Question 3:
Do you agree that a common European approach to the enforcement of financial information is required in order to avoid regulatory arbitrage by issuers? In this context, regulatory arbitrage refers to the position where an issuer's choice of the market on which to list its securities may be influenced by different approaches to enforcement being applied in different European jurisdictions.

We agree that an appropriate and rigorous European enforcement regime can underpin investors' confidence in financial markets and that a common approach to enforcement can help to avoid regulatory arbitrage by issuers. However, effective and efficient enforcement bodies still need to be established at national level. Different economic environments as well as the many differences in corporate governance legislation, civil law, tax and other regulations prevalent in the various European Member States mean that national competent enforcement authorities are still required.

Consequently, Enforcement should not be exercised in a centralized fashion, but national enforcement institutions should continue to exist. The role of ESMA should be limited to (a) coordination functions and (b) safeguarding of the uniform application of standards.

Question 5:
Do you agree that issuers from third countries using an equivalent GAAP to IFRS should be subject to an equivalent enforcement and coordination system? Do you agree with the measures proposed to make this enforcement more efficient?

Section 23 states as follows:

"*In accordance with the Transparency Directive, financial information of issuers from third countries are subject to enforcement by the enforcer in the EU home Member State.*"

The consultation paper puts forward the "home country" principle, i.e. companies listed abroad are subject to enforcement by the home country rather than the country of the stock exchange listing. In our opinion this is not in line with the Transparency Directive of the EU. It is also contrary to the current Austrian Securities Markets Law as well as the Austrian Law for Enforcement (which both are in line with EU law), which require that Austria is responsible for the enforcement for all companies *listed* in Austria.

Question 6:
Do you agree that enforcers should have the powers listed in paragraph 30 of the proposed guidelines? Are there additional powers which you believe that enforcers should have?

We would like to comment on Section 30 (b), which states:

"According to Article 24 (4) of the Transparency Directive, enforcers in all Member States shall have all necessary powers, which shall at least include:

(…)

b) the right to require any information and documentation relevant for enforcement at least from issuers and their auditors,(…)"

We would like to point out that the financial information has to be provided by the *company* that is subject to enforcement. Therefore, it is primarily up to the company's management to provide the competent enforcement authority with the explanations and any additional information it might need to fulfill its tasks. Direct contact between the competent enforcement authority and the company's auditor would undermine management's responsibilities for financial reporting. As set out in the European Directive on statutory audits of annual accounts and consolidated accounts, the auditor must be independent of the audited company and may not be involved in the audited company's decision-making, i.e. an auditor may not assume the role of management.

In our opinion, companies should be obliged to inform their auditors of any enforcement activities. Should management need assistance in providing the required information, it might decide to consult the auditor. The auditor should only act in cooperation with the company's management and at their request.

Legal confidentiality requirements generally preclude auditors from providing information about their clients to enforcement authorities unless there is an exception in law, or the client specifically consents to such access.

In our view, the ESMA Guidance should make clear that in case the auditor provides information by request of the management, the information and documentation required from the auditor is limited in two ways:

- It is limited to matters pertaining to the financial information **that have become known during the audit**.
- Any information and/or document the enforcer may ask for **should not include Audit working papers** that the auditor prepared for his or her own use, such as planning memoranda, work plans etc., in a complete different content **do not have to be submitted** to the enforcement authority unless they relate directly to the financial information of the entity subject to enforcement.

Question 8:
Are you in favour of enforcers offering pre-clearance? Do you have any comments on the way the pre-clearance process is described and the pre-conditions set in paragraphs 42 to 45 of the proposed guidelines?

Although we see some benefits in a pre-clearance system, we would like to point out that in our view there are some major concerns and limitations to such a system.
In our opinion any form of a pre-clearance system must meet specific conditions:

1. A clear distinction between the setting of financial reporting standards and their enforcement must be ensured. Enforcement bodies must not assume the role of a standardsetter.
2. If it is a controversial accounting issue that has a material impact on the company's financial statements and that issue cannot be clarified due to ambiguities or a lack of specific guidance in the relevant financial reporting framework, the competent enforcement authority should be required to submit the issue to the bodies responsible for standard setting and interpretation (IASB and IFRS IC) for their consideration and should in no instances take an enforcer's decision on an appropriate accounting.In order to safeguard the independence of the enforcement body from a particular issuer as required in Guideline 4, care must be taken that the enforcement body does not become too actively involved in the arrangement of facts and in the preparation of financial statements.
3. Providing the possibility to submit accounting issues for pre-clearance must not undermine the role of the auditor.

Consequently, pre-clearance, if really required by the market, should only be sought in very exceptional, well-defined circumstances. In our view, a formal process needs to be established that meets the following conditions:

- Any request by a company must be limited to a specified accounting issue, which that company must describe precisely,
- the company has already developed a proposed accounting treatment in consideration of the specific facts and circumstances (and may have done this in consultation with its auditor),
- the enforcer seeks the views of the company's auditor, and such views are to be considered and discussed within the pre-clearance process.
- If no final consensus or clear solution can be achieved the Company has to choose its accounting policy and has to disclose this fact (no decision by the enforcer on controversial/unsolved accounting & reporting issues).

Question 13:
What are your views with respect to the best way to take into account the common enforcement priorities established by European enforcers as part of the enforcement process?

We agree that one means to improve the coordination of European enforcement activities is to set out common enforcement priorities. These enforcement priorities should be commonly identified by the national competent enforcement authorities and ESMA. Sufficient flexibility should still be provided to the national competent enforcement authorities.

The common priorities should not be legally binding, but rather have the character of *recommendations*. The local enforcement institution should be able to decide on their application for each individual examined company; national enforcers should be able to add additional priorities.

Question 14:
Do you agree that the examination procedures listed in paragraph 54 of the proposed guidelines are appropriate for an enforcer to consider using? Are there other procedures which you believe should be included in the list?

Guideline 8 states that a*s part of the ex-post enforcement activities, enforcers can either use* ***full reviews*** *or a* ***combination of full reviews and partial reviews*** *of financial information of issuers selected for enforcement; use of only* ***partial reviews should not be considered as being satisfactory*** *for enforcement purposes.* KWT and iwp do not share this view.

The requirement of a "full review" might create expectations that an enforcement authority could not meet. In our opinion, a **"full review" contradicts an efficient and effective enforcement process** and consequently, it causes increased costs for both the enforcement authority and the issuer. At the same time it has only very limited preventive character. From our point of view, a **partial review** as it is being conducted all around Europe is the only reasonable examination procedure. Additionally, it is important to clarify that such a review exercised by an enforcement authority does not represent a second audit.

Question 15:
Do you agree that, in determining materiality for enforcement purposes, materiality should be assessed according to the relevant reporting framework, e.g. IFRS?

Materiality is a financial reporting concept that is user-driven – i.e., it is user needs that determine what materiality is. Consequently, by definition, materiality for the preparation of financial statements by companies, as well as for financial reporting enforcement authorities and regulators, cannot be different than materiality for users. The ultimate goal for any enforcement activities is to examine that information delivered to the market is drawn up in accordance with the relevant reporting framework. This should underpin investors' confidence in financial markets. Any such measures should be appropriate and well balanced.

Question 16:
What are your comments regarding enforcement actions as presented in paragraphs 57 to 67 of the proposed guidelines? Do you agree with the criteria proposed?

Section 57 states as follows:

"Guideline 9: An enforcer should be able to use the actions indicated below, which should be enforceable at the enforcer's initiative. Whenever a material misstatement is detected, the enforcer should in a timely manner take one of the following actions

a) require a restatement,
b) require a corrective note, or
c) require correction in future financial statements with adjustments of comparatives, where relevant."

In our opinion, these three enforcement actions might be generally suitable. However, we are concerned about the practical feasibility of these proposals. At present, enforcement actions are defined at national level, and for instance in Austria a requirement to restate financial information does not exist. Furthermore, common European enforcement actions and criteria for deciding which action is required to be taken in specific circumstances would be a significant interference in the national enforcement systems and in the responsibilities of the national competent enforcement authorities. Furthermore, the provisions of national Company Law should be taken into consideration which may require additional measure or preclude boards from doing restatements.

Considering Guideline 1 we therefore would welcome clarification that no further enforcement action needs to be taken if the issuer has corrected a misstatement on a timely basis by means of either a restatement, a corrective note or a correction in its future financial statements.

Question 17:
Do you have any comments on the specific criteria for the submission of decisions or emerging issues to the EECS database?

Guideline 14 states that (except in rare circumstances) an accounting issue should be submitted as an emerging issue to the EECS and that the enforcement decisions taken on the basis of an emerging issue **should take into account the outcome of the discussion** in the EECS.

We welcome providing national competent enforcement authorities with the opportunity to submit and discuss emerging issues in the EECS. We are, however, of the opinion that guideline 14 undermines the authority of the local enforcement institutions for independent decision-making. Most importantly, we do not agree with the proposal to require national competent enforcement authorities **to submit and discuss** each emerging issue in the EECS **before** taking their enforcement decision. On the one hand this would mean a significant interference in the responsibilities of the national competent authorities without

legal cause. On the other hand enforcement processes would become more unwieldy, which would result in additional costs for issuers under investigation.