

14 May 2014

**ESMA Consultation Paper  
Guidelines on Alternative Performance Measures (APMs)**

Afep appreciates the opportunity to comment on the ESMA Consultation Paper on draft guidelines relating to alternative performance measures (Alternative Performance Measures / APM).

You will find enclosed:

- a short presentation of Afep;
- the Afep's input to the consultation.

We hope these comments are helpful.

Best regards

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**Association Française des Entreprises Privées**  
**French Association of Large Companies**

Since 1982, Afep is the association which brings together large companies operating in France. The Association is based in Paris and Brussels.

Afep aims to foster a business-friendly environment and to present the company members' vision to French public authorities, European institutions and international organisations.

Restoring business competitiveness to achieve growth and sustainable employment in Europe and tackle the challenges of globalisation is Afep's core priority.

Afep's work relies on:

- the direct participation of business leaders and their teams in defining economic and social policy directions, as well as in determining the actions to be taken for growth and employment;
- direct and sound exchanges with public authorities, which are based on analyses and well-founded proposals;
- active and constructive contributions to French and European public consultations.

Afep is involved in drafting cross-sectoral legislation, at French and European level, in the following areas:

- economy,
- taxation,
- company law and corporate governance,
- corporate finance and financial markets,
- competition, intellectual property and consumer affairs,
- labour law and social protection,
- environment and energy,
- corporate social responsibility.

Afep has 108 members (the list of member companies is annexed). More than 8 million people are employed by Afep companies; their annual combined turnover amounts to €2,000 billion.

The Association's website ([www.Afep.com](http://www.Afep.com)) provides more information on how it operates and its recent work, as well as on the role of the large companies in the French economy.

The Chairman of Afep is Pierre Pringuet, CEO of Pernod Ricard. François Soulmagnon is Director General of the Association and Stéphanie Robert is Director.

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**Response to the ESMA Consultation Paper  
Guidelines on Alternative Performance Measures (APMs)**

**EXECUTIVE SUMMARY**

ESMA has launched a consultation on draft guidelines relating to alternative performance measures (Alternative Performance Measures / APM).

**Some key proposals meet strong reservations on the part of issuers, including:**

- the **systematic use of ESMA guidelines**, which issuers would be forced to comply with;
- the inclusion in the **definition of APMs** of measures that are included in the financial statements and are not defined by the applicable financial reporting framework;
- the **requirement to include many elements in all documents containing regulated information and APMs**:
  - . list of **definitions** of all APMs used;
  - . for the APMs that are not totals or subtotals presented in the financial statements, **reconciliation** of APMs to the most relevant amounts presented in the financial statements, separately identifying and explaining each reconciling item (for any element that is not extracted directly from the financial statements);
  - . **explanation** on the use of each APM and statement disclosing the reasons for which an issuer believes the presentation of APMs provides useful information to users;
  - . **comparatives** for the corresponding previous periods...
- **requirement to display APMs presented outside financial statements with less prominence, emphasis or authority than measures directly stemming from financial statements prepared in accordance with the applicable financial reporting framework.**

The proposals in question would be a source of increased complexity not only for issuers, but also for investors and analysts. They **would make financial communications more cumbersome, would sometimes be confusing and would penalize European companies compared to third country companies that are not subject to similar constraints.**

Consequently, **issuers call on ESMA to reconsider these proposals in light of the following principles:**

- **use recommendations, rather than binding positions or guidelines, except in duly justified cases (see response to question 1);**
- **provide the possibility not to apply the principles set out by ESMA for press releases, irrespective of their dates, if the requested items are presented in annual or half-yearly disclosure documents (see response to question 2);**

- **exclude from the definition of APMs the measures included in the financial statements (see response to question 5a));**
- **remove the principle of giving more prominence, emphasis or authority to measures defined by IFRS than measures included in the financial statements or presented outside (see responses to questions 5 a) and 9);**
- **introduce a materiality principle (see responses to questions 10, 11 and 12).**

**Q1: Do you agree that the ESMA [draft] guidelines should apply to all issuers defined as a legal entity governed by private or public law, other than Members State or Member State's regional or local authorities, whose securities are admitted to trading on a regulated market, the issuer being, in the case of depository receipts representing securities, the issuer of the securities represented regardless of the financial reporting framework they use to report? If not, why?**

The ESMA consultation paper proposes guidelines and underlines that national competent authorities (NCAs) and financial market participants must make every effort to comply.

Although the cost-benefit analysis describes the problem/issues behind the draft guidelines, it does not justify the fact that guidelines are preferred to recommendations.

While issuers recognize that it is useful to provide comments when presenting APMs, they consider that the means used by ESMA should remain proportional to the extent of the problems encountered in practice and should not lead to de facto create an additional level of regulation or additional constraints to be met to obtain approval from the NCA, where needed.

As the cost-benefit analysis does not provide information on the extent of the problems encountered, **companies are asking ESMA to favor the use of recommendations and to use guidelines only in cases that are clearly justified. The need for replacing recommendations (CESR recommendations) by ESMA guidelines does not seem established.**

**Q2: Do you agree that the ESMA [draft] guidelines should apply to APMs included in:**  
**a) financial statements prepared in accordance with the applicable financial reporting framework, that are made publicly available, and**  
**b) all other issued documents containing regulated information that are made publicly available?**  
**If not, why?**

We believe that the principles on APMs are intended to apply to APMs included in financial statements prepared in accordance with the applicable financial reporting framework and **only in some issued documents containing regulated information.**

We express our **disagreement as regards question 2b**): applying these principles to press releases would make them more cumbersome, although they are appreciated by investors and analysts for their timeliness, conciseness and relevance. According to the ESMA proposal, press releases should indeed include in an annex to the publication a list of definitions of all APMs used (cf. § 19), an explanation of their use (cf. § 26), and, where required, a reconciliation to the amounts presented in the financial statements.

We believe that the final ESMA position should explicitly include the principle, set out in § 14. page 10 of the consultation paper, that, for press releases, the application of the relevant principles should be assessed reading all documents containing the elements mentioned by ESMA.

However we believe that the final ESMA position should state more explicitly that, if a company has a consistent and stable policy for presenting its APMs, it is **not required to comply with the principles set out by ESMA for its press releases, irrespective of their dates, if the requested items are presented in annual or half-yearly disclosure documents** (financial statements, financial reports or prospectuses containing regulated information). This principle, used by the French NCA France for several years, does not seem to pose any difficulty to investors and analysts.

**Q3: Do you believe that the ESMA [draft] guidelines should also be applicable to prospectuses and other related documents, which include APMs (except for pro-forma information, profits forecasts or other measures which have specific requirements set out in the Prospectus Directive or Prospectus Directive implementing regulation )? Please provide your reasons**

According to the consultation paper, the principles set out by ESMA are applicable to documents containing regulated information:

- **if one of these documents is published together with the prospectus, we understand that these principles are applicable to the prospectus**, with the exception regarding all the measures that are subject to specific requirements under the Prospectus legislation;
- **otherwise**, and given that the Prospectus Regulation is a full-harmonization text, the **application** of these principles **to the prospectus** does **not** seem **justified**.

In addition, the consultation paper (cf. question 3) does not explain the concept of "documents related to the prospectus", which should therefore be specified. Where appropriate, please refer to our response to question 2 concerning press releases.

**Q4: Do you believe that issuing ESMA guidelines constitute a useful tool for dealing with the issues encountered with the use of APMs? If not, why?**

**We reiterate the comments made in our response to Question 1:**

While issuers recognize that it is useful to provide comments when presenting APMs, they consider that the means used by ESMA should remain proportional to the extent of the problems encountered in practice and should not lead to de facto create an additional level of regulation or additional constraints to be met to obtain approval from the NCA, where needed.

As the cost-benefit analysis does not provide information on the extent of the problems encountered, companies are asking that ESMA favors the use of recommendations and uses guidelines only in cases that are clearly justified. The need for replacing recommendations (CESR recommendations) by ESMA guidelines does not seem established.

**Q5: Do you agree with the suggested scope of the term APM as used in the [draft] guidelines? If not, why?**

We **strongly disagree** with the suggested scope of the term APM. According to the ESMA proposal (§ 15. pages 15 and 25), "an APM is any numerical measure of historical, current or future financial performance, which relates to the financial position, the comprehensive income or cash flows, other than a measure defined by the applicable financial reporting framework(s). "

There are three points on which we disagree:

- a) the definition of APMs, and in particular the reference to the definition by the applicable financial reporting framework(s);
- b) the reference being made to a single financial reporting framework;
- c) the reference to comprehensive income.

**a) Definition of APMs, and in particular reference to the definitions given by applicable financial reporting framework(s)**

Issuers are required to apply IFRS in their published financial statements (with rare exceptions). As IFRS give few definitions of relevant measures that are commonly used or requested by investors and analysts, issuers often use measures in their financial statements and financial communications, without being able to do so based on measures defined by IFRS.

**Companies use relevant measures in their financial statements** – on the face of or in the notes to the financial statements - **in accordance with IFRS** - IAS 1 requires the presentation of additional line items, headings, subtotals or disaggregations - **and under the control of their statutory auditor(s)**. Therefore it is **not necessary to impose on issuers the constraints considered by ESMA, where these measures are included in the financial statements**. We therefore believe that **there is no need to change the scope of the term APM as defined by CESR in § 8. of its October 2005 recommendation CESR/05-178b, which provides that "the defined measures are those included in audited financial statements in view of providing a true and fair view."**

**b) Reference being made to a single financial reporting framework**

In the absence of definitions in IFRS, certain national financial reporting frameworks may define APMs and thus give them a widespread public recognition. Issuers that apply IFRS and use APMs defined by a national accounting standard setter should be able to do so without being subject to the various constraints defined by ESMA. They could then refer in their communications to the definitions given by the national standard setter and specify how to access (while applying the principle set out in our response to question 2).

Accordingly, the wording of § 15 (page 25) of the ESMA proposal should on this point use the words of § 15 page 10 "(...) other than a measure defined by applicable financial reporting **frameworks**".

c) **Reference to comprehensive income**

We consider that the notion of "comprehensive income" should in no way replace that of net income, which alone seems to reflect a corporate performance. Accordingly, the words "results of the operations" used in § 26 of the ESMA proposal should be used instead of the words "comprehensive income".

**Q6: Do you believe that issuers should disclose in an appendix to the publication a list giving definitions of all APMs used? If not, why?**

For the measures that are not included in the audited financial statements (see our response to question 5 b)), **issuers should not be required to systematically publish a list giving definitions** of all measures used, particularly in the following cases:

- press releases, irrespective of their dates, if the requested items are presented in annual or half-yearly disclosure documents (see our response to question 2);
- for all publications, use of APMs under the conditions defined by a national standard setter (see our response to question 5c)).

**Q7: Do you agree that issuers should disclose a reconciliation of an APM to the most relevant amount presented in the financial statements? If not, why?**

For the measures that are not included in the audited financial statements (see our response to question 5 a)), we agree with the principles set out in paragraphs 22 to 25 page 26 of the ESMA proposal (thereby including exceptions to the principle of reconciliation).

However, when a reconciliation is performed, **the ESMA position should explicitly state that the issuer may choose to make this reconciliation to the most relevant amount presented in the notes to the financial statements** (and not just to the financial statements themselves)

**Q8: Do you agree that issuers should explain the use of APMs? If not, why?**

We partially disagree: issuers should only explain the use of measures that are not included in the financial statements (see our response to question 5 a)).

**Q9: Do you agree that APMs presented outside financial statements should be displayed with less prominence, emphasis or authority than measures directly stemming from financial statements prepared in accordance with the applicable financial reporting framework? If not, why?**

We **strongly disagree** with the principle of giving more prominence, emphasis or authority to measures defined by IFRS.

As mentioned in our response to question 5 a), IFRS give few definitions of relevant measures that are commonly used/requested by investors and analysts.

As a result issuers often use measures that are not defined by a financial reporting framework and use them in their financial communications, without being able to do so based on measures defined by IFRS or directly stemming from financial statements prepared in accordance with IFRS.

We understand that such measures cannot be totally replaced in financial releases by adjusted measures or measures not included in financial statements.

However, **we urge ESMA to reconsider its approach.**

Indeed, **while most measures that are not defined by a financial reporting framework are particularly relevant and used/requested by investors and analysts, and their use is under close scrutiny,** we consider that **displaying such measures with less prominence, emphasis and authority than accounting measures would be detrimental to the financial communication and to the understanding of the issuer's financial position and performance. In particular, investors and analysts would be confused by the presentation with greater prominence of a performance analysis that would only use figures from financial statements** - as proposed by ESMA in § 29 (page 27) -.

**Q10: Do you agree that issuers should explain the reasons for changing the definition and/or calculation of an APM? If not, why?**

For the measures that are not included in the audited financial statements (see our response to question 5 a)), it seems useful that issuers explain the reasons for changing the definition and/or calculation of a measure.

However, we consider that **such explanations should not be required if the information is not material.**

**Q11: Do you believe that issuers should provide comparatives and/or restatements when an APM changes? If not, why?**

For the measures that are not included in the audited financial statements (see our response to question 5 a)), it seems useful that issuers provide comparatives and/or adjustments when a measure changes, to the extent possible.

However we believe that **such comparatives and/or adjustments should not be required if the information is not material.**

**Q12: Do you believe that issuers should provide explanations when they no longer use an APM? If not, why?**

For the measures that are not included in the audited financial statements (see our response to question 5 a)), it seems useful that issuers provide explanations when they no longer use such measures.

However, we consider that **such explanations should not be required if the information is not material.**

**Q13: Do you agree that the [draft] guidelines will improve transparency, neutrality and comparability on financial performance measures to users? If not, please provide suggestions.**

The current ESMA proposals include elements that may facilitate understanding of the measures used by issuers and the consistency of these measures over time.

However, we express strong reservations about **several key ESMA proposals**. We consider that the proposals in question would be a source of increased complexity not only for issuers, but also for investors and analysts. They **would make financial communications more cumbersome, would sometimes be confusing and would penalize European companies compared to third country companies that are not subject to similar constraints.**

These proposals appear to be inconsistent with attempts to simplify financial information and make it more concise, and ultimately may force issuers to focus on quantity rather than quality of the information.

In our opinion, **several key proposals ESMA should be reconsidered, especially in light of the following principles:**

- **use recommendations, rather than binding positions or guidelines, except in duly justified cases (see response to question 1);**

- provide the possibility not to apply the principles set out by ESMA for press releases, irrespective of their dates, if the requested items are presented in annual or half-yearly disclosure documents (see response to question 2);
- exclude from the definition of APMs the measures included in the financial statements (see response to question 5a));
- remove the principle of giving more prominence, emphasis or authority to measures defined by IFRS than measures included in the financial statements or presented outside (see responses to questions 5 a) and 9);
- introduce a materiality principle (see responses to questions 10, 11 and 12).

**Q14: Do you agree with the analysis of the cost and benefit impact of the draft guidelines? Please provide any evidence or data that would further inform the analysis of the likely cost and benefits impacts of the proposals.**

**We do not agree with the analysis of the cost and benefit impact of the [draft] guidelines.**

**We reiterate the comments made in our response to Question 1:**

Although the cost-benefit analysis describes the problem/issues behind the [draft] guidelines, it does not justify the fact that guidelines are preferred to recommendations.

While issuers recognize that it is useful to provide comments when presenting APMs, they consider that the means used by ESMA should remain proportional to the extent of the problems encountered in practice and should not lead to de facto create an additional level of regulation or additional constraints to be met to obtain approval from the NCA, where needed.

As the cost-benefit analysis does not provide information on the extent of the problems encountered, companies are asking ESMA to favor the use of recommendations and to use guidelines only in cases that are clearly justified. The need for replacing recommendations (CESR recommendations) by ESMA guidelines does not seem established.