

TECH 2/04

CO-ORDINATION OF IFRS ENFORCEMENT ACTIVITIES

Memorandum of comment submitted in January 2004 to the Committee of European Securities Regulators (CESR) consultation paper 'Draft Standard No 2 on financial information: Co-ordination of enforcement activities', published in October 2003.

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INTRODUCTION

1. The Institute of Chartered Accountants in England and Wales welcomes the opportunity to respond to the Committee of European Securities Regulators (CESR) consultation paper 'Draft Standard No 2 on financial information: Co-ordination of enforcement activities', published by CESR in October 2003.
2. We have reviewed the consultation paper and set out below a number of comments. We deal first with significant matters before commenting on the specific principles set out in the consultation paper.

SIGNIFICANT MATTERS

Support for the Draft Standard

3. We welcome the publication of Draft Standard No. 2, and the principle-based approach that it adopts. Standard No. 1 on Financial Information ('Enforcement of Standards on Financial Information in Europe') identifies the importance of a high level of co-ordination and convergence in the enforcement of standards on financial information from 2005 onwards. Draft Standard No. 2 seeks to highlight the major issues arising and to suggest possible solutions. We welcome CESR's initiative in publishing these proposals and agree with the overall approach of the Draft Standard, although we have set out below some recommendations for improvement.

Co-ordination Forum

4. We recognise that CESR's immediate priority is early implementation of effective and co-ordinated enforcement in relation to listed companies. However, the co-ordination mechanism should not be closely aligned with any particular enforcement model. The objective should be the creation of an efficient co-ordination mechanism able to embrace all sectors and entities that use International Financial Reporting Standards (IFRS). We discuss this issue in more detail below in paragraph 15.

Global Enforcement

5. Confidence in IFRS financial information and in national and regional enforcement mechanisms will be undermined if enforcement decisions on IFRS are inconsistent, not only in Europe but around the world. In due course, regulatory enforcement should be undertaken on a global basis. In the meantime, CESR should encourage regular and effective dialogue between enforcement bodies in Europe and those in, for example, the United States, Australia and Japan.

Relationships with Standard Setters

6. The explanatory notes to Principle 20 of Standard No.1 recognise that issuing general interpretations of existing IFRS is part of the standard-setting process conducted by relevant bodies such as the International Financial Reporting

Interpretations Committee (IFRIC). We strongly agree that enforcers should not issue general application guidance on IFRS and should limit themselves to application guidance in individual cases, avoiding the development of a complex and diverse body of accounting literature. It is therefore important that application of the principles of this Standard is confined to co-ordination of enforcement decisions and that the mechanisms proposed do not stray inadvertently into the areas of general interpretation or application guidance.

7. We welcome the undertaking by CESR to open a dialogue with standard setting or interpretative bodies 'such as' International Accounting Standards Board (IASB) or IFRIC when it identifies omissions or the potential for conflicting interpretations in IFRS. However, the implications of the words 'such as' are unclear. The Standard should refer without ambiguity to dialogue with these two bodies. We do not anticipate that any other bodies would be involved.

Monitoring Enforcement

8. Consistency of enforcement across Europe is an essential corollary of the adoption of a single set of accounting standards in Europe. CESR should therefore consider how compliance with its enforcement principles - in particular the effectiveness of the consultation process and adherence to precedent - by both CESR members and non-CESR enforcers might be monitored after the implementation of its enforcement principles. This might involve a system of review amongst national enforcers and the discussion of apparent inconsistencies at meetings of the proposed co-ordination forum.

SPECIFIC PRINCIPLES

Principle 1

Ex ante and ex post enforcement decisions taken by competent independent administrative authorities or by bodies delegated by these authorities ("EU National Enforcers") should take into account existing precedents consistent with the timing and feasibility constraints which characterize the decision. Where practicable, discussions with other EU National Enforcers should take place before significant decisions are taken.

9. Enforcement in Europe should be the responsibility of effective national enforcement bodies, with decisions co-ordinated at European level to ensure that enforcement takes place on a consistent basis in all jurisdictions. The outcome might otherwise be regulatory arbitrage and 'enforcement shopping'. We therefore agree with Principle 1 that existing precedents should be taken into account when making enforcement decisions, with prior discussions with other EU National Enforcers where practicable.
10. A feature of Principle 1 is that all EU National Enforcers should take into account decisions taken by other enforcers 'consistent with...timing and feasibility constraints'. As acknowledged under Principle 20 of Standard No. 1, in some cases full consultation may be hampered by such constraints. We therefore endorse the

need for a highly efficient co-ordination mechanism embracing multilateral and bilateral consultation as well as electronic research of precedents. However, the Standard should clarify the circumstances in which there will be a strong presumption that prior consultation should occur, for example where a decision may be expected to have a major impact on the capital markets. It will also be necessary to ensure that any legal impediments to the sharing of relevant information between securities regulators and other National Enforcers are removed at the earliest opportunity.

11. Principle 1 requires co-ordination of both ex-ante and ex-post enforcement decisions in order to meet with the requirement of Recital 16 of the EU Regulation on IFRS. We support this approach.

Principles 2 and 3

Within a reasonable time after decisions are taken by an EU National Enforcer, details of these decisions should be made available to the other EU National Enforcers in accordance with the policies developed by CESR.

The EU National Enforcers should follow a confidentiality regime consistent with that applicable to CESR members.

12. We agree that the best dissemination mechanism for enforcement decisions will be an electronic database. This should include only cases where the enforcers identify an infringement of the reporting framework. The inclusion of cases in which enforcers conclude that no infringement has occurred is likely to be unhelpful to users of the database and would divert resources away from the important task of explaining adequately the circumstances and rationale for adverse enforcement decisions.
13. We note that CESR is to develop input policies for the database, addressing the technical details of the database, the selection criteria to be followed for identifying enforcement decisions to be described in the database and the confidentiality constraints to disclosure of enforcement decisions. Effective co-ordination will only be possible if appropriate information is translated and made available to other regulators without delay. We therefore look forward to the opportunity to comment on these proposed policies at an early date.
14. We agree that disclosure of enforcement decisions to parties such as issuers, their auditors and non-EU regulators will produce further benefits for harmonisation, and we therefore support public disclosure of relevant information. CESR should also develop criteria for determining which decisions should be published on the external database, taking account where necessary of confidentiality constraints. In due course the public database – like the co-ordination forum – should be extended to cover all relevant enforcement decisions, not only those relating to listed companies.

Principle 4

In order to achieve a high level of harmonization, the chairman of the SCE shall call European Enforcers Coordination Sessions (EECS) of the SCE to which all EU National Enforcers of standards on financial information should participate. Such sessions will be aimed at discussing decisions taken at national level, as well as experiences in the application of standards on enforcement.

15. We strongly support the early establishment of a forum where all EU National Enforcers, including non-CESR members, can exchange information and experiences regarding enforcement decisions taken at national level. However, as stated in paragraph 4 above, the co-ordination mechanism should not be closely aligned to any particular enforcement model. The objective should be the creation of an efficient co-ordination mechanism able to embrace all sectors and entities that use IFRS.
16. We believe that this necessitates a move at an early date to a more widely-based forum than meetings of the proposed 'European Enforcers Co-ordination Sessions' (EECS) of the CESR Sub-Committee on Enforcement (SCE), to which non-CESR members will be invited solely at the discretion of CESR members. This wider and separate forum should meet on a regular basis, rather than at the discretion of the Chairman of the SCE, and clear criteria should be developed for identifying matters that it should address.

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