Response Form to the Consultation Paper

Draft Guidelines on Enforcement of Sustainability Information (GLESI)

Responding to this paper

ESMA invites comments on all matters in *Consultation Paper – Draft Guidelines on Enforcement of Sustainability Information* (ESMA32-992851010-1016) and in particular on the specific questions summarised in Annex III of the Consultation Paper and included in this response form. 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](http://www.esma.europa.eu) under the heading “Open consultations” 🡪 “Consultation on draft Guidelines on Enforcement of Sustainability Information”.

**Instructions**

In order to facilitate analysis of responses to the Consultation Paper, respondents are requested to follow the below steps when preparing and submitting their response:

1. Insert your responses to the questions in the Consultation Paper in the present response form.
2. Please do not remove tags of the type <ESMA\_QUESTION\_GLESI\_1>. Your response to each question has to be framed by the two tags corresponding to the question.
3. If you do not wish to respond to a given question, please do not delete it but simply leave the text “TYPE YOUR TEXT HERE” between the tags.
4. When you have drafted your response, name your response form according to the following convention: ESMA\_GLESI\_nameofrespondent\_RESPONSEFORM. For example, for a respondent named ABCD, the response form would be entitled ESMA\_GLESI \_ABCD\_RESPONSEFORM.
5. Upload the form containing your responses, **in Word format**, to ESMA’s website ([www.esma.europa.eu](http://www.esma.europa.eu) under the heading “Open consultations” 🡪 “Consultation on draft Guidelines on Enforcement of Sustainability Information”).

**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](http://www.esma.europa.eu) under the heading ‘[Data protection](https://www.esma.europa.eu/about-esma/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.

General information about respondent

|  |  |
| --- | --- |
| Name of the company / organisation | Polish Association of Listed Companies (SEG) l |
| Activity | Non-financial counterparty ] |
| Are you representing an association? |  |
| Country / region | Poland |

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.

<ESMA\_QUESTION\_GLESI\_1>

No.

<ESMA\_QUESTION\_GLESI\_1>

1. Should any further legislative references be added to section 2.1 of the GLESI? If yes, please explain which ones and why.

<ESMA\_QUESTION\_GLESI\_2>

Sustainability information framework will be supplemented by Q&As issued by the European Commission (including Q&A on Taxonomy SF regulation), Q&A issued by EFRAG, Implementation Guidance issued by EFRAG on selected topics concerning ESRS, and reports and other papers issued by the Platform on Sustainable Finance. The Guidelines should incorporate these documents as a background to the enforcement of sustainability information. There are also envisaged ESRS interpretations to be issued in the future, similar to IFRS interpretations with the difference that the ESRS interpretations would be issued by the European Commission. Such legally binding interpretations would also support the consistent application of ESRS by companies.

Moreover, in section 2.1 the European Sustainability Reporting Standards are indicated only by the reference to the full ESRS that have been published in OJ on 22 December 2023, which is in our view too narrow reference as the ESRS will encompass all delegated acts issued under Articles 29b and 29c – that means also sector-specific ESRS and simplified ESRS for entities using the option provided by Article 19a par. 6 of the Accounting Directive. Listed SMEs will be allowed to use this option and in that case they will have to apply simplified ESRS issued under Art. 29c.

The revised definition would read:

“European Sustainability Reporting Standards – **Commission Delegated Regulations issued under Article 29b and Article 29c of the Accounting Directive, including** Commission Delegated Regulation (EU) 2023/2772 of 31 July 2023 supplementing Directive 2013/34/EU of the European Parliament and of the Council as regards sustainability reporting standards”

<ESMA\_QUESTION\_GLESI\_2>

1. Should any other abbreviations be added to section 2.2 of the GLESI? If yes, please explain which ones and why.

<ESMA\_QUESTION\_GLESI\_3>

No.

<ESMA\_QUESTION\_GLESI\_3>

1. 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.

<ESMA\_QUESTION\_GLESI\_4>

As regards the definition of "sustainability information":

This definition should also cover a statutory auditor's/independent assurance provider's opinion. These opinions are not mentioned in Articles 19a, 29a and 29d of the Accounting Directive, which are covered by the definition of "sustainability information framework".

The revised definition would read:

“Sustainability information: Information required by the sustainability **reporting** framework **together with an opinion from** **a statutory auditor or an independent assurance services provider**.”

In addition, for all types of examination, it should be indicated that the interaction may be not only between the enforcer and the issuer, but also between the enforcer and a statutory auditor or an independent assurance provider.

As regards the definition of “sustainability information framework” it should be replaced by the definition of “sustainability **reporting** framework” due to the following remarks:

We have doubts whether the definition of “Sustainability information framework” should include the reference to Art. 29d which does not address the sustainability information framework. Instead this article addresses the sustainability reporting framework, because Art. 29d does not introduces any additional disclosure requirement; it requires “to mark up the sustainability reporting” (Art.29d). In this regard ESMA could maintain the consistency with the already defined notion of “sustainability reporting” in the Accounting Directive as amended by CSRD, and define the notion of “sustainability reporting framework” (instead of “sustainability information framework”). The national competent authorities (enforcers) will also examine whether the sustainability information has been tagged in line with the XBRL taxonomy for ESRS and XBRL taxonomy for disclosures under Art. 8 of the Taxonomy Regulation as this is already the case of consolidated financial statements which have to be tagged in line with XBRL taxonomy for IFRS.

The revised notion would read:

“Sustainability **reporting** framework - 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”

<ESMA\_QUESTION\_GLESI\_4>

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

<ESMA\_QUESTION\_GLESI\_5>

While the guidelines discusses both infringements and immaterial departures, this guideline refers to infringements only.

Moreover, as the definition of infringement is “A material omission or a material misstatement in an issuer’s sustainability information”, discovering of greenwashing will only be limited to cases where such greenwashing results from a material omission or a material misstatement. There could be situations where an omission or misstatement is not material (immaterial departure) but still results in greenwashing. Therefore, we propose to revise the last sentence as follows:

“The guidelines also assist enforcers in discovering potential infringements and/or immaterial departures within issuers’ sustainability information, for example in relation to greenwashing21.”

<ESMA\_QUESTION\_GLESI\_5>

1. Do you have any remarks on the compliance and reporting obligations?

<ESMA\_QUESTION\_GLESI\_6>

No.

<ESMA\_QUESTION\_GLESI\_6>

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

<ESMA\_QUESTION\_GLESI\_7>

The revised sentence would read as follows:

Point 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 **and the same understanding of the sustainability information framework**.

In addition, given the overwhelming task of implementing the sustainability information framework, that differs significantly from financial reporting, we would suggest introducing a dialogue with issuers and auditors/independent assurance providers as a tool to encourage compliance in point 19.

The revised sentence would read as follows:

Point 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 **and by entering into dialogue with issuers and auditors/independent assurance providers to identify any potential compliance issues and ensure enforcement of sustainability information ex ante.**

<ESMA\_QUESTION\_GLESI\_7>

1. 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.

<ESMA\_QUESTION\_GLESI\_8>

We find this guideline problematic. The sustainability information framework is based on new legislation and the guideline expects that experienced people will be employed by the enforcers. We would rather suggest a time differentiation and add that experience should be proportionate to the development of the sustainability information framework. In addition, the circumstances to be taken into account should include language, as it may be an obstacle to the enforcement of sustainability information prepared in a language other than the language of a particular Member State.

The revised sentences could read as follows:

Point 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, **taking into account the date of adoption of 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, their ability to apply the sustainability information framework**, and a language of the sustainability information**. 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.

Point 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**, taking into account the date of adoption of the sustainability information framework**.

<ESMA\_QUESTION\_GLESI\_8>

1. 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.

<ESMA\_QUESTION\_GLESI\_9>

Guideline 3 seems to focus only on issuers from third countries preparing sustainability information under standards declared as equivalent to ESRS issued under Art.29b of the Accounting Directive. However, we believe it should also address certain issues related to the enforcement regarding listed SMEs.

Under CSRD (Art. 19a par.9 and 10 and Art.29a par. 8 and 9 of the Accounting Directive as amended by CSRD) listed SMEs will be allowed to make use of the option to be exempted from the obligation to prepare its sustainability reports and in that case they will have to present the consolidated sustainability reporting of a higher-level parent undertaking together with the assurance opinion. In that case listed SMEs might present consolidated sustainability statements of their parent undertakings from the EU prepared under ESRS or, in case higher-level parent undertakings are from third countries, their sustainability information prepared either under ESRS or in line with standards recognised as equivalent with ESRS. In both cases we can face a situation that this sustainability information has not been subject to any enforcement examination as a higher-level parent might be a large non-listed company. In our view this might create a transnational issue for enforcers. Therefore, Guideline 3 or a new guideline should address that issue.

<ESMA\_QUESTION\_GLESI\_9>

1. Do you agree with the draft Guideline 4 on the independence of enforcers? If not, please explain why and provide suggestions for amendments.

<ESMA\_QUESTION\_GLESI\_10>

Yes.

<ESMA\_QUESTION\_GLESI\_10>

1. Do you agree with the draft Guideline 5 on the mixed selection model? If not, please explain why and provide suggestions for amendments.

<ESMA\_QUESTION\_GLESI\_11>

The guideline refers to a period of time during which all issuers should be examined. A period of time should also be used to calculate averages for selection processes. The guideline does not require enforcers to specify the periods to be used for calculations. As a result, it could be difficult to verify compliance with this guideline. In addition, we suggest that the maximum time period should be specified to ensure that the enforcement actually takes place.

We propose to add a new point after point 36):

New point 37a) **The enforcer should set a time frame for the review of all issuers. The averages referred to in this guideline should be calculated using this period. Such period should be proportional to the number of issuers under supervision.**

Moreover, we believe that the criterion "Management's ethical standards" in point 37) should be further developed to make it fully operational. It is difficult to guess whether it refers to management's past behaviour, court judgments or fines, market reputation or other aspects.

In addition, we believe that the last sentence of point 39) should be a new point, as grounded complaints should trigger a selection of the sustainability information in question for examination, not only in the case of indications of non-compliance by the auditors/independent assurance providers, but in all cases.

Therefore, we propose new point after point 39) and deletion of the last sentence form point 39):

New point 40a) 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.

<ESMA\_QUESTION\_GLESI\_11>

1. 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.

<ESMA\_QUESTION\_GLESI\_12>

Yes.

<ESMA\_QUESTION\_GLESI\_12>

1. Do you agree with the proposed Guideline 7 on the selection universe? If not, please explain why and provide suggestions for amendments.

<ESMA\_QUESTION\_GLESI\_13>

Yes.

<ESMA\_QUESTION\_GLESI\_13>

1. 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.

<ESMA\_QUESTION\_GLESI\_14>

Yes.

<ESMA\_QUESTION\_GLESI\_14>

1. 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.

<ESMA\_QUESTION\_GLESI\_15>

It should be clarified in point 55, if a desktop examination could transform into an interactive examination. Current wording does not provide for such an option. However, it should be indicated that in case when the enforcer is in doubt whether there are no infringements, the enforcers should have a possibility to approach an issuer and investigate the potential infringement.

Therefore we propose to add point iii) in point 55) letter a):

**iii) A decision that the enforcer has discovered potential infringements in the sustainability information, or in relation to the issues / areas of the sustainability information which the enforcer has analysed, and that the enforcer should perform an interactive examination to further analyse the potential infringements**.

<ESMA\_QUESTION\_GLESI\_15>

1. 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.

<ESMA\_QUESTION\_GLESI\_16>

Yes.

<ESMA\_QUESTION\_GLESI\_16>

1. 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.

<ESMA\_QUESTION\_GLESI\_17>

Yes.

<ESMA\_QUESTION\_GLESI\_17>

1. 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.

<ESMA\_QUESTION\_GLESI\_18>

Due to the poor quality of translations of the ESRS into national languages, we expect that many immaterial departures and infringements will result either from the application of incorrectly translated disclosure requirements or from the application of an English version that differs from a national version. In addition, English ESRS contain errors which may also result in immaterial departures and infringements. Therefore, the guideline should address these possibilities.

We propose new point after point 66):

Point 67) Where an infringement or an immaterial departure from the sustainability information framework resulting from discrepancies between an English version and a translation of European Sustainability Reporting Standards into a national language is detected, such a situation should not be treated as an infringement or an immaterial departure and the enforcer should not take any action.

Footnote in point 70) should also refer to the provisions concerning the “double materiality” concept in ESRS 1, in Annex I to Commission Delegated Regulation (EU) 2023/2772, and any future legislation in this regard, as the concept of double materiality assessment will also be provided for by simplified ESRS.

<ESMA\_QUESTION\_GLESI\_18>

1. 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.

<ESMA\_QUESTION\_GLESI\_19>

Yes.

<ESMA\_QUESTION\_GLESI\_19>

1. 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.

<ESMA\_QUESTION\_GLESI\_20>

Yes.

<ESMA\_QUESTION\_GLESI\_20>

1. 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.

<ESMA\_QUESTION\_GLESI\_21>

In the EU some of the enforcers will be entrusted with supervision over the sustainability information of entities other than companies listed on regulated markets. Such enforcers may face emerging issues or issue decisions that should be circulated within the SRWG to ensure coordination of the enforcement within the EU. Though entities that are not listed on regulated markets are not covered by the Guidelines, we believe such area of the enforcement by some of the national enforcers should be covered by coordination within the SRWG.

<ESMA\_QUESTION\_GLESI\_21>

1. 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.

<ESMA\_QUESTION\_GLESI\_22>

We believe that, in the early stages of sustainability reporting, enforcers should communicate regularly on enforcement policies and decisions in individual cases. This should be done at least annually within the first five years of enforcement of each type of ESRS as listed below. We therefore propose to revise point 94) accordingly.

Paragraph 94) should be revised as follows

Point 94) Enforcers should periodically report to the public on the enforcement policies and decisions taken in individual cases, **at least annually within the first five years of application of full ESRS, sector-specific ESRS and simplified ESRS**. It is up to the enforcer whether to report on an anonymous or a non-anonymous basis on these matters.

Furthermore, as discussed in our answer to question 21, some of the enforcers will be entrusted with supervision over the sustainability information of entities other than companies listed on regulated markets. Such enforcers may face emerging issues or issue decisions that should be circulated within the SRWG to ensure coordination of the enforcement within the EU. Though entities that are not listed on regulated markets are not covered by the Guidelines, we believe such area of the enforcement by some of the national enforcers should be covered by coordination within the SRWG and, consequently, publication of decisions and reporting on enforcement should also consider the enforcement of sustainability information of such entities not listed on regulated markets.

<ESMA\_QUESTION\_GLESI\_22>

1. 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?

<ESMA\_QUESTION\_GLESI\_23>

Generally, we agree with the proposed policy option 1 as a starting point for the enforcement of the sustainability information. However, we do not exclude that in the future it could be more beneficial to diverge from the model based on GLEFI.

<ESMA\_QUESTION\_GLESI\_23>

1. If you advocate for a different policy option, how would it impact the benefits and costs? Please provide details.

<ESMA\_QUESTION\_GLESI\_24>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_GLESI\_24>

1. Do you wish to raise any other points which ESMA should consider as it finalises the guidelines?

<ESMA\_QUESTION\_GLESI\_25>

No. However, we would like to add to the “General information about respondent” that SEG is providing this opinion as NGO representing companies listed on regulated market in Poland.

<ESMA\_QUESTION\_GLESI\_25>