

Ms Mairead McGuinness
Commissioner in charge of Financial
services, financial stability, and Capital
Markets Union
European Commission
Rue de la Loi/Wetstraat 200
1049 Brussels Belgium

Dear Commissioner, Dear Mairead

In the wake of the Wirecard case and following up on ESMA's fast track peer review on the application of the Guidelines on enforcement of financial information (hereafter, GLEFI) in the context of Wirecard (FTPR on Wirecard), ESMA has engaged in discussions on potential improvements to Directive 2004/109/EC (hereafter, Transparency Directive or TD). ESMA considers that the Wirecard case has shown, once again, that timely and effective enforcement of financial information is paramount to ensure investor protection and confidence in capital markets.

As highlighted in previous exchanges with the European Commission,¹ the principles included in the TD on enforcement of financial information are very high level and allow for significant divergence upon transposition into national law, as illustrated by the significant differences in the institutional setups across the EU and the consequent differences in powers of authorities/entities in charge of the enforcement of financial information. While ESMA considers that one size does not fit all, the different institutional arrangements should not deter from an effective enforcement of financial information or an efficient collaboration amongst all relevant parties - whether internal or external, whether amongst TD authorities or beyond.

In 2017, following the issuance of the GLEFI, ESMA carried out a general peer review on how certain guidelines had been implemented. While this peer review acknowledged the progress achieved in supervisory convergence in enforcement of financial information, it also highlighted² a diversity of practices, actions, powers and resources across the EU. Although ESMA has continued to work to enhance convergence in this area, it has also identified shortcomings which require modifications in the provisions included in the TD. ESMA also notes that new challenges such as supervision of non-financial information or digital developments have demonstrated that the TD requires, at least, targeted updates and modifications to ensure it remains fit for purpose.

¹ ESMA/2012/245 of 11 April 2012 and ESMA/2012/584 of 17 September 2012 on Revision of the Transparency Directive – Enforcement of IFRS financial statements, ESMA32-51-757 of 15 July 2020 on Wirecard

² ESMA42-111-4138 Report on peer review on Guidelines on enforcement of financial information of 18 July 2017

The proposals included in this letter build on the conclusion of the FTPR report on Wirecard, the 2017 Peer review reports (general and onsite reports), previous letters sent by ESMA to the EU institutions on the subject of enforcement of financial information and the experiences gained within ESMA groups. The proposals are split into four main areas: (i) cooperation between TD National Competent Authorities (NCAs) and other authorities; (ii) coordination of enforcement of financial information at national level between central competent authorities and delegated entities/designated authorities (iii) strengthening of the independence of national competent authorities and (iv) strengthening of harmonised supervision of financial and non-financial information across the EU. These four main areas, main issues identified and respective proposals are developed below.

1. Cooperation between TD NCAs and other authorities

ESMA acknowledges that the enforcement of financial information is currently performed by entities with different setups, responsibilities and powers. In some jurisdictions the authority responsible for the enforcement of financial information is inter alia also the competent authority responsible for prudential supervision, audit oversight, prospectus approval, market integrity, or anti-money laundering supervision (AML). However, in other jurisdictions there are different authorities responsible for the supervision of these different pieces of financial sectorial legislation. ESMA considers that synergies can be maximised if all these authorities are able to cooperate and exchange information (including entity-specific information) between themselves where the need arises, regardless of the institutional setup. Similar considerations are also valid with regards to European authorities such as the Single Supervisory Mechanism (SSM).

ESMA is aware that in some countries, confidentiality clauses prevent an efficient and effective exchange of information for instance between audit oversight or market integrity supervision and enforcers of financial information. In other jurisdictions this cooperation and information exchange is dependent on national provisions and/or informal contacts between staff members. The current provisions included in the TD to foster and regulate such exchange of information and cooperation between TD authorities and other authorities are insufficient. Therefore, ESMA suggests that the EC considers the following modifications to the TD:

- a) to include provisions to eliminate, to the extent possible, confidentiality impediments that prevent an efficient and effective exchange of information between TD CAs and MAR/Prospectus CAs, audit oversight bodies, prudential supervisors, and AML/CFT supervisory authorities.
- b) to include a mandate for ESMA and/or for the 3 ESAs to develop RTS on cooperation and information exchange between accounting enforcers and audit oversight bodies, prudential supervisors (including SSM) as well as, where relevant, with AML/CFT supervisors. The RTS, which should constitute the European legal framework for information sharing and cooperation, may include, amongst others, principles to guide the information sharing and the content of such information or the framework for potential joint investigations.

2. Coordination of enforcement of financial information at national level

Article 24 of the TD allows Member States to designate another competent authority (other than the central competent authority) to examine if the information referred to in the TD is drawn up in accordance with the relevant reporting framework and take appropriate measures in case of discovered infringements. According to the same article, the central competent authority may also delegate such tasks.

The FTPR on Wirecard and discussions within ESMA's groups have shown that coordination and information exchange between central competent authorities and entities or authorities to which tasks related to enforcement of financial information have been delegated or designated, is not always effective. In some countries there are confidentiality clauses preventing an effective and timely exchange of information. In addition, it is not always clear what the responsibilities, reporting obligations and roles of both authorities (central competent authority, designated authority and/or delegated entities) are in relation to enforcement of financial information.

The TD is often silent on these aspects, and thus the absence of national provisions to complement the principles included in the TD leads to confusion on the roles of both entities and delays in the supervision and enforcement of financial information. To address these concerns, ESMA suggests to the EC the following modifications or clarifications in the TD:

- a) to include provisions to eliminate confidentiality impediments that prevent an efficient exchange of information between central competent authorities, designated authorities and delegated entities, for the purpose of the examination of information drawn up in accordance with the relevant reporting framework.
- b) to require that national transposition measures clarify who is ultimately responsible for ensuring that the provisions in the TD are applied by issuers if entities are designated for the purpose of Article 24.4 (h) of the TD. In case the central competent authority is ultimately responsible, the TD may also explicitly set out that reporting obligations from designated authorities to central competent authority should be defined in national legislation implementing these arrangements.
- c) to include review clauses regarding delegation and designation models, to ensure that the effectiveness of these models is evaluated on a regular basis.

3. Strengthening of the independence of NCAs in charge of enforcement of financial information

In the context of the Wirecard case and the 2017 peer review onsite reports, some independence issues and conflicts of interest of NCAs were identified in relation to governments, issuers and auditors. ESMA considers that it is paramount that NCAs are independent and perceived as independent by all stakeholders in order to ensure that financial market participants perceive accounting enforcers' actions and examinations to be free from

bias or of undue influence. ESMA considers that independence should be assessed at both institutional and staff levels.

To strengthen independence and to prevent potential conflicts of interest of national central competent authorities, of designated authorities and/or of delegated entities, ESMA suggests that the TD is modified:

- a) to include provisions not to allow the outsourcing of the task of regular examination of financial information to audit firms to avoid potential conflicts of interest. ESMA considers that audit firms may be hired to carry out specific assignments such as forensic examinations, examinations of 3rd country GAAPs, or examinations of very complex and specific tasks. However, core examinations of financial information should be performed by the central competent authorities or authorities/entities to which tasks have been designated or delegated in accordance with the TD.
- b) to include a provision stating that the central competent authority, designated authorities and/or delegated entities and their staff should be independent from market participants and they should perform their duties and act independently from Governments.

4. Strengthening of harmonised supervision of information across the EU

The lack of harmonisation of powers at national level resulting from different national setups and differences in the TD transposition leads to divergence in enforcement of financial information. This divergence relates both to powers to require information and to powers to remedy the issues encountered when accounting errors are discovered. ESMA notes that the procedures carried out when performing enforcement of financial information usually do not entail the detection or investigation of criminal activity or fraud. Therefore, in order to assist the relevant authorities, where there are suspicions of criminal activity conducted by issuers or their management or to deal with highly complex cases which may require the use of sophisticated technology, other tools and powers seem to be necessary.

Whilst ESMA acknowledges that convergence in enforcement of financial information has progressed significantly in the last years as a result of the implementation of GLEFI, there is still some room for improvement. Experience from application of GLEFI points to the need to further enhance supervisory convergence in specific aspects of enforcement of financial information and in the application and enforcement of the ESMA Guidelines on alternative performance measures. Consistent application and convergence in enforcement of information can be further improved if more supervisory cases, fulfilling certain criteria, are shared amongst NCAs before and after the decisions are taken and commonly agreed positions towards enforcement of information (such as statements, Q&As, reports and supervisory cases) are taken into account by all NCAs. ESMA considers it is key that NCAs' powers are further harmonised. Entities with responsibilities to carry out enforcement of financial information should have the necessary powers to require information and to take timely decisions when infringements are discovered. Therefore, ESMA recommends to the Commission:

- a) To modify Article 24 of the TD, to ensure that the delegated entities and designated authorities that carry out enforcement of financial information also have, at minimum, the binding power to:
 - i. require auditors, issuers, holders of shares or other financial instruments, and the persons that control them or are controlled by them, to provide information and documents,
 - ii. make public in case issuers failed to comply with their obligations,
 - iii. carry out on-site inspections,
 - iv. have the power to require corrective information (please see below).

- b) To supplement the powers of NCAs to:
 - i. require corrections in the future financial reports, corrective notes and reissuance of financial reports,
 - ii. require the issuer to have, at its cost, an independent second audit or forensic examination carried out in certain cases (such as when there are suspicions of criminal activity or highly complex cases),
 - iii. require third parties or auditors of issuers trading on regulated markets to provide periodic or ad-hoc reports concerning specific accounting issues,
 - iv. carry out joint on-site inspections or investigations with other NCAs, within the EU territory in complex cases with significant cross-border aspects.

- c) To raise financial reporting from Article 1 (3) to Article 1 (2) of the ESMA Regulation by including the IAS Regulation in the scope of Article 1 (2);

- d) To clarify that the ESMA Guidelines on APMs are part of the relevant reporting framework for the purpose of the enforcement of financial information or to include a mandate for ESMA to strengthen convergence in the application and enforcement of APMs.

Furthermore, ESMA would like to highlight that, whilst the proposals for improvements to the TD in this letter are mainly focused on the supervision and enforcement of information published by issuers in accordance with the Transparency Directive, ESMA also supports the EC initiatives to enhance EU requirements in the areas of corporate governance and audit with a particular emphasis on strengthening and clarifying the role of audit committees and their supervision and on enhancing the assurance on, and disclosure requirements regarding, effectiveness of issuers' internal controls. In addition, for ESMA it is key that coordination, cooperation and communication between audit committees and financial reporting enforcers is promoted.



Finally, ESMA highlights that, whilst modifications to the TD are necessary to further harmonise the supervisory landscape and ensure consistent application of the relevant reporting framework (IFRS, Accounting Directive, Non-Financial Reporting Directive), these changes need to be matched with sufficient professionally skilled personnel allocated to the task of supervision of information published by issuers in accordance with the TD.

In case you have any questions or comments please do not hesitate to contact me or Evert van Walsum, Head of the Investors and Issuers Department (Evert.vanWalsum@esma.europa.eu).

Yours sincerely,

[signed]

Steven Maijoor