Guideline 1 but has been adjusted to be suitable for sustainability information.

Guideline 4: Independence

42. Draft Guideline 4 establishes the important concept that, in order to ensure investor protection and avoid regulatory arbitrage, enforcers should be independent from

government, issuers, auditors / independent assurance service providers, other market participants, regulated market operators, holders of securities and other stakeholders. The draft guideline is based on GLEFI Guideline 3 and has undergone small wording adjustments to adapt the text to sustainability reporting. Additionally, the last two categories in the aforementioned list – holders of securities and other stakeholders – have been added compared to the GLEFI text to ensure that the draft guideline provides sufficient coverage of the actors from which the enforcer should be independent, notably as a large range of stakeholders have an interest in sustainability information (NGOs, trade unions and social partners, affected communities, etc.).

43. The draft guideline furthermore sets out a list of actions which enforcers should take to safeguard their independence, including having a code of ethics and using cooling off periods. It also states that enforcers should avoid both real, potential and perceived conflicts of interest, which is another part which has been added compared to GLEFI Guideline 3 to further enhance the robustness of the independence requirements.

Proposed guidelines

44. This leads to the following proposed guidelines on enforcers' internal organisation:

5.2 Enforcers' internal organisation

Guideline 2: Ensuring an effective enforcement process

- 20) **Enforcers should ensure the effectiveness of the enforcement of sustainability information. In order to do so, they should have sufficient human and financial resources to carry out their activities in an effective manner as well as the necessary powers in accordance with Article 24(4) of the Transparency Directive. The human resources should be professionally skilled, experienced with the sustainability information framework, able to assess interactions between sustainability and financial information and sufficient in number, taking into account the number of issuers subject to enforcement of sustainability information, their characteristics, the complexity of their sustainability statements and their ability to apply the sustainability information framework. When enforcers delegate tasks relating to the enforcement of sustainability information in accordance with Article 24(2) of the Transparency Directive, the delegated entity should be supervised by the enforcer and responsible to it.**
- 21) To ensure effective enforcement of sustainability information, enforcers should have sufficient resources. When considering the level of human resources required, the number of issuers within the scope of enforcement, the complexity of the sustainability information as well as the ability of those who prepare the sustainability information and of the auditors / independent assurance services providers to apply

the sustainability information framework play important roles.²³ 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.

- 22) There should be sufficient financial resources to ensure that the necessary amount of human resources and services can be used in enforcement of sustainability information. The financial resources should also be sufficient to ensure that the human resources are professionally skilled and experienced.
- 23) Enforcers should have the necessary powers to effectively carry out their enforcement tasks, as required by Article 24(4) of the Transparency Directive.
- 24) When enforcers delegate tasks related to the enforcement of sustainability information in accordance with Article 24(2) of the Transparency Directive, the final responsibility for enforcement, including the responsibility for the establishment and maintenance of an appropriate process for enforcement, remains with the enforcer.

Guideline 3: Sustainability information prepared under equivalent third country sustainability reporting requirements

- 25) **When enforcing sustainability information prepared under equivalent third country sustainability reporting requirements in accordance with the provisions applicable under the Transparency Directive, enforcers should ensure that they have access to appropriately skilled resources or otherwise should coordinate the enforcement of sustainability information with ESMA and other enforcers to ensure that they have the appropriate resources and expertise. Enforcers should discuss enforcement of sustainability information prepared under equivalent third country sustainability reporting requirements with ESMA in order to ensure consistency of treatment of such sustainability information.**
- 26) In accordance with the Transparency Directive, sustainability information of issuers from third countries is subject to enforcement by the enforcer in the home Member State. In such cases, the issuer's sustainability information may be prepared under third country sustainability reporting requirements which have been declared

²³ Due to the phase-in provisions in the Corporate Sustainability Reporting Directive and the European Sustainability Reporting Standards, enforcers will likely need less human resources (most notably, skills and number of staff) in 2025 compared to subsequent years. The need for human resources will gradually increase as more issuers are required to publish sustainability information under the Accounting Directive and as all disclosure requirements of the European Sustainability Reporting Standards become applicable. Enforcers will also have limited experience with the ESRS at first, however, this experience will grow from 2025 onwards. Particularly, the first year of enforcing sustainability information under the Corporate Sustainability Reporting Directive and the European Sustainability Reporting Standards may improve enforcers' ability to assess the resources they need to fulfil their enforcement mandate. This may lead to changes to the adequacy assessments which enforcers made prior to the first application of the guidelines, resulting in adjustments to the teams responsible for enforcement of sustainability information. A notable example of this situation may be enforcers who did not have powers to enforce the content of the non-financial information under the Non-Financial Reporting Directive who have new powers to enforce sustainability information under the Corporate Sustainability Reporting Directive.

equivalent to the sustainability information framework in accordance with Article 23 of the Transparency Directive. These guidelines apply also to the enforcement of sustainability information of third country issuers that use sustainability reporting requirements which have been declared equivalent in this way.

- 27) In such cases, if the enforcer determines that it is not efficient or possible to carry out the enforcement of sustainability information itself, the enforcer may by agreement refer the task of examining whether the sustainability information is prepared in accordance with the equivalent third country sustainability reporting requirements to another enforcer or to a centralised team to be organised by ESMA at the request of the enforcer. Without prejudice to Article 28(3) of the ESMA Regulation, the responsibility for the enforcement decision always remains with the enforcer of the home Member State.
- 28) According to the Transparency Directive, 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.

Guideline 4: Independence

- 29) **Enforcers should ensure adequate independence from government, issuers, holders of securities, auditors / independent assurance services providers, other market participants, regulated market operators and other stakeholders. Independence from government implies that government cannot unduly influence the decisions taken by enforcers. Independence from issuers, holders of securities, auditors / independent assurance services providers, other market participants and other stakeholders should, amongst other things, be achieved through codes of ethics and through the composition of the Board of the enforcer.**
- 30) 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 / independent assurance services providers, holders of securities, other market participants and other stakeholders. 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.
- 31) 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 sustainability 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.

- 32) In relation to the independence from issuers, holders of securities, auditors / independent assurance services providers, other market participants and other stakeholders, enforcers should avoid conflicts of interest, whether real, potential or perceived, by taking the required actions to ensure adequate independence, including, but not limited to:
- a) the establishment of codes of ethics for those involved in the enforcement process,
 - b) cooling off periods,
 - c) requiring assurance that staff involved in the enforcement of sustainability information do not breach any independence requirements because of relationships with either the issuer or the audit firm / independent assurance services provider involved, and
 - d) ensuring that representatives of issuers and auditors / independent assurance services providers are not able, together or individually, to have a majority of votes in the decision-making bodies of enforcers.

Consultation questions

- 8 Do you agree with the draft Guideline 2 on how enforcers should ensure that they have an effective process for enforcing sustainability information? If not, please explain why and provide suggestions for amendments.
- 9 Do you agree with the draft Guideline 3 on enforcement of sustainability information prepared under equivalent third country sustainability reporting requirements? If not, please explain why and provide suggestions for amendments.
- 10 Do you agree with the draft Guideline 4 on the independence of enforcers? If not, please explain why and provide suggestions for amendments.

3.5.3 Selection

Explanations

Guideline 5: A mixed selection model

45. Draft Guideline 5 is based on Guideline 5 of the GLEFI. The GLEFI text has been adapted to sustainability information, and additionally ESMA is proposing some further amendments, as follows:

- i. Splitting GLEFI Guideline 5 into two separate guidelines to have one guideline which addresses what the selection model should look like (draft Guideline 5) and one guideline which addresses the timing of the selection model (draft Guideline 6). In practice, this means removing the last sentence of GLEFI paragraph 53 from GLESI Guideline 5 and inserting this sentence in GLESI Guideline 6 instead. Splitting GLEFI Guideline 5 into two guidelines ensures that the guideline does not become overly long in light of some additional text which ESMA is proposing to add, as explained below.
- ii. Adding in draft Guideline 5 that an enforcer's selection model should be formalised, i.e., that the steps which the enforcer follows in its selection model should be described in a written document.
- iii. Adding a paragraph which requires enforcers to use risk-based selection for at least 50% of the issuers whose sustainability information they examine. ESMA suggests introducing this 50% threshold because it is generally expected that the sustainability statements of issuers selected through risk-based selection have a higher likelihood of containing infringements, and in order for an enforcer's selection model to be effective, risk-based selection should therefore play a substantial role.

ESMA proposes that the 50% requirement for risk-based selection should apply "on average" which means that, if an enforcer in any given year finds it necessary to depart from the 50%, this would be possible, as long as the 50% is achieved on average over a period of a few years. For example, if an enforcer needs to select a very high proportion of issuers based on risk in year 1 due to a particular event in its market, it may decide to go below 50% risk-based selection in year 2 and prioritise rotation-based selection to make sure it covers all its issuers within the time period it has defined.

- iv. In addition to these indications on risk-based selection, ESMA proposes clarifying that rotation-based selection should account for the second largest proportion of issuers that are selected for examination whereas randomised selection can account for a small proportion. The purpose of randomised selection is simply to prevent issuers from calculating their detection risk, i.e., when they can expect to be subject to examination, therefore only a small proportion of randomised selection is needed for this purpose to be achieved.
- v. Adding a new paragraph to explain that the risk of an infringement in the sustainability information should play a substantial role in the enforcer's selection model. This explanation is necessary because, with the requirement to enforce both financial and sustainability information of largely the same population of

issuers²⁴, enforcers may decide to establish an integrated enforcement process, including an integrated selection model. In such cases, paragraph 36 of draft Guideline 5 serves the purpose of clarifying that the selection model should ensure an appropriate and balanced consideration of the risk of an infringement in the sustainability information and in the financial information and ensure that the issuers whose sustainability information is selected for examination ultimately possess a risk of infringement in their sustainability information.

- vi. Adjusting the wording in paragraph 37 of draft Guideline 5 to clarify that enforcers should in all cases take account of the risk profile of the issuer, including its management, and that the enforcer should, additionally and as far as possible, take account of certain other factors, as listed in paragraph 37, a) to c).
- vii. Changing the GLEFI wording “an unqualified opinion from an auditor should not be considered as proving the absence of risk of a misstatement” to “when the auditor / independent assurance services provider has expressed an unmodified (limited or reasonable) assurance conclusion, this should not be considered as proving the absence of risk of an infringement”. This is to align the wording with the *Proposed International Standard on Sustainability Assurance 5000 – General Requirements for Sustainability Assurance Engagements* (draft ISSA 5000) which employs the term “unmodified assurance conclusion”. Furthermore, the text in this paragraph has been somewhat redrafted to further enhance clarity.

Guideline 6: Timing of selection model

- 46. Draft Guideline 6 consists of the last sentence of paragraph 53 of GLEFI Guideline 5 and a new sentence which collectively establish that enforcers should perform selection of issuers for examination once per year and make sure that each issuer is examined at least one time within a period which the enforcer should define in accordance with ESMA’s guidance on sustainability information. The draft guideline aims to ensure that selection takes place sufficiently often (i.e., annually) to enable enforcers to identify issuers whose current circumstances make them more susceptible to infringements – which is relevant to risk-based selection – and to make sure that rotation-based and randomised selection takes place frequently enough to render them effective. The draft guideline furthermore has the purpose of ensuring that an enforcer examines all the issuers in its jurisdiction which have securities admitted to trading on a regulated market and are required to publish sustainability information in accordance with the Accounting Directive.

²⁴ Issuers with securities admitted to trading on a regulated market are required to publish financial information in accordance with the Transparency Directive. Issuers with securities admitted to trading on a regulated market, with the exception of micro-undertakings, are required to publish sustainability information in accordance with the Transparency Directive and the Accounting Directive.

Guideline 7: Selection universe

47. Draft Guideline 7 clarifies the population of issuers from which enforcers should undertake their risk-based selection, randomised selection and rotation-based selection, respectively, and obliges enforcers to keep a list of those issuers for the purpose of selection. ESMA suggests it is important to add this guideline to ensure convergence in the way enforcers concretely carry out their selection. As such, draft Guideline 7 explains that enforcers should do their risk-based and their randomised selection from the full population of issuers with securities traded on regulated markets that are required to publish sustainability information under the Accounting Directive. On the other hand, the draft guideline explains that enforcers should remove the issuers whose sustainability information has recently been examined from the population of issuers from which they perform their rotation-based selection. This is because the goal of rotation-based selection is to ensure that all issuers are examined at least once within a given time period to be selected by the enforcer and once the issuer has been examined, it therefore does not have to be eligible for rotation-based selection until that time period has passed.
48. The draft guideline is new and not directly based on the GLEFI.

Proposed guidelines

49. This leads to the following proposed guidelines on the selection model:

5.3 Selection

Guideline 5: A mixed selection model

- 33) **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 a rotation approach. A risk-based approach should consider the risk of an infringement as well as the impact of an infringement on the financial markets.**
- 34) Selection models should be formalised and should be based on a combination of a risk-based approach, random sampling and rotation. A pure risk-based approach would mean that those issuers not fulfilling the risk criteria determined by the enforcer would never be subject to examination. There should always be a possibility of an issuer being selected for examination. A pure random system could mean that issuers with high risk were 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 sustainability statement was likely to be selected.
- 35) Risk-based selection takes account of the issuer's specific situation and characteristics. It is generally expected that detection of infringements in sustainability information is more likely when using risk-based selection than when using rotation-based and randomised selection. Therefore, enforcers should on

average use risk to select at least 50% of the issuers whose sustainability information they examine. Conversely, the proportion of issuers selected based on rotation and randomisation should on average be no more than 50%, with rotation-based selection accounting for the largest portion and randomised selection permitted to account for even a small percentage of the selection.

- 36) If the enforcer decides to integrate its risk-based selection of issuers whose sustainability information will be examined with the risk-based selection of issuers whose financial information will be examined, the enforcer should ensure that the selection model is balanced so the issuers selected for the purpose of risk-based examinations of sustainability information ultimately possess a risk of infringement in the sustainability information.
- 37) Determination of risk should be based on the combination of the probability of infringements in the issuer's sustainability information and the potential impact of an infringement on the financial markets. The complexity of the sustainability statement should be taken into account. The enforcer should also take account of the risk profile of the issuer, including its management, and, as far as possible, of:
- a) management's ethical standards,
 - b) management's experience with applying, and their ability or willingness to apply, the sustainability information framework correctly,
 - c) the level of experience of the issuer's auditors / independent assurance services providers with the sustainability information framework.
- 38) While larger issuers are typically faced with more complex reporting issues, fewer resources and less experience with preparing sustainability information could be more prevalent among smaller and / or new issuers.
- 39) Indications of infringements from the auditors / the independent assurance services providers, whether in their reports or otherwise, and from regulatory bodies should normally trigger a selection of the sustainability information in question for examination. On the other hand, when the auditor / independent assurance services provider has expressed an unmodified²⁵ (limited or reasonable) assurance conclusion, this should not be considered as proving the absence of risk of an infringement. Grounded complaints which, after preliminary scrutiny, contain concrete indications of infringements and appear reliable, should normally trigger a selection of the sustainability information in question for examination.

²⁵ [Proposed International Standard on Sustainability Assurance 5000 – General Requirements for Sustainability Assurance Engagements](#), International Auditing and Assurance Standards Board, 2 August 2023.

40) 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.

41) Selection models should comply with ESMA's guidance on sustainability information. Enforcers should discuss factors used as part of their national selection method in the SRWG. Such information will serve as a basis for any further potential developments that may be envisaged in relation to selection methods.

Guideline 6: Timing of selection model

42) **Enforcers should select issuers for examination sufficiently often (i.e., annually). The selection model should ensure that each issuer is examined at least once during a period selected by the enforcer in line with ESMA's guidance on sustainability information.**

Guideline 7: Selection universe

43) **Enforcers should undertake risk-based and randomised selection from the full universe of issuers who have securities admitted to trading on a regulated market and are required to publish sustainability information under the Accounting Directive. Enforcers should undertake rotation-based selection from a universe which excludes the issuers that were examined within the period selected by the enforcer.**

44) For the purpose of selection, enforcers should keep a list of the issuers within their enforcement remit who have securities admitted to trading on a regulated market and are required to publish sustainability information under the Accounting Directive.

45) The goal of risk-based selection is to select the issuers whose sustainability information is most likely to contain an infringement and for whom an infringement would have the largest impact on the financial markets. Therefore, risk-based selection should always be done from the full universe of issuers who have securities admitted to trading on a regulated market and are required to publish sustainability information under the Accounting Directive, including issuers who were examined in recent previous years.

46) The goal of randomised selection is to ensure that it is not possible for issuers to calculate when they will next be examined. Therefore, randomised selection should always be done from the full universe of issuers who have securities admitted to trading on a regulated market and are required to publish sustainability information under the Accounting Directive, including issuers who were examined in recent previous years.

47) The goal of rotation-based selection is to guarantee that all issuers who have securities admitted to trading on a regulated market and are required to publish

sustainability information under the Accounting Directive are examined at least once within a defined period. Therefore, once an issuer has been examined, the enforcer should not include that issuer in the universe from which rotation-based selection is done until the period within which the enforcer examines all issuers in accordance with Guideline 6 has passed.

Consultation questions

- 11 Do you agree with the draft Guideline 5 on the mixed selection model? If not, please explain why and provide suggestions for amendments.
- 12 Do you agree with the draft Guideline 6 on the timing of the selection model? If not, please explain why and provide suggestions for amendments.
- 13 Do you agree with the proposed Guideline 7 on the selection universe? If not, please explain why and provide suggestions for amendments.

3.5.4 Examination

Explanations

Guideline 8: Types of examination

50. This draft guideline establishes that enforcers can use four different approaches when they examine sustainability information, differing on two parameters: whether the enforcer communicates with the issuer during the examination (interactive vs. desktop examination) and whether the enforcer bases its examination on the entirety or a subset of the sustainability information (unlimited vs. focused examination).
51. The distinction between the four types of examination serves as the basis for a requirement for enforcers to use interactive examinations as the main approach to examinations and more specifically to use interactive unlimited examinations for at least 33% of their examinations or to cover at least 10% of the total amount of issuers under their enforcement with this type of examination. This prioritisation of interactive examinations, and interactive unlimited examinations in particular, is to ensure that the enforcer hears the issuer's views on the parts of the sustainability information which were unclear or where the enforcer suspects an infringement (the interactive element) and to enable the enforcer to get a picture of the entirety of the issuer's sustainability information (the unlimited element).
52. Draft Guideline 8 is based on Guideline 6 of the GLEFI and ESMA is proposing that no substantial changes are needed compared to the GLEFI text.

Guideline 9: The examination process

53. With draft Guideline 9, ESMA proposes to establish that the aim of the enforcer's examination process should be to assess whether an issuer's sustainability information is in accordance with the sustainability information framework and to check whether the sustainability information in the sustainability statement is consistent with information presented elsewhere in the issuer's annual financial report – this second element being important to ensure that any claims the issuer makes in the sustainability information are, where relevant, appropriately reflected in the financial information. The draft guideline also clarifies that enforcers do not provide the issuer with a positive assurance that their sustainability information complies with the sustainability information framework, as the enforcer is not performing an audit / assurance on the information.
54. Furthermore, draft Guideline 9 establishes that the enforcer should draw a conclusion to each of its examinations and that such a conclusion can take several forms:
 - i. Following a desktop examination, either that no indications of infringements have been discovered and that no further examination is therefore needed or – on rare occasions when an infringement is obvious even without communicating with the issuer – that an infringement was discovered and that an enforcement action is needed. These conclusions relate to desktop examinations because the enforcer has not been in contact with the issuer so it can typically only conclude that *there are no indications* that infringements exist.
 - ii. Following an interactive examination, either that the enforcer has not found infringements in the sustainability information and that consequently, no enforcement action is needed or that the enforcer has found an infringement in the sustainability information and that an enforcement action is therefore required. These types of conclusions relate to interactive examinations where the enforcer has discussed the sustainability information with the issuer and can therefore say *whether it has detected* infringements.
55. When the enforcer concludes that there is an infringement or an immaterial departure which has been left intentionally unchanged to present a certain image of the issuer, draft Guideline 9 obliges the enforcer to take one of the enforcement actions established in draft Guideline 12. Furthermore, the draft guideline requires enforcers to ensure that their examination procedures are sufficient for an effective enforcement process and to document the examination and its conclusion.
56. Draft Guideline 9 is based on GLEFI Guideline 6a and ESMA is proposing that no changes in substance are needed to the GLEFI text. On the other hand, it has been necessary to make a number of wording changes to adapt the terminology from financial reporting to sustainability reporting.

Guideline 10: Pre-clearance

57. The objective of draft Guideline 10 is to establish certain conditions when enforcers offer the possibility of pre-clearance (i.e., when enforcers grant a pre-approval of the way in which an issuer is suggesting to approach its sustainability information *before* the issuer publishes its annual financial report, including the sustainability statement). ESMA suggests it is important to establish such conditions to avoid that pre-clearance decisions from enforcers become akin to general interpretations of the sustainability information framework and to ensure that enforcers have the same level of information at their disposal as they have when they undertake ex-post examinations of already published sustainability information. Notably, draft Guideline 10 proposes that, when pre-clearance is offered, it should be part of a formal process and that the enforcer should only offer pre-clearance once the issuer and its auditor or independent assurance services provider have finalised their position on the sustainability information on which they are seeking pre-clearance.
58. Draft Guideline 10 is based on GLEFI Guideline 4 and has been subject to some wording amendments to adapt the language from financial information to sustainability information.

Guideline 11: Quality review

59. The purpose of draft Guideline 11 is to cause enforcers to undertake quality reviews of the examinations they have performed with a view to checking that the examination procedures which were used were appropriate and that the ensuing conclusions were robust. The draft guideline is based on GLEFI Guideline 6b and ESMA proposes that no substantial changes are needed compared to the GLEFI text.

Proposed guidelines

60. This leads to the following draft guidelines on examination procedures:

5.4 Examination

Guideline 8: Types of examination

- 48) **Enforcers should identify the most effective way to enforce sustainability information. As part of the ex-post activities regarding enforcement of sustainability information of issuers selected for examination, enforcers can use:**
- a) interactive unlimited examinations,**
 - b) interactive focused examinations,**
 - c) desktop unlimited examinations, and**

d) desktop focused examinations.

- 49) **Interactive unlimited examinations should generally constitute at least 33% of all examinations undertaken within any given year or cover at least 10% of the total amount of issuers under the enforcer’s supervision at the beginning of the year.**
- 50) Interactive examinations entail an exchange of information between the issuer and the enforcer regarding the sustainability information under examination. The interaction between the issuer and the enforcer may occur, for example, when the enforcer poses questions to the issuer, requires supporting documents or carries out on-site inspections. Enforcers should require necessary information irrespective of whether an indication exists in relation to the non-compliance of sustainability information with the sustainability information framework.
- 51) Interactive examinations should be the primary procedure used for enforcement of sustainability information, therefore the use of desktop examinations should be limited. Furthermore, the sole use of interactive focused examinations should not be considered as satisfactory for enforcement purposes.
- 52) Where an enforcer meets neither of the thresholds set out in paragraph 49 within a given year, it should be able to explain why it was unable to meet these thresholds.

Guideline 9: The examination process

- 53) **An enforcer’s examination process should aim at assessing whether sustainability information of issuers is in accordance with the sustainability information framework. In addition, enforcers should examine if the sustainability information contained in the sustainability statement is consistent with the information included elsewhere in the annual financial report, where relevant.**
- 54) Assessing whether sustainability information is in accordance with the sustainability information framework does not result in the enforcer giving a positive or negative assurance to the issuer that the sustainability information complies with the sustainability information framework, as explained under Guideline 1. However, if, in the course of its examination, the enforcer concludes that it has encountered an infringement or an immaterial departure as set out in paragraph 64 of Guideline 12²⁶.

²⁶ Guideline 12, paragraph 64: “Where an immaterial departure from the sustainability information framework is left intentionally uncorrected to achieve a particular presentation of the issuer, the enforcer should take appropriate action as if it was material.”

the enforcer should apply the enforcement actions set out in paragraph 63 of Guideline 12²⁷.

55) The conclusions of an enforcer following an examination can take one of the following forms:

a) Following a desktop examination

- i) A decision that there are no indications of infringements in the sustainability information, or in relation to the issues / areas of the sustainability information which the enforcer analysed, and that no further examination is therefore needed.
- ii) On rare occasions when infringements are obvious without interaction with the issuer, a decision that the enforcer has discovered infringements in the sustainability information and which enforcement action is required to address those infringements.

b) Following an interactive examination:

- i) A decision that the enforcer has not discovered infringements in relation to the issues / areas of the sustainability information it has analysed and that no enforcement action is required.
- ii) A decision that the enforcer has discovered infringements in the sustainability information and which enforcement action is required to address those infringements.

56) Enforcers should ensure that the examination procedures undertaken are sufficient in order to achieve an effective enforcement process and that the examination and its conclusion are documented appropriately.

Guideline 10: Pre-clearance

57) **Where pre-clearance is permitted, it should be part of a formal process, and provided only after the issuer and its auditor / independent assurance services provider have finalised their position on the sustainability information concerned.**

58) Enforcement of sustainability information normally takes published sustainability information as its starting point. Hence, by nature, it is an ex-post activity which is carried out in accordance with the examination procedures indicated in Guidelines

²⁷ Guideline 12, paragraph 63: "An enforcer should use the actions indicated below, at the enforcer's initiative. Whenever an infringement is detected, the enforcer should in a timely manner take at least one of the following actions in accordance with the considerations described in paragraph 67: a) require a reissuance of the sustainability statement, b) require a corrective note, or c) require a correction in the future sustainability statement with restatement of comparatives, where relevant."

8 and 9 and applied to the sustainability information selected based on the criteria set out in the selection methods indicated in Guidelines 5, 6 and 7.

- 59) 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 sustainability information. Certain conditions should be in place when enforcers are using pre-clearance. In particular, the issuer and its auditor / independent assurance services provider should have a firm position on the issues / areas of the sustainability information in relation to which pre-clearance is sought as this will enable a 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.
- 60) 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 reverse its position after the sustainability information has been published unless facts and circumstances have changed between the date the enforcer expressed its position and the date the sustainability 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 / independent assurance services providers on the sustainability information as long as the outcome does not constitute a decision.

Guideline 11: Quality review

- 61) **In order to ensure that the examination procedures used and the related conclusions are robust, enforcers should put in place quality reviews of the examinations performed.**
- 62) Quality reviews should be performed by staff that has relevant experience and expertise in the sustainability information framework and in the reporting issues which are being examined.

Consultation questions

- 14 Do you agree with the draft Guideline 8 on the four types of examination enforcers can use when they examine sustainability information? If not, please explain why and provide suggestions for amendments.
- 15 Do you agree with the draft Guideline 9 which addresses the enforcer's examination process? If not, please explain why and provide suggestions for amendments.
- 16 Do you agree with the draft Guideline 10 which presents the conditions which enforcers should apply when they offer their issuers pre-clearance of sustainability information? If not, please explain why and provide suggestions for amendments.

- 17 Do you agree with the draft Guideline 11 which requires enforcers to undertake quality reviews of their enforcement processes? If not, please explain why and provide suggestions for amendments.

3.5.5 Enforcement actions

Explanations

Guideline 12: Choice of enforcement action

61. Draft Guideline 12 establishes that when an enforcer detects an infringement in the sustainability information it is examining, it should take at least one of the following three enforcement actions in a timely manner: requiring the issuer to reissue the sustainability statement, requiring the issuer to publish a corrective note and requiring the issuer to provide a correction in the future sustainability statements along with a restatement of comparatives where that is relevant. The draft guideline additionally lays down certain conditions which enforcers should use to determine which of the three enforcement actions is suitable in a given situation. As the objective is to ensure that the issuer has published information in accordance with the sustainability information framework, the enforcement actions which provide corrected information right away – reissuance and corrective note – should generally be considered when the publication of an issuer’s next sustainability statement is far in the future and / or the sustainability information fails to cover an important matter. As a fundamental principle, the draft guideline establishes that similar enforcement actions should be used for similar infringements after taking account of materiality.
62. In addition to requiring the enforcer to take an enforcement action when it detects an infringement (i.e., a *material* omission or misstatement), the draft guideline also states that the enforcer should take an enforcement action when the issuer has made an *immaterial* departure from the sustainability information framework and has failed to correct this immaterial departure to present itself in a certain way. Further in relation to immaterial departures, the enforcer should inform the issuer when it identifies a departure which is currently immaterial, but which could become material in the future.
63. Lastly, the draft guideline states that, when the enforcer requires a correction in the future sustainability statement, the reason for selecting this enforcement action should be stated clearly in the enforcer’s conclusion.
64. Draft Guideline 12 is based on GLEFI Guideline 7 and has been amended to be suitable for sustainability reporting.

Guideline 13: Materiality

65. Draft Guideline 13 establishes that enforcers should assess the materiality of an omission or misstatement in the sustainability information which they are examining taking into account the materiality approach established by the part of the sustainability

information framework in accordance with which the information was prepared (the Accounting Directive and the European Sustainability Reporting Standards or Article 8 of the Taxonomy Regulation and the Disclosures Delegated Act). When the sustainability information framework relies on double materiality, this should therefore form the basis for the enforcer's materiality assessment of any omission or misstatement. The draft guideline is based on GLEFI Guideline 8 which has been adjusted to adapt the language to sustainability information.

Guideline 14: Follow-ups

66. Draft Guideline 14 underlines the importance of following up when the enforcer takes an enforcement action to ensure the issuer has correctly implemented the action. This is to make sure the correct sustainability information ultimately makes it into the public sphere. The draft guideline is based on GLEFI Guideline 9 with small wording adjustments to adapt the language to sustainability information.

Proposed guidelines

67. This leads to the following proposed guidelines on enforcement actions:

5.5 Enforcement actions

Guideline 12: Choice of enforcement action

- 63) **An enforcer should use the actions indicated below, at the enforcer's initiative. Whenever an infringement is detected, the enforcer should in a timely manner take at least one of the following actions in accordance with the considerations described in paragraph 67:**
- a) **require a reissuance of the sustainability statement,**
 - b) **require a corrective note, or**
 - c) **require a correction in the future sustainability statement with restatement of comparatives, where relevant.**
- 64) **Where an immaterial departure from the sustainability information framework is left intentionally uncorrected to achieve a particular presentation of the issuer, the enforcer should take appropriate action as if it was material.**
- 65) **Where an immaterial departure from the sustainability information 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.**
- 66) **Similar actions should be used where similar infringements are detected, after consideration has been taken of materiality.**

- 67) When deciding between the types of action to be applied, enforcers should take into account the following considerations:
- a) Subject to the existing powers of the enforcer and consistent with Guideline 1, when deciding between requiring a reissuance of the sustainability statement or a corrective note, the final objective is that the best possible information is provided, and an assessment should be made of whether the original sustainability statement and a corrective note provide sufficient clarity or whether a reissuance of the sustainability statement is the best solution.
 - b) When deciding whether to require either a correction in the future sustainability statement or the publication of a corrective note / reissuance of the sustainability statement at an earlier moment, different factors should be considered, namely:
 - i) the timing of the decision: for instance, where the decision is very close to the date of the publication of the next sustainability statement, a correction in the future sustainability statement might be appropriate;
 - ii) the nature of the decision and the surrounding circumstances: for instance, where the correct information has made it to the public sphere at the moment the decision is taken, the enforcer could opt for a correction in the future sustainability statement.
- 68) When the enforcer decides to require a correction in the future sustainability statement, the reason for selecting this enforcement action should be stated clearly in the enforcer's conclusion.

Guideline 13: Materiality

- 69) **When determining materiality, where applicable, of an omission or misstatement for the purpose of enforcement of sustainability information, this should be assessed taking into account the part of the sustainability information framework used for the preparation of the sustainability information.**
- 70) When the sustainability information framework relies on a double materiality perspective²⁸, this should be the basis for the enforcer's materiality assessment of an omission or misstatement.

²⁸ Within the meaning of the term referred to in Recital 29 to the preamble of the Corporate Sustainability Reporting Directive.

Guideline 14: Follow-ups

- 71) **Enforcers should ensure that actions are appropriately acted on by the issuers against which the actions were taken.**
- 72) As infringements could, by definition, have an impact on the decisions made on the basis of sustainability information, it is important that the corrected information is published, unless impracticable, on a timely basis. Therefore, when actions a) or b) mentioned in Guideline 12 are taken, the relevant sustainability information and the action taken should be made available, unless impracticable, directly by the issuer and/or by the enforcer.

Consultation questions

- 18 Do you agree with the draft Guideline 12 which presents the considerations enforcers should apply when they identify an infringement in the sustainability information and have to determine which enforcement action to use? If not, please explain why and provide suggestions for amendments.
- 19 Do you agree with the draft Guideline 13 which clarifies the approach to materiality in the enforcement of sustainability information? If not, please explain why and provide suggestions for amendments.
- 20 Do you agree with the draft Guideline 14 which establishes that enforcers should check whether issuers took appropriate action when they were subject to an enforcement action? If not, please explain why and provide suggestions for amendments.

3.5.6 European coordination

Explanations

Guideline 15: European common enforcement priorities

68. Draft Guideline 15 establishes the important principle that enforcers should discuss their experiences with application of the sustainability information framework in ESMA's Sustainability Reporting Working Group (SRWG). The purpose of having such discussions in the SRWG is to enable European coordination of national enforcement activities and for this reason, all enforcers should send representatives to this group. Based on these discussions in the SRWG, the draft guideline lays down that enforcers should identify European common enforcement priorities (ECEP) in advance of the next reporting year. The ECEP should be made public so issuers can be aware of them, and this should be done sufficiently early so that enforcers can incorporate them into their national enforcement programmes.

69. Draft Guideline 15 is based on GLEFI Guideline 10. Some adjustments have been made to the text to adapt it to sustainability information and to further enhance its precision.

Guideline 16: Coordination in SRWG

70. Further to draft Guideline 15, draft Guideline 16 elaborates on the role of the SRWG and establishes that enforcers should coordinate their ex-ante and ex-post decisions in the group to achieve harmonised enforcement practices and should furthermore provide input on ESMA's work on sustainability information. The draft guideline additionally clarifies that when the group identifies material controversial issues, ambiguities or any lack of specific guidance, ESMA will relay this to the relevant body in charge of standard-setting and interpretation of the sustainability information framework, i.e., the European Commission. The draft guideline is based on GLEFI Guideline 11 with small adaptations of the wording to make it suitable for sustainability information.

Guideline 17: Emerging issues

71. Draft Guideline 17 explains that discussions of cases in the SRWG can take place either before or after the enforcer takes a decision in the case and that, in the situations listed in the guideline, the enforcer should submit cases before taking a decision unless it is prevented from doing so by a tight deadline. These situations include cases where there is no prior decision or prior discussion in the SRWG of a reporting issue and cases where the enforcer deems that the reporting issue has significant importance for the internal market. The purpose of submitting emerging issues is to discuss and agree the treatment of this type of case at a European level before the national enforcer acts, thereby ensuring supervisory convergence.
72. In addition to the situations in which enforcers are required to submit cases, the draft guideline explains that enforcers can also voluntarily submit cases when they wish to receive the input and advice of their colleagues from other jurisdictions.
73. The draft guideline is based on GLEFI Guideline 12. Some amendments have been made to the wording to adapt it to sustainability reporting and to further enhance clarity. Additionally, the last paragraph of GLEFI Guideline 14 has been moved to draft Guideline 17 to place all provisions regarding when to submit an emerging issue within the same guideline. Finally, the last two paragraphs of GLEFI Guideline 12 have been swapped so the draft guideline first talks about mandatory submission of emerging issues and then, in the last paragraph, about voluntary submission of emerging issues.

Guideline 18: Decisions

74. The purpose of draft Guideline 18 is to require enforcers to submit decisions for information and discussion in the SRWG when they meet one or several of a list of criteria, such as referring to reporting matters with technical merit and relating to an emerging issue which was previously discussed in the SRWG.

75. The draft guideline is based on GLEFI Guideline 13 and has had small adjustments to the wording to adapt it to sustainability information. Furthermore, the last paragraph of the GLEFI text has been moved to draft Guideline 20 as it relates to both emerging issues and decisions and therefore fits better there.

Guideline 19: Taking earlier decisions into account

76. Draft Guideline 19 establishes that when enforcers take a decision in a new case, they should take account of earlier decisions and discussions in the SRWG. While this has the purpose of creating supervisory convergence within and across jurisdictions, the draft guideline also confirms that the final decision in each case remains the responsibility of the enforcer. The draft guideline lastly specifies that enforcers should identify relevant previous decisions by searching in the database mentioned in draft Guideline 20.
77. The draft guideline is based on GLEFI Guideline 14. Its wording was slightly adapted to be suitable to sustainability information and the last paragraph of the GLEFI text has been moved to draft Guideline 17, as explained above.

Guideline 20: Submission of emerging issues and decisions

78. The purpose of draft Guideline 20 is to lay down the deadline within which enforcers should submit emerging issues to ESMA (two weeks before the SRWG meeting during which the enforcer wishes to discuss the emerging issue) and the deadline within which enforcers should submit decisions to ESMA (within three months of the decision having been taken). The draft guideline further establishes that enforcers' descriptions of emerging issues / decisions should meet certain qualitative criteria to ensure fruitful discussions. Lastly, the draft guideline establishes that ESMA should be in charge of the technical maintenance of the database.
79. The draft guideline is based on GLEFI Guidelines 15 and 16 which have been merged to put provisions on deadlines and submission of cases in one place. The wording has furthermore been slightly adjusted to fit to sustainability information.

Guideline 21: Publication of decisions

80. Draft Guideline 21 requires enforcers, under ESMA's coordination, to publish a selection of the decisions which have been discussed in the SRWG to promote consistency in the application of the sustainability information framework. The draft guideline furthermore lays down certain criteria for how this selection of decisions should be identified, for example that the decision refers to a complex reporting issue or an issue that could lead to different interpretations of the sustainability information framework. The draft guideline is based on GLEFI Guideline 17 and has had its wording adapted to the topic of sustainability information.

Guideline 22: Reporting on enforcement activities

81. Draft Guideline 22 obliges enforcers to periodically report on their national enforcement activities to the public in their own jurisdictions as well as to ESMA for the purpose of ESMA's yearly report on corporate reporting enforcement and regulatory activities. The draft guideline is based on GLEFI Guideline 18 and has been adjusted slightly to the terminology of sustainability information.

Proposed guidelines

82. This leads to the following proposed guidelines on European coordination:

5.6 European coordination

Guideline 15: European common enforcement priorities

- 73) **In order to achieve a high level of harmonisation in enforcement, enforcers should discuss and share experience on the application and enforcement of the sustainability information framework during meetings of the Sustainability Reporting Working Group (SRWG). On that basis, enforcers under ESMA coordination should identify common enforcement priorities on a yearly basis.**
- 74) In order to achieve a high level of harmonisation in enforcement, ESMA has set up the SRWG in which all enforcers should be members and should participate.
- 75) To promote supervisory convergence, enforcers under ESMA coordination should identify common reporting matters for enforcement of sustainability information in the Union 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 Member States or might be 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.

Guideline 16: Coordination in SRWG

- 76) **Although the responsibility for enforcement rests with enforcers, in order to promote harmonisation of enforcement practices and to ensure a consistent approach among enforcers to the application of the sustainability information framework, coordination of ex-ante and ex-post decisions should take place in the SRWG. Enforcers, under ESMA's coordination, should also identify reporting matters and provide technical input for the preparation of ESMA statements and/or opinions.**
- 77) 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 sustainability information in the Union requires coordination and a high level of harmonisation of actions among enforcers. In order to ensure proper

and rigorous enforcement of sustainability information and avoid regulatory arbitrage, ESMA will promote harmonisation of enforcement approaches through coordination of ex-ante and ex-post decisions taken by enforcers.

- 78) The adoption of the sustainability information framework and interpretations of its application are reserved for standard setters. Therefore, ESMA and enforcers do not issue any general application guidance to issuers on the sustainability information framework. Nevertheless, as part of the enforcement activities, enforcers apply their judgement in order to determine whether reporting practices are considered as being within the accepted range as permitted by the sustainability information framework.
- 79) When the sustainability information framework is applied, ESMA will convey material controversial reporting issues, as well as ambiguities and any lack of specific guidance, discovered during the enforcement process to the body responsible for standard setting and interpretation (namely, the European Commission). This is also the case for any other issues identified which create enforceability constraints during the enforcement process.

Guideline 17: Emerging issues

- 80) **Discussion of cases at the SRWG can take place either before the enforcer draws a conclusion to its examination (emerging issues) or after the enforcer draws a conclusion to its examination (decisions). Except in rare circumstances where the deadline imposed on an enforcer makes it impossible to prepare, present and discuss with the SRWG before a decision is taken, a reporting issue should be submitted as an emerging issue in any of the following situations:**
- a) **Where no decision has yet been taken by an enforcer on the reporting issue at hand or where the SRWG has had no prior discussion of the issue. This does not apply to matters presenting little technical merit or where the sustainability information framework is clear and where the infringement is obvious;**
 - b) **Where the reporting issue at hand is identified by enforcers or ESMA as of significant importance for the internal market;**
 - c) **Where the enforcer disagrees, or intends to take a decision that appears not to be in accordance, with:**
 - i) **An earlier decision on the same or a similar reporting issue; or**
 - ii) **The outcome of a discussion of an emerging issue on the same or a similar reporting issue.**

Submitting the case as an emerging issue in these situations has the goal of establishing whether differences in facts and circumstances justify a decision which is different from the precedent.

d) Where the enforcer identifies a risk of significantly different reporting practices by issuers across Europe.

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

82) Reporting issues encountered by an enforcer, other than those when the sustainability information framework is clear, the infringement obvious and a decision has already been taken, should be brought to the attention of ESMA and discussed in the SRWG 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 SRWG. The outcome should also be taken into account by other enforcers. ESMA may also bring emerging issues to the SRWG in case reporting issues are of significant importance to the internal market.

83) In addition to the situations presented in paragraph 80, a reporting issue may be presented as an emerging issue where the enforcer is looking for further guidance from other enforcers, for example because of the complex nature of the reporting issue or where the enforcer is looking for further guidance because the issue might raise an enforceability issue.

Guideline 18: Decisions

84) A decision should be submitted to the SRWG if the decision fulfils one or more of the following criteria:

- a) The decision refers to reporting matters with technical merit;**
- b) The decision has been discussed as an emerging issue, unless it was decided otherwise during the discussion in the SRWG meeting;**
- c) The decision will be of interest for other reasons to other enforcers (this judgement is likely to be informed by SRWG discussions);**
- d) The decision indicates to an enforcer that there is a risk of significantly different reporting practices being applied by issuers;**
- e) The decision is likely to have a significant impact on other issuers;**

- f) The decision is taken on an issue not directly addressed by a specific provision in the sustainability information framework;**
- g) The decision has been overruled by an appeals committee or Court; or**
- h) The decision appears to be in contradiction with an earlier decision on the same or a similar reporting issue.**

85) Emerging issues and decisions discussed in the SRWG normally refer to sustainability information prepared under the sustainability information framework but could also cover sustainability information prepared under equivalent third country sustainability reporting requirements.

Guideline 19: Taking earlier decisions into account

86) **Enforcement decisions by enforcers should take into account earlier decisions on the same reporting 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 SRWG on a decision on whether or not a piece of sustainability information is in accordance with the sustainability information framework and the action related to it. Irrespective of the outcome of the SRWG discussion, the final decision is the responsibility of the enforcer.**

87) In order to ensure a consistent enforcement regime throughout the Union, enforcers should, before taking an enforcement decision, look for decisions taken by other enforcers in the relevant database mentioned in Guideline 20 and take them into account, as they should take into account the enforcer's own earlier decisions on the same reporting issue. This is the case irrespective of whether the decision is taken as pre-clearance or as a decision based on a published sustainability statement.

Guideline 20: Submission of emerging issues and decisions

88) **All emerging issues that meet any of the submission criteria as mentioned in Guideline 17 should be submitted to ESMA with the relevant details normally within two weeks before the SRWG meeting in which they are going to be discussed. All enforcement decisions that meet any of the submission criteria as mentioned in Guideline 18 should be submitted to ESMA with the relevant details normally within three months of the decision being taken.**

89) To ensure effective and efficient discussions, emerging issues and decisions should be clear and concise yet include all relevant facts, the issuer's arguments, the basis for the enforcer's rationale and the conclusion.

90) Coordination in the SRWG should be facilitated by the existence of an enforcement database. The objective of the database is to constitute a platform for sharing information on a continuous basis. The time frame for submission of decisions 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 will log the enforcement decision into the database. The enforcement database contains the outcome of the discussion that took place during the meeting. ESMA is responsible for the technical maintenance of the database.

Guideline 21: Publication of decisions

91) **In order to promote consistency of application of the sustainability information framework, enforcers should decide which decisions included in the database can be subject to publication on an anonymous basis.**

92) A selection of 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:

- a) The decision refers to a complex reporting issue or an issue that has led or could lead to different applications of the sustainability information framework; or
- b) 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
- c) The decision relates to an issue on which there is no experience or on which enforcers have inconsistent experiences; or
- d) The decision has been taken on an issue not directly addressed by a specific provision in the sustainability information framework.

Guideline 22: Reporting on enforcement activities

93) **Enforcers should report periodically on their 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.**

94) Enforcers should periodically report to the public on the enforcement policies and decisions taken in individual cases. It is up to the enforcer whether to report on an anonymous or a non-anonymous basis on these matters.

95) Enforcers should report to ESMA findings and enforcement decisions relating to the common enforcement priorities, as identified in accordance with Guideline 15. These, together with other activities relevant to European coordination, are published by ESMA in its report on corporate reporting enforcement and regulatory activities.

Consultation questions

- 21 Do you agree with the proposed requirements for how to coordinate enforcement of sustainability information at a European level in draft Guidelines 15, 16, 17, 18, 19 and 20? If not, please explain why and provide suggestions for amendments.
- 22 Do you agree that it is useful to publish extracts of decisions taken by enforcers, as required by draft Guideline 21, and to report on enforcement activities at national and European level, as required by draft Guideline 22? If not, please explain why and provide suggestions for amendments.

4 Annexes

4.1 Annex I: Legislative mandate to issue guidelines

Transparency Directive, Article 28d:

ESMA guidelines

After consulting the European Environment Agency and the European Union Agency for Fundamental Rights, ESMA shall issue guidelines in accordance with Article 16 of Regulation (EU) No 1095/2010 on the supervision of sustainability reporting by national competent authorities.

ESMA Regulation, Article 16(1):

Guidelines and recommendations

1. The Authority shall, with a view to establishing consistent, efficient and effective supervisory practices within the ESFS, and to ensuring the common, uniform and consistent application of Union law, issue guidelines addressed to all competent authorities or all financial market participants and issue recommendations to one or more competent authorities or to one or more financial market participants.

Guidelines and recommendations shall be in accordance with the empowerments conferred in the legislative acts referred to in Article 1(2) or in this Article.

4.2 Annex II: Draft cost-benefit analysis

Introduction

Article 24(1) of the Transparency Directive obliges enforcers to ensure that the provisions adopted pursuant to the Transparency Directive are applied, including the requirement for issuers with securities admitted to trading on a regulated market to provide a sustainability statement – drawn up in accordance with the ESRS and the Disclosures Delegated Act – in the management report which forms an integral part of the annual financial report.

Article 28d of the Transparency Directive mandates ESMA, after having consulted the European Environment Agency (EEA) and the European Union Agency for Fundamental Rights (EU FRA), to issue guidelines on national competent authorities' supervision of sustainability reporting.

The objective of performing a cost-benefit analysis is to assess the costs and benefits of the policy options which were analysed during the process of drafting the guidelines.

Assessment of the proposed policy options

Specific objective	<p>According to Article 16 of the ESMA Regulation, the goal of ESMA guidelines is to “[<i>establish</i>] consistent, efficient and effective supervisory practices within the ESFS, and to [<i>ensure</i>] the common, uniform and consistent application of Union law.”</p> <p>Specifically in relation to the GLESI, Recital 79, second paragraph of the CSRD clarifies that “[...] given the novel character of the sustainability reporting requirements, ESMA should issue guidelines for national competent authorities to promote convergent supervision of sustainability reporting by issuers subject to [<i>the Transparency Directive</i>].”</p>
Policy option 1	
Description	<p>To establish Guidelines for Enforcement of Sustainability Information (GLESI) which closely resemble ESMA’s Guidelines for Enforcement of <u>Financial</u> Information (GLEFI).</p> <p>The GLEFI have been in place since 2014 and are well-established among European enforcers. They provide detailed instructions for the various steps of the enforcement process (how to select the information which will be examined, how to undertake the examination, how to determine which enforcement action to use in case an infringement is discovered). Additionally, they establish expectations regarding enforcers’ internal</p>

	<p>organisation (resources, powers, independence) and regarding coordination of enforcement at a European level.</p> <p>While using the GLEFI as the starting point for the GLESI and trying to maintain alignment between the two sets of guidelines, this policy option adjusts the content of the GLESI to the specificities of sustainability information.</p>
<p>How would this policy option achieve the objective described above?</p>	<p>Policy option 1 would meet the objective as it would promote convergence of supervisory practices and consistency across enforcement of sustainability and financial information, leading to efficient use of enforcers' resources.</p> <p>More specifically, it would establish harmonised approaches across all jurisdictions to selecting and examining issuers and taking enforcement actions against them in cases of infringements as well as harmonised approaches to enforcers' internal set-up and contributions to coordination at a European level.</p> <p>On top of this, where appropriate, it would create closely similar practices for enforcement of sustainability and financial information. This would permit enforcers to incorporate the new enforcement requirements into their existing enforcement models relatively seamlessly, as such leading to efficient use of their resources.</p>
<p>Policy option 2</p>	
<p>Description</p>	<p>To develop the GLESI from scratch without reference to the GLEFI.</p>
<p>How would this policy option achieve the objective described above?</p>	<p>While this policy option may lead to a similar level of supervisory convergence <u>within</u> the enforcement of sustainability information as policy option 1, it would not ensure consistency <u>across</u> enforcement practices in the realms of sustainability and financial information.</p> <p>ESMA suggests that there is no obvious reason to establish fundamentally different enforcement practices for sustainability and financial information, since issuers' processes for preparing the two types of information are similar, including a requirement for both types to be subject to assurance (though limited as opposed to reasonable in the first years of reporting under the CSRD). Additionally, differences in enforcement practices could lead to inconsistent supervisory treatments of sustainability and financial information whereas there is a need for connectivity</p>

	between the two. In addition, a fundamentally different enforcement approach to sustainability information would be more difficult to implement, and therefore less efficient, for enforcers.
Conclusion	
Which policy option is the preferred one?	Policy option 1, as it will lead to convergence in the enforcement of sustainability information, to consistency in the way sustainability and financial information are enforced and to an efficient use of enforcers' resources as they can extend the enforcement processes they already use for financial information to sustainability information.
Is the policy chosen within the sole responsibility of ESMA? If not, what other body is concerned / need to be informed or consulted?	<p>ESMA is responsible for issuing the guidelines after consulting the EEA and the EU FRA. In agreement with the EEA and the EU FRA, ESMA has invited both agencies to submit a response to the public consultation conducted with the present consultation paper. ESMA will take the responses from the EEA and the EU FRA into account when it analyses feedback to the consultation and will keep the EEA and the EU FRA informed of changes to the GLESI which may be of interest to their respective remits.</p> <p>In addition, ESMA is consulting the Securities and Markets Stakeholders Group on the development of the guidelines as foreseen in Article 16(2) of the ESMA Regulation.</p>

Impacts of the proposed policy options

Policy option 1	
Benefits	<p>Policy option 1 would firstly provide clear guidance on how enforcers should carry out enforcement of sustainability information, thus leading to convergent enforcement practices. Secondly, it would ensure consistent enforcement of sustainability and financial information. Thirdly, it would lead to an efficient use of enforcers' resources by allowing them to benefit from economies of scope across the enforcement of sustainability and financial information.</p> <p>A more indirect benefit of policy option 1 would be the contribution of enforcement to the transparency of sustainability information and as such the protection of investors looking to base their investment decisions on sustainability information.</p>

Costs to regulator	ESMA envisages that the costs to enforcers will remain within a reasonably low range since they already follow most of the practices in relation to enforcement of <i>financial</i> information which policy option 1 would require them to apply in relation to enforcement of <i>sustainability</i> information. This option will also help limit the incremental costs which will inevitably arise due to the new set of reporting requirements to be supervised.
Compliance costs	ESMA does not foresee direct compliance costs from policy option 1, as the GLESI are directed at enforcers and should not have a direct impact on market participants. There may be indirect compliance costs as issuers will be expected to take account of the European common enforcement priorities and the decisions published in accordance with the GLESI.
Innovation-related aspects	No innovation related impacts are expected from this option.
ESG-related aspects	Due to the nature of the GLESI, all issues discussed in this cost-benefit analysis are of relevance to ESG-related aspects.
Proportionality-related aspects	Option 1 allows enforcers to rely on existing enforcement practices and exploit economies of scope, hence no proportionality-related aspects are expected to be impacted by this option.
Policy option 2	
Benefits	<p>Policy option 2 would provide clear guidance on how enforcers should carry out enforcement of sustainability information, thus leading to convergent enforcement practices.</p> <p>A more indirect benefit of policy option 2 would be the contribution of enforcement to the transparency of sustainability information and as such the protection of investors looking to base their investment decisions on sustainability information.</p>
Costs to regulator	ESMA estimates that policy option 2 would imply moderate costs for enforcers connected with setting up entirely new enforcement practices (one-time cost), training staff in their application (one-time cost) and managing different practices in the enforcement of sustainability and financial information for those enforcers who have integrated enforcement teams (ongoing cost).

Compliance costs	ESMA does not foresee direct compliance costs from policy option 2, as the GLESI are directed at enforcers and should not have a direct impact on market participants. There may be indirect compliance costs as issuers will be expected to take account of the European common enforcement priorities and the decisions published prepared in accordance with the GLESI.
Innovation-related aspects	No innovation related impacts are expected from this option.
ESG-related aspects	Due to the nature of the GLESI, all issues discussed in this cost-benefit analysis are of relevance to ESG-related aspects.
Proportionality-related aspects	The comparably higher one-time costs identified in option 2 may impact enforcers with limited resources to a greater extent and thus has the potential to create disproportionate costs and an unlevel playing field among enforcers. This may be further exacerbated by the additional ongoing costs, which may require enforcers to employ additional staff resources for the different supervisory lines of financial and sustainability information.
Conclusion	On the basis of the analysis above, ESMA concludes that the benefits of issuing these guidelines on the basis of policy option 1 outweigh the costs.

Consultation questions

- 23 Do you agree that the proposed policy option 1 is preferable from a cost-benefit perspective? If not, please explain. If yes, have you identified other benefits and costs which are not mentioned above?
- 24 If you advocate for a different policy option, how would it impact the benefits and costs? Please provide details.

4.3 Annex III: List of consultation questions

- 1 Do you have comments on the proposed scope of the GLESI? If yes, please explain your views and provide alternative suggestions where needed.
- 2 Should any further legislative references be added to section 2.1 of the GLESI? If yes, please explain which ones and why.
- 3 Should any other abbreviations be added to section 2.2 of the GLESI? If yes, please explain which ones and why.
- 4 Do you agree with the definitions ESMA proposes for inclusion in section 2.3 of the GLESI? Has ESMA covered all the concepts that need to be defined? If not, please explain your concerns and propose how to address them.
- 5 Do you agree with the proposed purpose of the GLESI? If not, please explain why and make a proposal for what should change.
- 6 Do you have any remarks on the compliance and reporting obligations?
- 7 Do you agree with the proposed objective of the enforcement of sustainability information? If not, please explain why and provide suggestions for amendments.
- 8 Do you agree with the draft Guideline 2 on how enforcers should ensure that they have an effective process for enforcing sustainability information? If not, please explain why and provide suggestions for amendments.
- 9 Do you agree with the draft Guideline 3 on enforcement of sustainability information prepared under equivalent third country sustainability reporting requirements? If not, please explain why and provide suggestions for amendments.
- 10 Do you agree with the draft Guideline 4 on the independence of enforcers? If not, please explain why and provide suggestions for amendments.
- 11 Do you agree with the draft Guideline 5 on the mixed selection model? If not, please explain why and provide suggestions for amendments.
- 12 Do you agree with the draft Guideline 6 on the timing of the selection model? If not, please explain why and provide suggestions for amendments.
- 13 Do you agree with the proposed Guideline 7 on the selection universe? If not, please explain why and provide suggestions for amendments.
- 14 Do you agree with the draft Guideline 8 on the four types of examination enforcers can use when they examine sustainability information? If not, please explain why and provide suggestions for amendments.

- 15 Do you agree with the draft Guideline 9 which addresses the enforcer's examination process? If not, please explain why and provide suggestions for amendments.
- 16 Do you agree with the draft Guideline 10 which presents the conditions which enforcers should apply when they offer their issuers pre-clearance of sustainability information? If not, please explain why and provide suggestions for amendments.
- 17 Do you agree with the draft Guideline 11 which requires enforcers to undertake quality reviews of their enforcement processes? If not, please explain why and provide suggestions for amendments.
- 18 Do you agree with the draft Guideline 12 which presents the considerations enforcers should apply when they identify an infringement in the sustainability information and have to determine which enforcement action to use? If not, please explain why and provide suggestions for amendments.
- 19 Do you agree with the draft Guideline 13 which clarifies the approach to materiality in the enforcement of sustainability information? If not, please explain why and provide suggestions for amendments.
- 20 Do you agree with the draft Guideline 14 which establishes that enforcers should check whether issuers took appropriate action when they were subject to an enforcement action? If not, please explain why and provide suggestions for amendments.
- 21 Do you agree with the proposed requirements for how to coordinate enforcement of sustainability information at a European level in draft Guidelines 15, 16, 17, 18, 19 and 20? If not, please explain why and provide suggestions for amendments.
- 22 Do you agree that it is useful to publish extracts of decisions taken by enforcers, as required by draft Guideline 21, and to report on enforcement activities at national and European level, as required by draft Guideline 22? If not, please explain why and provide suggestions for amendments.
- 23 Do you agree that the proposed policy option 1 is preferable from a cost-benefit perspective? If not, please explain. If yes, have you identified other benefits and costs which are not mentioned above?
- 24 If you advocate for a different policy option, how would it impact the benefits and costs? Please provide details.
- 25 Do you wish to raise any other points which ESMA should consider as it finalises the guidelines?

4.4 Annex IV: Draft Guidelines on Enforcement of Sustainability Information

1 Scope

Who?

- 1) These guidelines apply to all competent authorities undertaking supervision (referred to as enforcement in these guidelines, see section 2.3 *Definitions*) of sustainability information under the Transparency Directive.

What?

- 2) These guidelines apply in relation to the enforcement of sustainability information under Article 24(4) of the Transparency Directive to ensure that sustainability information provided by issuers, who have securities admitted to trading on a regulated market and who are required to publish sustainability information under the Accounting Directive, complies with the requirements of the Transparency Directive.
- 3) This means sustainability information of issuers already listed on a regulated market. It includes issuers from third countries using the European Sustainability Reporting Standards as well as issuers from third countries using sustainability reporting requirements which have been declared equivalent to the European Sustainability Reporting Standards.
- 4) The guidelines are principles-based and define enforcement of sustainability 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 enforcers should make use of and explain how enforcement activities are coordinated within ESMA.

When?

- 5) These guidelines apply to enforcement of sustainability information published from 1 January 2025.

2 Legislative references, abbreviations and definitions

- 6) Unless otherwise specified, terms used and defined in the Transparency Directive, the Accounting Directive and the Taxonomy Regulation 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:

2.1 Legislative references

<i>Transparency Directive</i>	Directive 2004/109/EC of the European 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/EC ²⁹
<i>Accounting Directive</i>	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 ³⁰
<i>European Sustainability Reporting Standards</i>	Commission Delegated Regulation (EU) .../...of XXX supplementing Directive 2013/34/EU of the European Parliament and of the Council as regards sustainability reporting standards ³¹
<i>Taxonomy Regulation</i>	Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 ³²
<i>Disclosures Delegated Act</i>	Commission Delegated Regulation (EU) 2021/2178 of 6 July 2021 supplementing Regulation (EU) 2020/852 of the European Parliament and of the Council by specifying the content and presentation of information to be disclosed by undertakings subject to Articles 19a or 29a of Directive 2013/34/EU concerning environmentally sustainable economic activities, and specifying the methodology to comply with that disclosure obligation ³³
<i>Markets in Financial Instruments Directive II</i>	Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU ³⁴
<i>ESMA Regulation</i>	Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and

²⁹ OJ L 390, 31.12.2004, p. 38–57.

³⁰ OJ L 182, 29.6.2013, p. 19–76.

³¹ The adopted delegated act is available [here](#) (not in force until it is published in the Official Journal).

³² OJ L 198, 22.6.2020, p. 13–43.

³³ OJ L 443, 10.12.2021, p. 9–67.

³⁴ OJ L 173, 12.6.2014, p. 349–496.

Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC³⁵

Corporate Sustainability Reporting Directive

Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting³⁶

Non-Financial Reporting Directive

Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups³⁷

2.2 Abbreviations

<i>ESMA</i>	European Securities and Markets Authority
<i>SRWG</i>	Sustainability Reporting Working Group
<i>EU</i>	European Union

2.3 Definitions

Enforcement of sustainability information

Supervision of sustainability information, including sustainability reporting as referred to in Article 28d of the Transparency Directive. In particular, enforcement of sustainability information consists of examining whether sustainability information is prepared in accordance with the sustainability information 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.

These guidelines refer to ‘enforcement’ instead of ‘supervision’, as referenced in Article 28d of the Transparency Directive, to ensure consistency with the wording used in ESMA’s Guidelines on Enforcement of Financial Information³⁸.

Sustainability information

Information required by the sustainability information framework

³⁵ OJ L 331, 15.12.2010, p. 84–119.

³⁶ OJ L 322, 16.12.2022, p. 15–80.

³⁷ OJ L 330, 15.11.2014, p. 1–9.

³⁸ [ESMA32-50-218](#) Guidelines on enforcement of financial information, 4 February 2020.

<i>Issuer</i>	An issuer as defined in Article 2(1)(d) of the Transparency Directive with the exclusion of ‘natural persons’
<i>Regulated market</i>	A regulated market as defined in Article 4(1), point (21) of the Markets in Financial Instruments Directive II
<i>Enforcer</i>	National competent authority
<i>Sustainability information framework</i>	Articles 19a, 29a and 29d of the Accounting Directive along with the European Sustainability Reporting Standards and Article 8 of the Taxonomy Regulation along with the Disclosures Delegated Act
<i>Infringement</i>	A material omission or a material misstatement in an issuer’s sustainability information
<i>Home Member State</i>	The home Member State as defined in Article 2(1)(i) of the Transparency Directive
<i>Market operator</i>	A market operator as defined in Article 4(1), point (18) of the Markets in Financial Instruments Directive II
<i>Immaterial departure</i>	An immaterial omission or an immaterial misstatement in an issuer’s sustainability information
<i>Corrective note</i>	Issuance by an enforcer or an issuer, as initiated or required by an enforcer, of a note making public an infringement with respect to particular item(s) included in already published sustainability information and, unless impracticable, the corrected information
Types of selection	
<i>Risk-based selection</i>	When an enforcer identifies issuers whose sustainability information meets certain risk criteria and subjects the sustainability information of all or some of those issuers to examination
<i>Rotation-based selection</i>	When an enforcer selects an issuer’s sustainability information for examination once within a specific period
<i>Randomised selection</i>	When an enforcer selects an issuer’s sustainability information for examination from a wider group of issuers without reference to the risk profile of the sustainability information or to when the issuer’s sustainability information was last examined, so that all issuers have an equal chance of being selected

Types of examination

Interactive unlimited examination of sustainability information

An enforcer's evaluation of the entire content of an issuer's sustainability information in order to identify issues / areas that, in the enforcer's opinion, need further analysis, and the enforcer's subsequent assessment of whether the sustainability information regarding those issues / areas is in accordance with the sustainability information framework. The interactive unlimited examination entails an interaction between the enforcer and the issuer. Based on the examination procedures it has undertaken and the information it has received from the issuer, the enforcer concludes whether it has discovered infringements in relation to the issues / areas it has analysed.

Interactive focused examination of sustainability information

An enforcer's assessment of whether pre-defined issues / areas in an issuer's sustainability information are in accordance with the sustainability information framework. The interactive focused examination entails an interaction between the enforcer and the issuer. Based on the examination procedures it has undertaken and the information it has received from the issuer, the enforcer concludes whether it has discovered infringements in relation to the pre-defined issues / areas it has analysed.

Desktop unlimited examination of sustainability information

An enforcer's evaluation of the entire content of an issuer's sustainability information in order to identify issues / areas that, in the enforcer's opinion, need further analysis, and the enforcer's subsequent assessment of whether the sustainability information regarding those issues / areas is in accordance with the sustainability information framework. The desktop unlimited examination does not entail any interaction between the enforcer and the issuer. Based on the examination procedures it has undertaken, the enforcer concludes whether there are indications that infringements exist in relation to the sustainability information it has analysed.

Desktop focused examination of sustainability information

An enforcer's assessment of whether pre-defined issues / areas in an issuer's sustainability information are in accordance with the sustainability information framework. The desktop focused examination does not entail any interaction between the enforcer and the issuer. Based on the examination procedures it has undertaken, the enforcer concludes whether there are indications that infringements exist in relation to the pre-defined issues / areas it has analysed.

Types of case discussion

<i>Decision</i>	When an enforcement case is discussed in the SRWG after the enforcer has taken a decision in the case
<i>Emerging issue</i>	When an enforcement case is discussed in the SRWG before the enforcer takes a decision in the case

3 Purpose

- 7) These guidelines are based on Article 28d of the Transparency Directive and on Article 16 of the ESMA Regulation. The objectives of the guidelines are to establish consistent, efficient and effective supervisory practices in relation to, and ensuring the common, uniform and consistent application of, Article 24(4) of the Transparency Directive in relation to the inclusion of a sustainability statement within the management report (Article 4(1) and 4(2), point b of the Transparency Directive) of issuers who have securities admitted to trading on a regulated market and are required to publish sustainability information under the Accounting Directive. In particular, the guidelines aim to ensure that enforcers carry out the enforcement of sustainability information in a converged manner and to make sure that this enforcement also closely resembles the enforcement which is undertaken in relation to financial information. The guidelines also assist enforcers in discovering potential infringements within issuers' sustainability information, for example in relation to greenwashing³⁹.

4 Compliance and reporting obligations

4.1 Status of the guidelines

- 8) In accordance with Article 16(3) of the ESMA Regulation, competent authorities must make every effort to comply with these guidelines.
- 9) Competent authorities to which these guidelines apply should comply by incorporating them into their national legal and / or supervisory frameworks, as appropriate.

4.2 Reporting requirements

- 10) Within two months of the date of publication of the guidelines on ESMA's website in all EU official languages, competent authorities to which these guidelines apply must notify

³⁹ According to [ESMA30-1668416927-2498](#) Progress Report on Greenwashing – *Response to the European Commission's request for input on "greenwashing risks and the supervision of sustainable finance policies"*, 31 May 2023, paragraph 13, the European Supervisory Authorities understand greenwashing as a "practice where sustainability-related statements, declarations, actions, or communications do not clearly and fairly reflect the underlying sustainability profile of an entity, a financial product, or financial services. This practice may be misleading to consumers, investors, or other market participants."

ESMA whether they (i) comply, (ii) do not comply, but intend to comply, or (iii) do not comply and do not intend to comply with the guidelines.

- 11) In case of non-compliance, competent authorities must also notify ESMA within two months of the date of publication of the guidelines on ESMA's website in all EU official languages of their reasons for not complying with the guidelines.
- 12) A template for notifications is available on ESMA's website. Once the template has been filled in, it shall be transmitted to ESMA.

5 Guidelines on enforcement of sustainability information

5.1 Basic concepts

Guideline 1: Objective of enforcement

- 13) **The objective of enforcement of sustainability information is to contribute to a consistent application of the sustainability information framework and, thereby, to the transparency of sustainability information. This will help make the status of sustainability information comparable to that of financial information. Through enforcement of sustainability information, enforcers contribute to the protection of investors and the promotion of market confidence as well as to the avoidance of regulatory arbitrage.**
- 14) To enable a comparison of the sustainability information of different issuers, it is important that this information is based on a consistent application of the sustainability information framework, in the sense that if facts and circumstances are similar, the disclosures will be similar to the extent required by the sustainability information framework.
- 15) To ensure that enforcement of sustainability information throughout the Union is carried out in a similar way, enforcers should share the same understanding of the principles set out in these guidelines.
- 16) Enforcement of sustainability information implies the examination of sustainability information to assess whether it is in accordance with the sustainability information framework. An enforcer's work differs from assurance on scope as the enforcer performs a priority-based examination in which, based on screening the sustainability information and monitoring issuers and markets, it chooses certain topics for further examination. An enforcer's work also differs from assurance on objective as the enforcer does not issue an opinion with a positive or negative assurance on the sustainability information. Instead, the enforcer should, based on the information gathered and the examination procedures undertaken in accordance with Guidelines 8 and 9, be able to conclude whether infringements of the sustainability information framework were discovered in relation to the issues / areas which it has assessed. Furthermore, the enforcer largely

examines information that has already been subject to (limited or reasonable) assurance and published, while the auditor / independent assurance services provider examines the sustainability information when it is prepared for publication.

- 17) In order for enforcement of sustainability information to be effective, enforcers should take appropriate actions in accordance with these guidelines, where infringements of the sustainability information framework are detected, to ensure that, whenever necessary, information prepared in accordance with the sustainability information framework is provided. Enforcers should react in a consistent manner if infringements of the sustainability information framework are detected.
- 18) This is intended not only to promote consistent application of the sustainability information framework, contributing to the efficient functioning of the internal market, which is also important for financial stability, but also to avoid regulatory arbitrage.
- 19) Enforcers may also seek to encourage compliance by issuing alerts and other publications to assist issuers in preparing their sustainability statement in accordance with the sustainability information framework.

5.2 Enforcers' internal organisation

Guideline 2: Ensuring an effective enforcement process

- 20) **Enforcers should ensure the effectiveness of the enforcement of sustainability information. In order to do so, they should have sufficient human and financial resources to carry out their activities in an effective manner as well as the necessary powers in accordance with Article 24(4) of the Transparency Directive. The human resources should be professionally skilled, experienced with the sustainability information framework, able to assess interactions between sustainability and financial information and sufficient in number, taking into account the number of issuers subject to enforcement of sustainability information, their characteristics, the complexity of their sustainability statements and their ability to apply the sustainability information framework. When enforcers delegate tasks relating to the enforcement of sustainability information in accordance with Article 24(2) of the Transparency Directive, the delegated entity should be supervised by the enforcer and responsible to it.**
- 21) To ensure effective enforcement of sustainability information, enforcers should have sufficient resources. When considering the level of human resources required, the number of issuers within the scope of enforcement, the complexity of the sustainability information as well as the ability of those who prepare the sustainability information and of the auditors / independent assurance services providers to apply the sustainability

information framework play important roles.⁴⁰ 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.

- 22) There should be sufficient financial resources to ensure that the necessary amount of human resources and services can be used in enforcement of sustainability information. The financial resources should also be sufficient to ensure that the human resources are professionally skilled and experienced.
- 23) Enforcers should have the necessary powers to effectively carry out their enforcement tasks, as required by Article 24(4) of the Transparency Directive.
- 24) When enforcers delegate tasks related to the enforcement of sustainability information in accordance with Article 24(2) of the Transparency Directive, the final responsibility for enforcement, including the responsibility for the establishment and maintenance of an appropriate process for enforcement, remains with the enforcer.

Guideline 3: Sustainability information prepared under equivalent third country sustainability reporting requirements

- 25) **When enforcing sustainability information prepared under equivalent third country sustainability reporting requirements in accordance with the provisions applicable under the Transparency Directive, enforcers should ensure that they have access to appropriately skilled resources or otherwise should coordinate the enforcement of sustainability information with ESMA and other enforcers to ensure that they have the appropriate resources and expertise. Enforcers should discuss enforcement of sustainability information prepared under equivalent third country sustainability reporting requirements with ESMA in order to ensure consistency of treatment of such sustainability information.**
- 26) In accordance with the Transparency Directive, sustainability information of issuers from third countries is subject to enforcement by the enforcer in the home Member State. In such cases, the issuer's sustainability information may be prepared under third country sustainability reporting requirements which have been declared equivalent to the sustainability information framework in accordance with Article 23 of the Transparency

⁴⁰ Due to the phase-in provisions in the Corporate Sustainability Reporting Directive and the European Sustainability Reporting Standards, enforcers will likely need less human resources (most notably, skills and number of staff) in 2025 compared to subsequent years. The need for human resources will gradually increase as more issuers are required to publish sustainability information under the Accounting Directive and as all disclosure requirements of the European Sustainability Reporting Standards become applicable. Enforcers will also have limited experience with the ESRS at first, however, this experience will grow from 2025 onwards. Particularly, the first year of enforcing sustainability information under the Corporate Sustainability Reporting Directive and the European Sustainability Reporting Standards may improve enforcers' ability to assess the resources they need to fulfil their enforcement mandate. This may lead to changes to the adequacy assessments which enforcers made prior to the first application of the guidelines, resulting in adjustments to the teams responsible for enforcement of sustainability information. A notable example of this situation may be enforcers who did not have powers to enforce the content of the non-financial information under the Non-Financial Reporting Directive who have new powers to enforce sustainability information under the Corporate Sustainability Reporting Directive.

Directive. These guidelines apply also to the enforcement of sustainability information of third country issuers that use sustainability reporting requirements which have been declared equivalent in this way.

- 27) In such cases, if the enforcer determines that it is not efficient or possible to carry out the enforcement of sustainability information itself, the enforcer may by agreement refer the task of examining whether the sustainability information is prepared in accordance with the equivalent third country sustainability reporting requirements to another enforcer or to a centralised team to be organised by ESMA at the request of the enforcer. Without prejudice to Article 28(3) of the ESMA Regulation, the responsibility for the enforcement decision always remains with the enforcer of the home Member State.
- 28) According to the Transparency Directive, 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.

Guideline 4: Independence

- 29) **Enforcers should ensure adequate independence from government, issuers, holders of securities, auditors / independent assurance services providers, other market participants, regulated market operators and other stakeholders. Independence from government implies that government cannot unduly influence the decisions taken by enforcers. Independence from issuers, holders of securities, auditors / independent assurance services providers, other market participants and other stakeholders should, amongst other things, be achieved through codes of ethics and through the composition of the Board of the enforcer.**
- 30) 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 / independent assurance services providers, holders of securities, other market participants and other stakeholders. 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.
- 31) 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 sustainability 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.
- 32) In relation to the independence from issuers, holders of securities, auditors / independent assurance services providers, other market participants and other stakeholders,

enforcers should avoid conflicts of interest, whether real, potential or perceived, by taking the required actions to ensure adequate independence, including, but not limited to:

- a) the establishment of codes of ethics for those involved in the enforcement process,
- b) cooling off periods,
- c) requiring assurance that staff involved in the enforcement of sustainability information do not breach any independence requirements because of relationships with either the issuer or the audit firm / independent assurance services provider involved, and
- d) ensuring that representatives of issuers and auditors / independent assurance services providers are not able, together or individually, to have a majority of votes in the decision-making bodies of enforcers.

5.3 Selection

Guideline 5: A mixed selection model

- 33) **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 a rotation approach. A risk-based approach should consider the risk of an infringement as well as the impact of an infringement on the financial markets.**
- 34) Selection models should be formalised and should be based on a combination of a risk-based approach, random sampling and rotation. A pure risk-based approach would mean that those issuers not fulfilling the risk criteria determined by the enforcer would never be subject to examination. There should always be a possibility of an issuer being selected for examination. A pure random system could mean that issuers with high risk were 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 sustainability statement was likely to be selected.
- 35) Risk-based selection takes account of the issuer's specific situation and characteristics. It is generally expected that detection of infringements in sustainability information is more likely when using risk-based selection than when using rotation-based and randomised selection. Therefore, enforcers should on average use risk to select at least 50% of the issuers whose sustainability information they examine. Conversely, the proportion of issuers selected based on rotation and randomisation should on average be no more than 50%, with rotation-based selection accounting for the largest portion and randomised selection permitted to account for even a small percentage of the selection.

- 36) If the enforcer decides to integrate its risk-based selection of issuers whose sustainability information will be examined with the risk-based selection of issuers whose financial information will be examined, the enforcer should ensure that the selection model is balanced so the issuers selected for the purpose of risk-based examinations of sustainability information ultimately possess a risk of infringement in the sustainability information.
- 37) Determination of risk should be based on the combination of the probability of infringements in the issuer's sustainability information and the potential impact of an infringement on the financial markets. The complexity of the sustainability statement should be taken into account. The enforcer should also take account of the risk profile of the issuer, including its management, and, as far as possible, of:
- a) management's ethical standards,
 - b) management's experience with applying, and their ability or willingness to apply, the sustainability information framework correctly,
 - c) the level of experience of the issuer's auditors / independent assurance services providers with the sustainability information framework.
- 38) While larger issuers are typically faced with more complex reporting issues, fewer resources and less experience with preparing sustainability information could be more prevalent among smaller and / or new issuers.
- 39) Indications of infringements from the auditors / the independent assurance services providers, whether in their reports or otherwise, and from regulatory bodies should normally trigger a selection of the sustainability information in question for examination. On the other hand, when the auditor / independent assurance services provider has expressed an unmodified⁴¹ (limited or reasonable) assurance conclusion, this should not be considered as proving the absence of risk of an infringement. Grounded complaints which, after preliminary scrutiny, contain concrete indications of infringements and appear reliable, should normally trigger a selection of the sustainability information in question for examination.
- 40) 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.
- 41) Selection models should comply with ESMA's guidance on sustainability information. Enforcers should discuss factors used as part of their national selection method in the

⁴¹ [Proposed International Standard on Sustainability Assurance 5000 – General Requirements for Sustainability Assurance Engagements](#), International Auditing and Assurance Standards Board, 2 August 2023.

SRWG. Such information will serve as a basis for any further potential developments that may be envisaged in relation to selection methods.

Guideline 6: Timing of selection model

- 42) **Enforcers should select issuers for examination sufficiently often (i.e., annually). The selection model should ensure that each issuer is examined at least once during a period selected by the enforcer in line with ESMA's guidance on sustainability information.**

Guideline 7: Selection universe

- 43) **Enforcers should undertake risk-based and randomised selection from the full universe of issuers who have securities admitted to trading on a regulated market and are required to publish sustainability information under the Accounting Directive. Enforcers should undertake rotation-based selection from a universe which excludes the issuers that were examined within the period selected by the enforcer.**
- 44) For the purpose of selection, enforcers should keep a list of the issuers within their enforcement remit who have securities admitted to trading on a regulated market and are required to publish sustainability information under the Accounting Directive.
- 45) The goal of risk-based selection is to select the issuers whose sustainability information is most likely to contain an infringement and for whom an infringement would have the largest impact on the financial markets. Therefore, risk-based selection should always be done from the full universe of issuers who have securities admitted to trading on a regulated market and are required to publish sustainability information under the Accounting Directive, including issuers who were examined in recent previous years.
- 46) The goal of randomised selection is to ensure that it is not possible for issuers to calculate when they will next be examined. Therefore, randomised selection should always be done from the full universe of issuers who have securities admitted to trading on a regulated market and are required to publish sustainability information under the Accounting Directive, including issuers who were examined in recent previous years.
- 47) The goal of rotation-based selection is to guarantee that all issuers who have securities admitted to trading on a regulated market and are required to publish sustainability information under the Accounting Directive are examined at least once within a defined period. Therefore, once an issuer has been examined, the enforcer should not include that issuer in the universe from which rotation-based selection is done until the period within which the enforcer examines all issuers in accordance with Guideline 6 has passed.

5.4 Examination

Guideline 8: Types of examination

- 48) **Enforcers should identify the most effective way to enforce sustainability information. As part of the ex-post activities regarding enforcement of sustainability information of issuers selected for examination, enforcers can use:**
- a) **interactive unlimited examinations,**
 - b) **interactive focused examinations,**
 - c) **desktop unlimited examinations, and**
 - d) **desktop focused examinations.**
- 49) **Interactive unlimited examinations should generally constitute at least 33% of all examinations undertaken within any given year or cover at least 10% of the total amount of issuers under the enforcer's supervision at the beginning of the year.**
- 50) Interactive examinations entail an exchange of information between the issuer and the enforcer regarding the sustainability information under examination. The interaction between the issuer and the enforcer may occur, for example, when the enforcer poses questions to the issuer, requires supporting documents or carries out on-site inspections. Enforcers should require necessary information irrespective of whether an indication exists in relation to the non-compliance of sustainability information with the sustainability information framework.
- 51) Interactive examinations should be the primary procedure used for enforcement of sustainability information, therefore the use of desktop examinations should be limited. Furthermore, the sole use of interactive focused examinations should not be considered as satisfactory for enforcement purposes.
- 52) Where an enforcer meets neither of the thresholds set out in paragraph 49 within a given year, it should be able to explain why it was unable to meet these thresholds.

Guideline 9: The examination process

- 53) **An enforcer's examination process should aim at assessing whether sustainability information of issuers is in accordance with the sustainability information framework. In addition, enforcers should examine if the sustainability information contained in the sustainability statement is consistent with the information included elsewhere in the annual financial report, where relevant.**
- 54) Assessing whether sustainability information is in accordance with the sustainability information framework does not result in the enforcer giving a positive or negative assurance to the issuer that the sustainability information complies with the sustainability

information framework, as explained under Guideline 1. However, if, in the course of its examination, the enforcer concludes that it has encountered an infringement or an immaterial departure as set out in paragraph 64 of Guideline 12⁴², the enforcer should apply the enforcement actions set out in paragraph 63 of Guideline 12⁴³.

- 55) The conclusions of an enforcer following an examination can take one of the following forms:
- a) Following a desktop examination
 - i) A decision that there are no indications of infringements in the sustainability information, or in relation to the issues / areas of the sustainability information which the enforcer analysed, and that no further examination is therefore needed.
 - ii) On rare occasions when infringements are obvious without interaction with the issuer, a decision that the enforcer has discovered infringements in the sustainability information and which enforcement action is required to address those infringements.
 - b) Following an interactive examination:
 - i) A decision that the enforcer has not discovered infringements in relation to the issues / areas of the sustainability information it has analysed and that no enforcement action is required.
 - ii) A decision that the enforcer has discovered infringements in the sustainability information and which enforcement action is required to address those infringements.
- 56) Enforcers should ensure that the examination procedures undertaken are sufficient in order to achieve an effective enforcement process and that the examination and its conclusion are documented appropriately.

⁴² Guideline 12, paragraph 64: "Where an immaterial departure from the sustainability information framework is left intentionally uncorrected to achieve a particular presentation of the issuer, the enforcer should take appropriate action as if it was material."

⁴³ Guideline 12, paragraph 63: "An enforcer should use the actions indicated below, at the enforcer's initiative. Whenever an infringement is detected, the enforcer should in a timely manner take at least one of the following actions in accordance with the considerations described in paragraph 67: a) require a reissuance of the sustainability statement, b) require a corrective note, or c) require a correction in the future sustainability statement with restatement of comparatives, where relevant."

Guideline 10: Pre-clearance

- 57) **Where pre-clearance is permitted, it should be part of a formal process, and provided only after the issuer and its auditor / independent assurance services provider have finalised their position on the sustainability information concerned.**
- 58) Enforcement of sustainability information normally takes published sustainability information as its starting point. Hence, by nature, it is an ex-post activity which is carried out in accordance with the examination procedures indicated in Guidelines 8 and 9 and applied to the sustainability information selected based on the criteria set out in the selection methods indicated in Guidelines 5, 6 and 7.
- 59) 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 sustainability information. Certain conditions should be in place when enforcers are using pre-clearance. In particular, the issuer and its auditor / independent assurance services provider should have a firm position on the issues / areas of the sustainability information in relation to which pre-clearance is sought as this will enable a 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.
- 60) 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 reverse its position after the sustainability information has been published unless facts and circumstances have changed between the date the enforcer expressed its position and the date the sustainability 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 / independent assurance services providers on the sustainability information as long as the outcome does not constitute a decision.

Guideline 11: Quality review

- 61) **In order to ensure that the examination procedures used and the related conclusions are robust, enforcers should put in place quality reviews of the examinations performed.**
- 62) Quality reviews should be performed by staff that has relevant experience and expertise in the sustainability information framework and in the reporting issues which are being examined.

5.5 Enforcement actions

Guideline 12: Choice of enforcement action

- 63) **An enforcer should use the actions indicated below, at the enforcer’s initiative. Whenever an infringement is detected, the enforcer should in a timely manner take at least one of the following actions in accordance with the considerations described in paragraph 67:**
- a) **require a reissuance of the sustainability statement,**
 - b) **require a corrective note, or**
 - c) **require a correction in the future sustainability statement with restatement of comparatives, where relevant.**
- 64) **Where an immaterial departure from the sustainability information framework is left intentionally uncorrected to achieve a particular presentation of the issuer, the enforcer should take appropriate action as if it was material.**
- 65) **Where an immaterial departure from the sustainability information 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.**
- 66) **Similar actions should be used where similar infringements are detected, after consideration has been taken of materiality.**
- 67) When deciding between the types of action to be applied, enforcers should take into account the following considerations:
- a) Subject to the existing powers of the enforcer and consistent with Guideline 1, when deciding between requiring a reissuance of the sustainability statement or a corrective note, the final objective is that the best possible information is provided, and an assessment should be made of whether the original sustainability statement and a corrective note provide sufficient clarity or whether a reissuance of the sustainability statement is the best solution.
 - b) When deciding whether to require either a correction in the future sustainability statement or the publication of a corrective note / reissuance of the sustainability statement at an earlier moment, different factors should be considered, namely:
 - i) the timing of the decision: for instance, where the decision is very close to the date of the publication of the next sustainability statement, a correction in the future sustainability statement might be appropriate;
 - ii) the nature of the decision and the surrounding circumstances: for instance, where the correct information has made it to the public sphere at the

moment the decision is taken, the enforcer could opt for a correction in the future sustainability statement.

- 68) When the enforcer decides to require a correction in the future sustainability statement, the reason for selecting this enforcement action should be stated clearly in the enforcer's conclusion.

Guideline 13: Materiality

- 69) **When determining materiality, where applicable, of an omission or misstatement for the purpose of enforcement of sustainability information, this should be assessed taking into account the part of the sustainability information framework used for the preparation of the sustainability information.**
- 70) When the sustainability information framework relies on a double materiality perspective⁴⁴, this should be the basis for the enforcer's materiality assessment of an omission or misstatement.

Guideline 14: Follow-ups

- 71) **Enforcers should ensure that actions are appropriately acted on by the issuers against which the actions were taken.**
- 72) As infringements could, by definition, have an impact on the decisions made on the basis of sustainability information, it is important that the corrected information is published, unless impracticable, on a timely basis. Therefore, when actions a) or b) mentioned in Guideline 12 are taken, the relevant sustainability information and the action taken should be made available, unless impracticable, directly by the issuer and/or by the enforcer.

5.6 European coordination

Guideline 15: European common enforcement priorities

- 73) **In order to achieve a high level of harmonisation in enforcement, enforcers should discuss and share experience on the application and enforcement of the sustainability information framework during meetings of the Sustainability Reporting Working Group (SRWG). On that basis, enforcers under ESMA coordination should identify common enforcement priorities on a yearly basis.**
- 74) In order to achieve a high level of harmonisation in enforcement, ESMA has set up the SRWG in which all enforcers should be members and should participate.
- 75) To promote supervisory convergence, enforcers under ESMA coordination should identify common reporting matters for enforcement of sustainability information in the

⁴⁴ Within the meaning of the term referred to in Recital 29 to the preamble of the Corporate Sustainability Reporting Directive.

Union 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 Member States or might be 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.

Guideline 16: Coordination in SRWG

- 76) **Although the responsibility for enforcement rests with enforcers, in order to promote harmonisation of enforcement practices and to ensure a consistent approach among enforcers to the application of the sustainability information framework, coordination of ex-ante and ex-post decisions should take place in the SRWG. Enforcers, under ESMA's coordination, should also identify reporting matters and provide technical input for the preparation of ESMA statements and/or opinions.**
- 77) 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 sustainability information in the Union requires coordination and a high level of harmonisation of actions among enforcers. In order to ensure proper and rigorous enforcement of sustainability information and avoid regulatory arbitrage, ESMA will promote harmonisation of enforcement approaches through coordination of ex-ante and ex-post decisions taken by enforcers.
- 78) The adoption of the sustainability information framework and interpretations of its application are reserved for standard setters. Therefore, ESMA and enforcers do not issue any general application guidance to issuers on the sustainability information framework. Nevertheless, as part of the enforcement activities, enforcers apply their judgement in order to determine whether reporting practices are considered as being within the accepted range as permitted by the sustainability information framework.
- 79) When the sustainability information framework is applied, ESMA will convey material controversial reporting issues, as well as ambiguities and any lack of specific guidance, discovered during the enforcement process to the body responsible for standard setting and interpretation (namely, the European Commission). This is also the case for any other issues identified which create enforceability constraints during the enforcement process.

Guideline 17: Emerging issues

- 80) **Discussion of cases at the SRWG can take place either before the enforcer draws a conclusion to its examination (emerging issues) or after the enforcer draws a conclusion to its examination (decisions). Except in rare circumstances where the deadline imposed on an enforcer makes it impossible to prepare, present and discuss with the SRWG before a decision is taken, a reporting issue should be submitted as an emerging issue in any of the following situations:**

- a) **Where no decision has yet been taken by an enforcer on the reporting issue at hand or where the SRWG has had no prior discussion of the issue. This does not apply to matters presenting little technical merit or where the sustainability information framework is clear and where the infringement is obvious;**
- b) **Where the reporting issue at hand is identified by enforcers or ESMA as of significant importance for the internal market;**
- c) **Where the enforcer disagrees, or intends to take a decision that appears not to be in accordance, with:**
 - i) **An earlier decision on the same or a similar reporting issue; or**
 - ii) **The outcome of a discussion of an emerging issue on the same or a similar reporting issue.**

Submitting the case as an emerging issue in these situations has the goal of establishing whether differences in facts and circumstances justify a decision which is different from the precedent.

- d) **Where the enforcer identifies a risk of significantly different reporting practices by issuers across Europe.**
- 81) **Enforcement decisions taken on the basis of an emerging issue should take into account the outcome of the discussion in the SRWG.**
- 82) Reporting issues encountered by an enforcer, other than those when the sustainability information framework is clear, the infringement obvious and a decision has already been taken, should be brought to the attention of ESMA and discussed in the SRWG 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 SRWG. The outcome should also be taken into account by other enforcers. ESMA may also bring emerging issues to the SRWG in case reporting issues are of significant importance to the internal market.
- 83) In addition to the situations presented in paragraph 80, a reporting issue may be presented as an emerging issue where the enforcer is looking for further guidance from other enforcers, for example because of the complex nature of the reporting issue or where the enforcer is looking for further guidance because the issue might raise an enforceability issue.

Guideline 18: Decisions

- 84) **A decision should be submitted to the SRWG if the decision fulfils one or more of the following criteria:**
- a) **The decision refers to reporting matters with technical merit;**
 - b) **The decision has been discussed as an emerging issue, unless it was decided otherwise during the discussion in the SRWG meeting;**
 - c) **The decision will be of interest for other reasons to other enforcers (this judgement is likely to be informed by SRWG discussions);**
 - d) **The decision indicates to an enforcer that there is a risk of significantly different reporting practices being applied by issuers;**
 - e) **The decision is likely to have a significant impact on other issuers;**
 - f) **The decision is taken on an issue not directly addressed by a specific provision in the sustainability information framework;**
 - g) **The decision has been overruled by an appeals committee or Court; or**
 - h) **The decision appears to be in contradiction with an earlier decision on the same or a similar reporting issue.**
- 85) Emerging issues and decisions discussed in the SRWG normally refer to sustainability information prepared under the sustainability information framework but could also cover sustainability information prepared under equivalent third country sustainability reporting requirements.

Guideline 19: Taking earlier decisions into account

- 86) **Enforcement decisions by enforcers should take into account earlier decisions on the same reporting 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 SRWG on a decision on whether or not a piece of sustainability information is in accordance with the sustainability information framework and the action related to it. Irrespective of the outcome of the SRWG discussion, the final decision is the responsibility of the enforcer.**
- 87) In order to ensure a consistent enforcement regime throughout the Union, enforcers should, before taking an enforcement decision, look for decisions taken by other enforcers in the relevant database mentioned in Guideline 20 and take them into account, as they should take into account the enforcer's own earlier decisions on the same reporting issue. This is the case irrespective of whether the decision is taken as pre-clearance or as a decision based on a published sustainability statement.

Guideline 20: Submission of emerging issues and decisions

- 88) **All emerging issues that meet any of the submission criteria as mentioned in Guideline 17 should be submitted to ESMA with the relevant details normally within two weeks before the SRWG meeting in which they are going to be discussed. All enforcement decisions that meet any of the submission criteria as mentioned in Guideline 18 should be submitted to ESMA with the relevant details normally within three months of the decision being taken.**
- 89) To ensure effective and efficient discussions, emerging issues and decisions should be clear and concise yet include all relevant facts, the issuer's arguments, the basis for the enforcer's rationale and the conclusion.
- 90) Coordination in the SRWG should be facilitated by the existence of an enforcement database. The objective of the database is to constitute a platform for sharing information on a continuous basis. The time frame for submission of decisions 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 will log the enforcement decision into the database. The enforcement database contains the outcome of the discussion that took place during the meeting. ESMA is responsible for the technical maintenance of the database.

Guideline 21: Publication of decisions

- 91) **In order to promote consistency of application of the sustainability information framework, enforcers should decide which decisions included in the database can be subject to publication on an anonymous basis.**
- 92) A selection of 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:
- a) The decision refers to a complex reporting issue or an issue that has led or could lead to different applications of the sustainability information framework; or
 - b) 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
 - c) The decision relates to an issue on which there is no experience or on which enforcers have inconsistent experiences; or
 - d) The decision has been taken on an issue not directly addressed by a specific provision in the sustainability information framework.

Guideline 22: Reporting on enforcement activities

- 93) **Enforcers should report periodically on their 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.**
- 94) Enforcers should periodically report to the public on the enforcement policies and decisions taken in individual cases. It is up to the enforcer whether to report on an anonymous or a non-anonymous basis on these matters.
- 95) Enforcers should report to ESMA findings and enforcement decisions relating to the common enforcement priorities, as identified in accordance with Guideline 15. These, together with other activities relevant to European coordination, are published by ESMA in its report on corporate reporting enforcement and regulatory activities.