

PEER REVIEW ON GUIDELINES ON ENFORCEMENT OF FINANCIAL INFORMATION

ANNEX 4F: Onsite visit report – Germany (14 - 16 March, 2017)

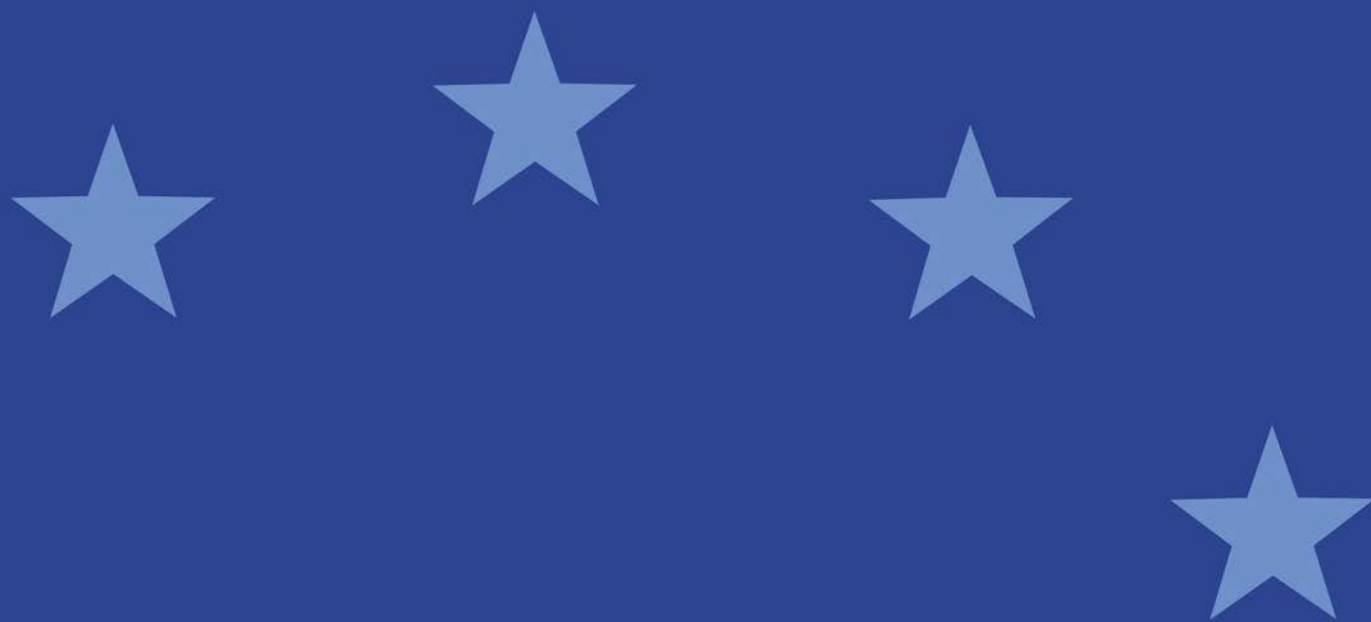


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Acronyms used

AG	Assessment Group
BaFin	Bundesanstalt für Finanzdienstleistungsaufsicht
CESR	Committee of European Securities Regulators
FREP	Financial Reporting Enforcement Panel / Deutsche Prüfstelle für Rechnungslegung
EC	European Commission
EFI	Enforcement of Financial Information
FTE	Full Time Equivalent
MS	Member State
NCA	National Competent Authority
SCSC	Supervisory Convergence Standing Committee
TD	Transparency Directive 2004/109/EC as amended

1. Introduction

1. The ESMA Work Programme 2016 set out that a peer review would be carried out to assess the compliance by NCAs with certain of the ESMA Guidelines on Enforcement of Financial Information (ESMA/2014/1293) (**EFI Guidelines**).
2. This peer review was conducted in accordance with Article 30 of Regulation (EU) No. 1095/2010 of the European Parliament and of the Council of 24 November 2010 (**ESMA Regulation**) and the revised ESMA Peer Review Methodology (ESMA/2013/1709) (**Methodology**).
3. In accordance with the Methodology, the peer review was carried out by an Assessment Group (**AG**), which reported its findings to the ESMA Board of Supervisors, for its approval, after having consulted the Supervisory Convergence Standing Committee (**SCSC**).
4. The peer review was restricted to guidelines 2, 5 and 6 of the EFI Guidelines.
5. The objectives of this peer review were:
 6. *In the context of Guideline 2:* to assess the sufficiency of human and financial resources of NCAs taking into account the number and characteristics of issuers subject to enforcement of financial information; and to assess the adequacy of the professional experience and background of enforcers considering the nature of the issues that need to be dealt with under the applicable rules.
 7. *In the context of Guideline 5:* to assess whether selection methods in place within an NCA are based on a mixed approach whereby a risk based approach is combined with a sampling and/or rotation approach; to assess whether the risk based approach considers the combination of the probability of infringements by an issuer and its potential impact on the financial markets. When performing this assessment, the peer review will consider whether the risk approach takes into consideration all the relevant criteria as defined in the Guidelines; to assess whether the sampling and/or rotation approach ensures that issuers not captured in the risk criteria may be selected for review; and to assess whether the selection model takes into account the common enforcement priorities identified by enforcers together with ESMA.
 8. *In the context of Guideline 6:* to assess whether the examination procedures in place within an NCA ensure that the enforcement of financial information performed either by unlimited scope examinations, or a combination of unlimited scope and focused examinations, is effective; notably, whether the examinations carried out by enforcers ensured that material errors were likely identified; to assess whether the examination procedures following the risk based selection model are adequate; and to assess whether the examination techniques used and the related conclusions of the review of the financial information of issuers selected as part of the enforcement process are appropriately documented.

9. The first stage of the peer review involved a targeted self-assessment questionnaire, which was completed by NCAs, followed by on-site visits at seven NCAs.

10. Germany was one of the jurisdictions selected by the AG to be visited onsite. The visit lasted between approximately three days from 14 to 16 March 2017, and took place at the offices of the Financial Reporting Enforcement Panel (**FREP**) in Berlin, where the visiting team comprised of members of the AG met with representatives from FREP and representatives from Bundesanstalt für Finanzdienstleistungsaufsicht (**BaFin**).

11. The visiting team was composed of six persons:

the Co-Ordinator [REDACTED] (FSC, DK)
the Rapporteur [REDACTED] (ESMA),
the ESMA expert [REDACTED]

and the following NCA members of the AG:

[REDACTED] (FMA, AT),
[REDACTED] (CSSF, LU),
[REDACTED] (Consob, IT)

12. The review covered enforcement activity under the Guidelines from 1 January 2015 up to 31 October 2016 carried out in relation to the 2014 annual financial statements and 2015 interim financial statements (where applicable), and was extended to the work carried out on the 2015 annual financial statements. All questions made to NCAs related to that period and answers were requested to cover that period unless otherwise specified in the text.

2. Findings from the on-site visits including desk-based analysis

11. The Bundesanstalt für Finanzdienstleistungsaufsicht (**BaFin**) has been designated in Germany as the central competent administrative authority under the TD.
12. In addition, German law modifies and assigns some of the competences of BaFin, if an approved/recognised Review Panel exists. So, for example, the random sample examination can only be initiated by the approved/recognised Review Panel. The Financial Reporting Enforcement Panel (**FREP**) is the only Review Panel approved/recognised by the German Ministry of Justice. This recognition/approval is done on a contractual basis between FREP and the Ministry of Justice¹.
13. BaFin/FREP stated to the AG, that FREP has been designated under German law, and in accordance with Article 24(1) of the TD, as an authority responsible for examining whether information referred to in the TD is drawn up in accordance with the relevant reporting framework, although FREP is a private body (an Association, "Verein") that was established in 2005 and which, along with BaFin's EFI team, is funded through an annual fee charged on all companies which are subject to the TD requirements. BaFin collects these fees. The basis for the fee is the domestic volume of stocks traded and varies between €250 and €40,000 per annum.
14. In Germany a two-tier enforcement procedure has been established which provides for both an examination by FREP organised under private law and in certain cases by BaFin which is vested with statutory power. When it comes to examining whether information is drawn up in accordance with the relevant reporting framework, as a starting point, FREP and BaFin both act independently. As a rule of practice, the examinations are mostly initiated by FREP.
15. With regard to the examination whether financial reports are drawn up in accordance with the relevant reporting framework, FREP reports that it is deemed to be a designated national competent authority as that term is understood in the TD. With regard to taking appropriate measures in case of discovered infringements, there is no designation of FREP under German law, i.e. this is in the remit of BaFin as the central competent administrative authority. FREP and the EFI team of BaFin are together treated as the EFI function in Germany for the purposes of this report.
16. Although FREP is recognised in German law, it does not have any statutory powers given to it to demand cooperation from issuers. Instead, FREP relies on the cooperation of the companies it examines. At the conclusion of FREP's work, including when an issuer accepts the conclusions and the consequences of FREP's findings, the case is to be transferred to BaFin for BaFin to exercise the necessary statutory authorities for directing that certain actions be taken by issuers.

¹ The approval/recognition contract is not limited in time, but can be terminated by both parties.

17. FREP argues the fact that the operation is voluntary means that issuers will more willingly cooperate. They believe that this feature is very important for them. Issuers, they say, feel that they can discuss their issues with FREP as equals due to a comparable level of extensive practical, professional experience and, as FREP is not an administrative sanctioning authority they argue that issues can be resolved more quickly.

18. FREP staff have different professional backgrounds (i.e. former auditors, CFOs, academics, analysts) allowing them to analyse accounting issues encountered from different perspectives and thus enabling them, FREP says, to discuss issues with issuers more openly, understand their point of views and share similar working histories.

19. FREP's goals of enforcement are specifically to:

- enhance the quality of financial reporting of listed companies
- strengthen the capital market's trust in the accuracy of financial reporting, and
- avoid future accounting errors

and to achieve this, FREP must

- conduct enforcement examinations in order to identify material misstatements of financial statements.

These goals are included in the basis of conclusions to the relevant German law (Gesetzesbegründung).

20. If a company refuses to cooperate in a FREP examination, or does not agree with any accounting infringements identified by FREP, BaFin takes over the case file and conducts its own examination termed "error identification procedure". BaFin can also conduct its own examination if it has "substantial doubts" about the accuracy of the results of a FREP examination or about whether FREP has conducted an examination properly.

21. Additionally, according to German law, BaFin can request enforcement examinations by FREP.

22. So, although FREP is the primary institution in Germany for carrying out examinations of financial statements of issuers, there are five cases in which BaFin gets involved:

- (a) Case group 1: The company accepts the error findings by FREP. The subsequent error publication procedure is in BaFin's remit.
- (b) Case group 2: The company does not accept the error findings by FREP.
- (c) Case group 3: The company refuses or fails to cooperate with FREP.

- (d) Case group 4: BaFin has substantial doubts about the accuracy of the examination result or the proper conduct of the examination by FREP.
 - (e) Case group 5: BaFin takes over the examination if it is itself conducting a special examination with the same audit subject (for banks, insurance companies and, since 1 January 2016, for investment companies under the enforcement supervision, only).
23. In Case groups 2 to 5, BaFin conducts its own examinations (“error identification procedures”), and any subsequent error publication is within BaFin’s remit as well.
 24. As a rule, BaFin starts its own examinations taking into account the outcome of FREP’s examinations (if any).
 25. FREP reports that it has been in only 20 cases (over 11 years) where issuers refused to cooperate. In nearly all cases the refusals to cooperate are from small non-German issuers (in many cases these companies are defunct but still within the selection sample). Where issuers, ‘do not cooperate’ it is always FREP that declares an issuer non-cooperative and hands the file over to BaFin. In no case has a domestic based issuer refused to acknowledge the jurisdiction of FREP.
 26. In the cases where FREP has reached a conclusion, but this conclusion has not been accepted by the issuer (55 cases in the past 11 years), the file is transmitted to BaFin for an examination by BaFin. In approximately 80% of these cases the outcome of the examination by BaFin was the similar as the conclusion reached by FREP.
 27. FREP and BaFin can exchange information with the Auditor Oversight Body in Germany. There is a well-established flow of information from FREP to this body (about 200 cases over 11 years). Whenever an error has been discovered by FREP/BaFin, but the auditor had not qualified its opinion, FREP/BaFin will refer the case and the auditor to the Auditor Oversight Body. In 2016 it has been made clear that the Auditor Oversight Body can provide information to FREP or to BaFin about any infringements encountered by it when examining auditors under its control.
 28. FREP carries out all examinations of financials statements in Germany on the first tier. BaFin is responsible when problems occur(see below). BaFin is also responsible for international cooperation.
 29. FREP also has a programme of error prevention activities including: setting enforcement priorities, public relations activities, communications with standard setters and investors, workshops with management and supervisory board members, annual discussions with audit firms, and case-related ex-ante queries.
 30. Once a year, FREP holds discussions with representatives of medium-sized audit firms via the platform of the Institute of Public Auditors in Germany, and during the first quarter of each year,

FREP holds individual discussions with the chairs of the management boards or managing directors of the five largest German audit firms. In these meetings, FREP discusses the main findings encountered when examining the financial statements with the auditors of the respective issuers.

31. FREP communicated to the AG that it does not want to publish written communications including specific examples of issues they encounter during the year. FREP perceives a danger in potentially becoming an interpretative body. FREP states that it believes that delivering short messages for the CFOs of issuers are more effective and that these messages are better delivered through the channels of interaction that it has established.
32. FREP has recently appointed an external compliance manager to whom any member of FREP can go to present issues that that person might have with the operation of FREP.

Market characteristics

33. At July 2016, there were 615 issuers subject to German accounting enforcement (Home Member State Germany).
34. There are 65 German companies included in the EUROSTOXX 600 representing approximately 14%, by market capitalisation, of the composition of the EUROSTOXX 600. This ratio has been used by the AG as a proxy for estimating the relevant importance of the jurisdiction in the EU as a whole.

Guideline 2 – Financial and Human Resources

Organisational resources of FREP

35. The AG requested each NCA to quantify for the AG the effective use of the human complement and to express that in terms of Full Time Equivalent (FTE). One Full Time Equivalent (FTE) is equivalent to one employee working full-time per week in accordance with contractual obligations in your NCA (e.g. anywhere between 35 to 40 hours per week). For example, (based on a 40 hour working hour week) three employees working respectively 50 hours, 40 hours and 10 hours amount to 100 hours per week. The FTE is 2.5 (100/40).
36. FREP has reported a figure of 15.6 FTE, representing the human resources effectively performing the job of enforcement of financial information. This comprises 14 “Panel Members”, a president, a vice-president, and a managing director (legal advisor).
37. There is, additionally, an FTE of 7.8 supporting staff.
38. The Panel Members are effectively technically qualified accounting professionals with qualifications and experience in reviewing financial statements. They are recruited from private industry and given 4 year renewable contracts.

39. FREP report that there are no difficulties in recruitment. FREP report that there are always sufficient, and sufficiently experienced candidates, when a competition is launched. Salaries in FREP are reported as being equivalent to the private sector.
40. The 17 members of FREP's governing body (all representative organisations) elect seven members of a Nominations Committee. This Committee runs competitions for new Panel Members. FREP managing director prepares the information for them e.g. CVs, table of the candidates. The FREP president, vice president and managing director participate in the selection process/interviews as 'guests' and at the nominations committee deliberations but cannot vote. Nevertheless, FREP president, vice president and managing director reported that there is always a consensus with the Nominations Committee.
41. Before panel members contracts are about to terminate, they are asked whether they want to renew. If so, Panel members whose terms are proposed for renewal have to be re-confirmed by the Nominations Committee but there is not another competition.
42. Many Panel Members are recruited directly from the auditing firms and issuers. However, there is a comprehensive conflict of interest policy that prevents that Panel Members to take part of examinations where potential conflict of interest might exist. For example, Panel Members who have worked within the last three years or still have contracts with in Big Audit firms cannot take part of examinations of issuers audited by the respective audit firms. Similarly, Panel Members receive or have received benefit entitlements (such as pensions) from the entities involved (e.g. auditors or issuers).
43. There is, however, no cooling off period if Panel Members decide to leave FREP either at the end of the contract or before its term. In case the contract suspension, Panel Members may return to their previous employer (e.g. Audit Firms, issuers) or Panel Members may also take work responsibilities in audit firms or issuers where they have taken part of examinations.
44. In response to challenge from the AG, FREP argued that
- a. this rotation guarantees "up-to-the-minute" practical knowledge from professional practitioners and avoids the perception of FREP being an authority consisting of intellectuals/academics without first-hand practical experience. Instead, FREP says, this rotation enables it to be perceived as a competent authority at eye-level with issuers, thereby promoting a high acceptance rate of FREP decisions;
 - b. rotation prevents an overly trusting relationship between the Panel Members and the issuers under examination. In the case of a constant set of Panel Members with long-term contracts, the same FREP members would be involved in examinations of any particular company several times over many years, especially if special expertise (bank, insurance, real estate, etc.) is needed;

- c. rotation also allows for enforcement knowledge to be brought back to capital market issuers and audit companies on a regular basis, which is also a component of error prevention in the capital market;
- d. FREP as a private sector body can only offer limited career opportunities within the organisation and only gives the Panel Members the opportunity to gather rewarding experiences in enforcement for a limited time period. This is communicated by the nomination committee in each interview with new candidates; and
- e. nevertheless, FREP has been able to obtain highly qualified candidates over the time. The main reason for accounting experts to join FREP is the possibility to attain this enforcement experience for a limited time which can be marketed on their resume. Therefore, intensive cooling-off clauses after the termination of their engagement in FREP in their contracts would make the recruitment of highly qualified experts nearly impossible.

Experience and qualifications

- 45. All of the 16 EFI staff of FREP have extensive experience relevant to the work of enforcement of financial information and FREP report an average of 23 years' experience of these staff.
- 46. All staff of FREP hold third-level qualifications, with 13 of the EFI staff holding relevant professional qualifications as an accountant or auditor. The others have extensive accounting backgrounds, e.g. being former chiefs of group accounting in listed index companies, or a PhD in accountancy with numerous publications in IFRS issues.
- 47. FREP do not take persons directly from graduate programmes. Normally the panel candidates have to have experience of approximately 10 years', but when selecting these candidates in practice the level of experience tends to be higher than 10 years, hence the current average level of experience.
- 48. When advertising for new Panel Members, FREP will sometimes seek industry specialists, such as banking expertise, which they say is essential to be able to carry out their role.

Training

- 49. FREP reports that EFI staff received on average 50 hours training in 2014 and 36 hours on average in 2015. Of this, approximately 37 hours training was in IFRS on average in 2014 and 22 hours training in IFRS in 2015. The majority of the IFRS courses are updates, both general updates as well as updates focused primarily on banks.
- 50. 8 hours in 2014 on average, and 6 hours on average in 2015, of the training focused on national GAAP. Other training focused on enforcement methodologies, including a course on detecting and investigating fraudulent financial reporting (for FREP EFI staff 5 hours on average in 2014 and 8 hours on average in 2015).

Organisational resources of BaFin

51. BaFin reports 6 FTE available to do the job of review of financial statements and taking actions. There is an additional resource of 4 FTE available to support this work.
52. This 10 FTE is made up of 10 persons in the EFI unit, which is full complement.

Experience and qualifications

53. Of the 6 core EFI staff, three have between 5 and 15 years' relevant experience (on average 8) and three have more than 15 years' experience (on average 18).
54. All of BaFin's six core EFI staff hold university degrees or similar, of which three hold professional qualifications as an accountant or an auditor. Two are lawyers.
55. BaFin report that salary comparison data is not available, but they report that there is no observable gap in salaries paid compared to the private sector. In this regard, it was noted that not all the EFI Staff of BaFin are civil servants. As such, the salaries of these members are, on average, higher than the average salary of civil servants. The costs attributable to EFI function are also funded by the enforcement of financial information levy charged to issuers.

Training

56. BaFin reports that EFI staff received on average 32 hours training in 2014 and 40 hours on average in 2015. Of this, approximately 20 hours training was in IFRS on average in 2014 and 30 hours training in IFRS in 2015.
57. In addition, BaFin Staff also received 12 hours in 2014 on average, and 10 hours on average in 2015, on training on legal issues, in particular different aspects of securities law.

Guideline 5 – Selection Methods

Process for selection of financial statements for examination

58. The process for selection of issuers for examination is done wholly by FREP. BaFin does not carry out independent selection, but BaFin has the power to request on his own an examination of issuer ("audit on request of BaFin"). For example, prudential supervision department within BaFin may report findings where there may be potential accounting infringements to its EFI team who subsequently may instruct FREP to carry out a review. Other times, it may be market abuse colleagues who raise issues to the EFI Team. These types of referral happen about 4-5 times per year. There is a legal requirement that BaFin must have specific grounds of a breach of accounting principles.

59. BaFin can also identify companies that they regard as risky and might be included in the abstract risk-based pool for assessment by FREP. This would be done during the regular meetings with FREP.
60. Before FREP initiates an examination, it will communicate the individual selection to BaFin. BaFin may request that certain issuers are not examined for specific reasons e.g. BaFin is undertaking its own examination of that entity and this examination has the same scope of an examination that would be carried out by FREP (only applies to banks, insurance companies and investment companies) or where a “special auditor” was appointed by the court to examine the financial statements of an issuer (e.g. the shareholders requested under German law an independent auditor to undertake such examination).
61. FREP has a written selection procedure which has been published and is available at http://www.frep.info/pruefverfahren/verfahrensregelungen_en.php
62. The model for sampling selected by the FREP takes in particular the dual approach of a risk-based “with-cause” selection and a random sampling into consideration as well as the principle that all listed companies should be reviewed within a defined period (aiming for full coverage - rotation).
63. The risk-based selection first focuses on the probability of a material error in the financial reporting. The possible impact of the error on the market is taken into account in the stratification of the general population for rotation and random sampling.
64. FREP currently seeks to select approximately 115 issuers per year for examination, planning/expecting to carry out about 100 of those due to the attrition of issuers from the selection (e.g. due to de-listing, insolvency, merger etc.).
65. FREP first identifies its capacity for a given year before making a selection. Then it starts the process of identifying the list of issuers to be examined, starting with the issuers not examined in the previous year and carried over. If a selected issuer is not examined during a year, then that issuer is automatically included in the selection for the following year.
66. The examinations in a year are made up of issuers carried over, then those based on risk, then those randomly selected from two separate pools, and finally a random selection from the whole population.
67. The risk-based selection accounts for between 15 – 20% of the total number of issuers selected for examination in a year. Although, this might be higher if sufficiently numerous problems were reported or there were sufficiently numerous concrete risk factors.
68. The first portion of issuers is identified when concrete indications of erroneous financial reporting exist (i.e. qualified audited opinion, concrete issues identified, examinations requested by BaFin) an “examination with cause or concrete risk” should be initiated. These are focused

reviews and are the only focused reviews that are carried out by FREP. All of these issuers are selected by FREP for examination. These are not de-selected from the general population and will potentially be looked at for unlimited scope examination in the other parts of the selection model.

69. FREP will next identify a pool of issuers based on abstract risk conditions . E.g. industry based risk factors, enforcement priorities. There is a list of risk factors maintained by FREP for consideration of the abstract risk conditions:

- a) IPO
- b) Exceptional transactions (business acquisitions and sales, transactions with related parties)
- c) Special facts and circumstances
- d) Economic situation of the company
- e) Loss situations
- f) Change of CFO/CEO/Supervisory Board
- g) Specific industry risks
- h) Pressure due to high expectations
- i) Delayed preparation/publication of the annual accounts
- j) Risks identified in the ECEP or FREP annual priorities
- k) Companies that have not been examined for a long time
- l) Companies that stood out in the last enforcement examination

70. When this pool of issuers is identified, a purely random selection of 40% of this pool will be made. An unlimited scope examination is carried out on these selected issuers.

71. As most of the issuers identified under the abstract risk assessment is made through the review of media (e.g. newspapers), FREP reported a limitation on the information gathered on these risk factors, i.e. it is more likely that information on risks will be more visible on larger companies than in smaller issuers. But FREP was confident that, through various information sources, they would identify all the necessary information.

72. The random-sampling amounts to between 80 – 85% of the selection.

73. FREP makes a stratification of the sample selection considering the impact of a material error in financial reporting to market confidence and investor protection.

74. Random sampling is taken separately from two strata of companies. The remaining population of issuers (having taken out those carried forward and those selected from the risk-based pool) are divided into two categories or 'strata'. The first is made up of those issuers who comprise the four stock indices in Germany: DAX, MDAX, SDAX, and TecDAX. This pool is about 160-strong (160 members of the index less any that have been already selected). The second category / stratum is made up of all other issuers. The rotation system in place (not the risk

based approach) ensures that issuers with high potential impact of an infringement on the financial markets are examined within 4-5 years as these belong to Stratum 1 of the rotation .

75. Issuers are selected so that the issuers in Stratum 1 are examined by rotation every 4-5 years. Issuers in the second stratum (which are all other issuers) are examined by rotation every 8 to 10 years. So, a random selection is made of approximately 1/5th of the issuers in Stratum 1, and approximately 1/10th of the issuers in Stratum 2. The rotation cycle is not renewed automatically, i.e. companies under stratum examined on year 1 will not automatically be examined in year 6.
76. The final stage of selection is a purely random selection from all issuers (not yet selected). 10 issuers are selected randomly. From that 10, three issuers are added to the yearly planned examinations. The three are selected based on judgment of the FREP staff. So, for example, if any of the 10 issuers had been included in the pool of issuers identified by risk factors, then FREP staff would put that issuer into the selection for examination. FREP specifically added this final element to ensure that there is no comfort given to any issuers that they would not be selected in any given year.
77. FREP looks at the make-up of the market indices each year to try and capture changes to the indices, and to identify any companies falling out of consideration (but these issuers will be identified for the risk-pool).
78. In a stratified sample selection all companies within a stratum have the same probability of being examined. This should ensure that all companies are subject to examination within a specific timeframe. As such, each selected company will be removed from the stratum until the last year after which point all companies in the related stratum have been subject to examination. If new risk factors are identified with respect to a selected company, that company is returned to the sampling population. So, the Stratum 1 companies would total approximately 130 in year two, 100 in year three, etc.
79. If asked by BaFin to do an examination, FREP will carry out that examination as an additional issuer added to the already defined selection. This may occur due to complaints received by BaFin, for example.
80. FREP have a committee (Sample Selection Committee) that reviews, at least annually, whether modifications to the principles for a random-sample examination are necessary or appropriate. Risk identification is performed by the Media Analysis Committee that brings its findings to the Sample Selection Committee. Changes to the examination principles will be agreed with the Federal Ministries of Justice and Finance.
81. The annual selection is considered confidential and not made public.

82. It is not possible to change the selection once it is made. Note, however, that additional issuers can be chosen for a focused examination performed whenever necessary if specific indications of a potential error are identified.
83. As with other jurisdictions, random-sampling selection made each year is not specific to a particular financial statement. Since FREP only examines the last approved consolidated financial statements², a selection for example in 2015 may lead to an unlimited scope examination of the 2014 financial statements, if the 2014 financial statements are the last approved set of financial statements available. Likewise, if an issuer publishes 2016 financial statements before the 2015 examination has been initiated, then the 2016 financial statement will be examined. The issuer will still be examined even if the subsequent financial statements have been issued; only the financial statement year may vary. Nevertheless, the majority of the examinations selected in a particular year will lead to examinations of the financial statements of that same year. A selected issuer will not be examined only if the issuer merges, delists from the regulated market or no longer is subject to enforcement of financial information in Germany.
84. 84 2014 annual reports were selected for examination. 87 2015 annual reports were selected for examination.
85. Of the 87 2015 annual reports selected for examination in 2016, FREP reports that 12 were selected on the risk-based assessment, 75 were selected by the “stratified rotation”. These 87 were all unlimited scope examinations.
86. Five 2014 annual reports and one 2015 annual report were selected for focused review following a concrete identification of risk.
87. As German law has changed, there is now in existence a home-country principle. So, now FREP/BaFin will not look at issuers who are based in another EU country but listed in Germany, but will leave this for the relevant authority in that other country. Before, FREP had looked at all issuers with listings in Germany regardless of home country.
88. At the same time, FREP will now also look at issuers who are based in Germany but who have listings in other EU jurisdictions. Unless these companies would be selected based on risk (either concrete or abstract) these companies will be reviewed under the examination stratum 2 - other companies – rotation time period (i.e. between 8 to 10 years).

Guideline 6 – Examination Procedures

89. The onsite visits programme included a review of some examination files of the NCA being visited, in this case files of FREP and BaFin. The files were selected at the discretion of the

² Financial Statements as approved by the management of the issuer not by shareholders' meeting.

AG from the list of issuers examined in 2015 up to 31 October 2016 provided by each NCA. The review of specific files provides an AG with an overview of the procedures in place when performing the examination of financial statements and how the analysis and the conclusions were processed and documented (as required by Guideline 6). The interest of the AG in reviewing these files is not to assess the technical merit or to provide an independent analysis of specific accounting issues, but rather to have concrete examples on the areas of focus (e.g. measurement, presentations, recognition), the type of questions asked, the way an analysis is made, the quality of the review performed, and how supported were the conclusions and the actions taken.

90. The review of files contributes to the AG understanding how the enforcement of financial information is performed and to form an opinion on how effective the enforcement of financial information is in that jurisdiction. For this purpose, the files selected took into consideration different criteria such as what decisions were taken, whether the examination was unlimited or focused, sectors/industries or the sizes of the issuers examined.
91. However, the AG was not able to have access to all the files requested from FREP. According to the FREP, the legal advice that they received is that the German legal regime forbids FREP from sharing information with third parties unless the respective issuer examined so agrees, or unless the files have already been shared with BaFin. In Germany, regarding the error identification procedure, only the files on which the issuer does not agree with the outcome of FREP's examination or decides not to cooperate with FREP are made available to BaFin. As a result, the visiting team only had access to two complete error identification files out of seven requested. And as a result, the cases reviewed by the AG only provided an overview of the files and documents which are or were sent to BaFin for BaFin to pursue its own examination. The AG could not assess whether files on which issuers agreed with the outcome, or files where no action was taken would be similarly supported or documented.
92. Before the finalisation of this report, on 30 March 2017, the German parliament approved an adjustment of the legislation. The adjustment will clarify that the FREP, at the request of ESMA, will provide all the necessary information to ESMA so that ESMA can carry out the duties assigned to it in accordance with Art. 35 of the ESMA Regulation.

FREP examination procedure

93. FREP has a procedure in place that has been made public, and is available at the following place: http://frep.info/pruefverfahren/ablauf_eines_pruefverfahrens_en.php
94. Following the selection of issuers, there is a systematic assignment within FREP of the examinations to what are known as "Chambers". There are as many Chambers as there are Panel Members. When an examination is assigned to a specific Chamber, a different Panel Member is designated based on workload and appropriate expertise and becomes the "responsible Panel Member" for the examination of the financial statements of that issuer. A "Quality Review

Panel Member” is also designated to support the “Responsible Panel Member” in its examination and to provide a quality review role.

95. The responsible Panel Member is, in effect, responsible for the review of financial statements of an issuer, and other relevant documents. This exercise identifies several issues for focus and on which FREP will engage in further investigation and assessment (on average 5 to 6 issues).
96. The examination team is made up of five persons in total. Three are voting members of a Chamber, being the Panel Member assigned to the Chamber (not responsible for the examination of the quality review), the President and Vice-President, and two others, the Responsible Panel Member and the Quality Review Panel Member are non-voting but who do most of the examination work on the financial statements.
97. The President and Vice-President of FREP are voting members of all Chambers, under the condition that they are independent with respect to the issuer and its auditor. The third voting-member of a Chamber is always the Panel Member assigned to that Chamber (who is not carrying out the work on that particular issuer). The Chair of each Chamber will always be either the FREP President or Vice President, and this alternates from Chamber to Chamber. The Chair does not have any additional voting entitlement, and all decisions of the Chamber are made by majority vote. As the president and vice-president are members of all Chambers, they can effectively decide all cases, assuming they are of the same view. This, according to FREP, provides consistency. If there was ever a perceived difficulty with the way in which decisions were being made, Panel Members could, FREP says, approach the external compliance manager.
98. As Panel Members can occupy three different roles in different Chambers, they each have different responsibilities in different Chambers, and these are generally distributed evenly. So, typically, a Panel Member will be the Responsible Panel Member for some Chambers, the Quality Review Panel Member for an equal number of other Chambers, and the voting Panel Member for another equal number of Chambers, approximately. With the Panel Member’s rotating roles, FREP says that each member has the opportunity to view the different cases from various perspectives.
99. There will be approximately 50 Chambers instituted at any one time at different stages of examination, and with a different combination of Panel Members. There is a systematic assignment of Panel Members to Chambers, and where conflicts of interest prevent a Panel Member from being assigned to a particular Chamber, the process automatically goes to the next numbered Panel Member.
100. If there is a conflict of interest, then Panel Members are substituted in rotation. As Panel Members will normally have come from industry, and will sometimes still have a relationship with some issuer or its auditor (e.g. being on a sabbatical from an auditor), there are rules for

ensuring that any conflict is avoided. Panel members cannot work in a Chamber that is examining the financial statements that are audited by a firm with whom a Panel Member may have, or have had, a relationship. So, for example, if a Panel Member receives a pension from an auditing firm, that person can never be involved in an examination of financial statements where that firm is the auditor.

101. This conflict of interest policy extends to the president or vice-president. Whenever, any of them have a relationship with the issuer or the auditor, they cannot take part on the examination or on the decisions taken by the chamber on that respective case. In these cases, the president, vice-president or both are replaced by other Panel Member(s).
102. When correspondence goes from FREP with the results of the examination, the letters are identified as being from a 'Chamber' within FREP and signed by the Chamber's Chair, otherwise they are signed by the Panel Member in charge of the examination.
103. FREP gives examinations with cause priority over examinations based on random-sampling.
104. FREP's first contact with an issuer is when they have been selected: to inform them under which paragraph of the selection procedure they were selected (i.e. randomly or on the basis of a specific causal reason) or whether the examination was requested by BaFin. FREP will also ask them whether they wish to cooperate, and also to send to FREP certain standard documentation. The time given to an issuer to respond is usually two weeks.
105. The standard documentation always includes: (i) the approved financial statements and (ii) the auditor's long-form report and list of unadjusted audit differences. This is the starting point of an examination, and is requested from the issuer when an issuer is selected. If a relevant topic has been discussed in the audit committee, they can also ask for minutes of meetings. The company can also provide FREP with an external opinion on the issue.
106. When examining an issuer's financial statements, FREP looks at the most recently adopted stand-alone financial statements and the associated management report; and the most recently approved consolidated financial statements and the associated group management report.
107. For examinations, FREP reports that the focus is on material issues (although all of the financial statements are reviewed). The examiner (responsible Panel Member) identifies and presents the evidence for areas for a particular issuer that are or should be take priority for examination. The examiner looks also at the ECEP and national priorities (set by FREP). This approach "tailors" the examination to a particular issuer based on the issues identified. The examination will then proceed on these limited identified issues for that issuer.
108. FREP noted to the AG that the examination is not a re-audit. So, the examination by FREP will focus on a few core issues. Usually, five key issues are selected form review of financial

statements. FREP does not follow up everything with the issuer, they take a close look at a small number of relevant areas. While FREP focuses on main issues, they will also maintain a category of other things that are, for example, not clear enough in the financial statements. In addition to the five issues focused on, there is usually 'other' minor items (situations which are not material but clearly demonstrate poor application of IFRS). These minor items are also reported in the letter but with less emphasis (in most of the cases there is no follow up questions). Usually these can lead to recommendations of minor issues that are not material which are not reported for the purpose of the EECs Activity report as 'actions'.

109. FREP does not communicate the assessment of materiality to issuers, simply the fact that in FREP's view the error is material. They do necessarily make judgments on materiality before determining whether there is an error or a recommendation. FREP states that they cannot make their own judgment on what figures should be; However, where applicable, they assess whether the methodologies used are appropriate and analyse whether the issuers' assumptions are reasonable and consistent. FREP says that when it does an examination, they challenge issuers' figures but they do not to replace the issuers' assumptions with its own assumptions. FREP states though that they need internal information in order to do a proper examination of the underlying figures.
110. FREP says that there is no disclosure checklist or work programme checklist used in examinations as FREP relies on the experience of Panel Members. FREP says that the rotation of Panel Members ensures that there is a lot of communication and this ensures a level of consistency. Also, they say that the priorities are a form of checklist, but effectively there is a blank sheet for examiners. The learning experience is not formalised but relies on as an informal peer enforcement mechanism. FREP values the individuality of the examiners and the examinations. The quality review member adds a level of institutional input.
111. In focused examinations, the half-year financial reports are looked at, together with the most recently published 'payment reports', and the financial statements preceding the most recently adopted financial statements.
112. FREP states that they ask questions of an issuer in all cases. Therefore, every company knows that they are reviewed. Even if there is no obvious error, FREP will still raise questions on things that they would like to analyse further, for example something that appears risky although no indication of error.
113. The responsible Panel Members effectively does the review, and presents the output to the Chamber, after having consulted the Quality Review Panel Member.
114. Once the initial work of examination is presented, there is a Chamber meeting, with lengthy discussions arriving at preliminary or final decisions. There is no prescription for the how Chambers do their work, and it is reported that they can, and do, often meet more than once.

115. The Chamber stays constituted for all of the period during the examination. All questions and correspondence with issuers are sent by the responsible Panel member. The Chamber receives a draft of the first set of questions to the issuers to ensure that it agrees with the focus areas chosen.
116. FREP consults the EECS via BaFin on issues and can seek consultation with university professors and audit firms for “expert opinions”. The latter occurs on average 3 to 4 times per year. This expertise is solely to inform FREP and is not disclosed to issuers.
117. The time allocation on a case is roughly in the proportions of 60% by the responsible Panel Member, 30% by the Quality Review Panel Member and 10% by the Chamber voting members. Chambers will naturally spend more time on a case if there are important issues arising.
118. The responsible Panel Member analyses the issuer’s financial statements and other available information including subsequent interim financial statement and information identified in the press and prepares a written list of questions for the issuer. The quality review Panel Member also reviews the financial statements and the letter to the issuer before it is sent. The first set of questions is also sent to the Chamber in case it has additional questions for the issuer. The questions relate to potentially significant accounting issues and how the issuer’s chosen accounting treatment complies with the relevant reporting framework. Supporting documents, including for example purchase agreements (in case of business combinations) contracts, minutes of meetings, external appraisals, impairment calculation can also be requested from the issuer. Documents are requested or questions are included in letters to issuers irrespective of whether there is an indication in the disclosures that a particular accounting treatment may not be correct.
119. Letters are normally sent by FREP to the CFO of an issuer, who must respond in person providing the consent on behalf of the company. No communication is made by FREP to the supervisory board. They explain that approach on the basis that their process is voluntary, and that they are not allowed by law to contact the supervisory board. FREP can only contact the management board of the issuer or a member of the management board.
120. The issuer’s responses are reviewed by both the responsible Panel Member and the quality review Panel Member and additional questions are posed to the issuer if necessary. Depending on the issuer and the contentious issues identified, third party experts may be engaged to provide their opinion on specific issues. In the case of a potentially material error, the responsible Panel Member summarises the situation noted and analyses the relevant accounting treatment. The analysis is discussed with the quality reviewing Panel Member and the Chamber before a preliminary finding is sent to the issuer. The issuer is requested to indicate whether he agrees with both the description and the analysis and, if not, to support his position with reference to the relevant standards. The issuer also has the opportunity to meet the examination participants and discuss the issues in person.

121. Interaction with the issuer, and perhaps meetings with the issuer (with the auditors), lead ultimately to draft preliminary findings. Then, the responsible Panel Member will prepare a memorandum to the Chamber with an 'examination report' describing the review process. The examination report is underwritten by the Chamber.
122. At the conclusion of every examination the responsible Panel Member prepares a memo describing the various issues addressed during the examination and his/her overall conclusion. The Chamber discusses the various topics with the responsible Panel Member and the quality reviewing Panel Member and decides whether the financial statements on the whole are erroneous.
123. If the financial statements are not considered to be erroneous, FREP informs BaFin that the examination has been concluded. If the Chamber decides that an error has occurred, again the issuer is asked whether he agrees. If he concurs with FREP, FREP informs BaFin and BaFin requires as a rule that the issuer publish the error in *inter alia* the Federal Gazette. If the issuer disagrees with FREP, the case must be forwarded to BaFin, who then reviews the accounting issue again at its level.
124. If at the end of the examination the Chamber believes that there is an indication of an auditing error, the Auditing Oversight Body is informed. Likewise, if there is indication of potential criminal intent/activity, the district attorney is notified.
125. FREP informed the AG that there were no occasions when it has sought to expedite the examination process because the problem that is being investigated is urgent in nature. Examinations always proceed in the same manner, although some may take longer than others due to the complexity of the issues raised or the weight of correspondence between FREP and the issuer. In the 11 years (1,239 examinations) FREP has completed approximately 45% of its examinations within 6 months, and approximately 85% of its examinations within 12 months.
126. In 70-80% of cases issuers accept the error found by FREP. Issuers must consent to the jurisdiction of FREP and must agree to the decision by FREP.
127. In respect of recording what is done on examinations, FREP organises an electronic information system (with one dedicated employee). This is a database that records the progress of all cases and acts as a management information system. This was developed and introduced in 2007. The database does not permit a search for previous issues arising on which FREP accepted the accounting treatment followed by issuers.
128. The system describes three different phases with different input authorisations. The system includes documentation of recommendations and errors including the follow-up of implementation / restatement in the next financial statements. The system provides management reports on demand. It can also be used as a research tool to identify issuers, issues (with a number of fields including, for example, the number of an IFRS).

129. The management reports include all statistical data regarding examinations completed, error rates, types of errors and related analysis, acceptance rate, recommendations made, length of examinations, etc. The system also reports on concentration of issues in a year of examinations. The issues that are recorded are those where there were problems and where these were communicated to the issuer.
130. Where an issuer accepts the outcome of FREP, there is usually a publication notice by order of BaFin which will refer to FREP having found an error in the issuer's financial reporting. It will be, however, the publication of the company, not a publication of FREP. They have to publish the error in German in the 'Bundesanzeiger' (Federal Gazette for *inter alia* corporate financial statements) and as well as in either a national newspaper for statutory stock exchange announcements or by way of an electronic system for the dissemination of information which is broadly used by e.g. credit institutions. Where the issuer accepts the error, the information is given to BaFin who will direct the issuer to publish. FREP has no further involvement. This is the second tier and adds, it was estimated, about an additional 3 to 4 weeks to the process.
131. If a company, after having accepted an error from FREP, does not correct the error in the following financial statements, FREP stated to the AG that they could only go towards initiating an indication based examination and making the same or similar announcement the next year. But, FREP says, the auditor rarely would let that happen. However, FREP states that it is aware of two such cases in the past. The explanation FREP offers is that perhaps there is a change of auditor, or change of CFO, with as a result different judgements being made.
132. While there is a publicity notice regarding the outcome of the examination, issuers only have to correct errors in next financial statements in accordance with IAS 8; that is, correcting errors in the comparative financial statements.
133. Where the issuer does not accept the finding, the file is given to BaFin, and BaFin will proceed to deal with the file, and may order the company to publish some notice. In those cases, the publicity will state that the publicity follows an examination by BaFin.
134. In approximately 80% of cases FREP does not find a material misstatement, including evidence of missing disclosures.
135. FREP finds that errors occur in about 15% of the Stratum 1 issuers (DAX – 9%; MDAX – 15%; SDAX – 20%; TecDAX – 11%), whereas the experience is that the error rate of the Stratum 2 issuers arises to about 23%.
136. Across the 11 years, the proportion of cases in which errors are found has now stabilised at about 15% per annum, whereas in the early years the error rate was at about 25%.

137. In 2015 FREP made in total 12 findings of material misstatements. All of these had to be corrected via a publicised statement i.e. a corrective note. In 2015 FREP also made recommendations for corrections in future financial statements arising from 25 examinations.
138. When FREP makes findings of errors, it follows up subsequently to ensure that the errors are corrected in future financial statements. FREP also follows up to check on the implementation of recommendations.
139. The only “sanction” arising out the FREP process is publicity in amongst others the ‘Bundesanzeiger’ (Federal Gazette for *inter alia* corporate financial statements) ordered by BaFin. There are no powers directly available to FREP. Any publicity notices are made under the direction of BaFin. The Official Federal Gazette is in German, but FREP mentions that a high percentage of the persons with an interest in the financial market in Germany do not speak German. FREP reports that they have sought a translation of the publicity notices but were informed that there was a legal restriction on doing so.
140. The form of publication is not prescribed in law. FREP says that the extent of the form of public communication is drafted by FREP in accordance with what they see as the approach of BaFin. Should, FREP says, BaFin indicate a different approach for the publications (voluntary) then FREP could change its approach in the first draft publication that it would present to issuers as part of the conclusion of the examination. In any case, even if an issuer agrees, a file is sent to BaFin who will themselves decide on the wording of the publication.
141. In 55 cases over from July 2005 until December 2016, the issuer did not accept the outcome of the examination by FREP. This amounts to approximately 23% of the total cases examined with errors found by FREP. In 11 cases BaFin has concluded that there was no error. This amounts to approximately 5% of the total of cases examined and concluded by FREP that an error was found.

EECS

142. FREP also organises a ‘jour fixe’ - a monthly internal forum arranged for discussing accounting issues. In addition, before the discussion of accounting issues by the chamber, the Panel member in charge of the examination should assess whether there is a need to present issues to EECS. For this purpose, a specific form was developed in order to guide the Panel member to decide.
143. Before each EECS physical meeting, the FREP EECS representative splits the Emerging issues and decisions through the Panel Members who might have dealt with similar cases/previous experiences. Subsequently, a preparatory meeting is organised where all members discuss the cases and provide the EECS representative with input to bring forward to the meetings.

144. After the meetings, there is also an EECS wrap-up organised where a summary of EECS discussions of selected cases are shared and discussed.

Interaction with the Market

145. FREP also reports that it has an important preventive function in the German Market and on improving the quality of the application of IFRS. In this respect, every year FREP publishes its annual report where it provides statistics about its main findings (i.e. error findings, most common errors issues). Similarly, every year FREP publishes its enforcement priorities, which add on to the European Common Enforcement Priorities published by ESMA.

146. Additionally, FREP also holds annual individual meetings with the five largest audit firms to discuss its main findings in the examination carried to issuers audited by the respective audit firms. It also holds public meetings with smaller big audit firms, issuers' management and supervisory board members.

147. Due to the confidentiality regime in place in Germany, FREP is not allowed to share (not even in anonymous basis) detailed information about its findings, nor provide information about the rationale for considering that an accounting treatment is incorrect. In this respect, FREP reported that due to this regime German decisions are not able to be included in the ESMA's extracts of decisions. FREP acknowledges that this limitation may negatively impact its ability to further contribute to the enhancement of quality of application of IFRS in Germany and in Europe and thus further contributing to prevent errors to be found.

148. In this last topic, FREP noted that discussions are being undertaken with the German Minister of Justice about the confidentiality regime in place in Germany, potentially allowing FREP to share its internal documents with ESMA and/or allowing the publication, on anonymous basis, of decisions taken by FREP.

BaFin involvement in the examination procedure

149. As a rule, BaFin never carries out a first examination of financial statements. By law, it will generally be FREP that carries out the first examination. If BaFin thinks that there is an accounting problem with a company, they order FREP to initiate an enforcement examination – FREP are part of the system. So, BaFin cannot perform its own examination at the same time as presenting the information to FREP. FREP has no contact with BaFin prudential supervision. However, there is communication via BaFin's EFI unit. BaFin can stop FREP (Case 5) from doing work where there is overlapping supervisory work that is being carried out. In the latter, the ongoing examination must be exactly on the same scope / accounting issue.

150. In the case group 2 where a company does not accept the error findings by FREP, BaFin will carry out its own error identification examination. In this case, if BaFin comes to a conclu-

sion that there are errors that should be corrected and that a publicity notice should be published, then the company is made pay the cost of the hours incurred by BaFin on the examination. This ranges from approximately €5-10,000 to €100,000 in practice.

151. In the case group 3 where the company refuses or fails to cooperate with FREP during the first stage, then the company must pay the costs of the examination carried out by BaFin regardless of the outcome of the examination.

152. In some cases, BaFin can inform the market that there is an examination going on after a FREP examination. This has never been used (although it has been considered in all cases). BaFin reports that the use of this power would need extreme circumstances.

153. One of the steps in Case 3 is to check if a company plans to de-list. If the company will be, in the future, not listed, then BaFin might not perform any examination or proceed to a publication order (the company will need to have taken advanced steps in the process of delisting for this to apply). This, BaFin says, is due to a restriction in law. But if an error has been identified by FREP already, and the company just does not accept the outcome (Case 2), then BaFin can continue. BaFin recently succeeded in court to publish a notice of an error even where the company had de-listed.

154. In the 11 years of the two-tier system being in place, there have only been 20 (out of 1,239) cases where a company has refused or failed to cooperate with a FREP examination. These have been partially attributed to non-German companies that have been listed in Germany who are not familiar with FREP. In other cases it has been due to insolvency, wind-down situations, or a refusal to cooperate with FREP on the basis that FREP was about to make an conclusion which the issuer thought was erroneous. Non-cooperation with FREP is, therefore, relatively rare.

155. There have been 55 cases where companies have not accepted the outcome of a FREP examination. All of these are referred by FREP to BaFin. In 44 of these cases, BaFin has found errors as well. In 11 cases, BaFin has disagreed with FREP's findings or has not continued the examination due to a delisting.

156. When FREP sends a file to BaFin, there are three different scenarios:

- (a) where FREP has carried out an examination and the issuer accepts the outcome;
- (b) where FREP has carried out an examination but the issuer does not accept the outcome;
- (c) where the issuer refuses or fails to cooperate with the examination process of FREP

157. In each of these, what BaFin does is slightly different. BaFin acknowledges that the final outcome of each case – including juridical validity – is of outstanding importance for the success of the German two-tier enforcement system. BaFin has in mind, from the start, that the issuer may appeal to court, which actually does happen on a regular basis. In more than 20 % of all cases that BaFin has examined on the second tier, the issuers objected against BaFin's decision. Therefore, when performing an examination they strive to ensure that their decision is lawful. When principles in IFRS are not sufficiently clear to guarantee that the court would agree with their view or if it is impossible to gather sufficient information to prove in court that an issuer committed an infringement in the IFRS, they will decide in favour of the issuer. BaFin representatives pointed out that, in the field of intervention by administrative authorities the legality of the process takes precedence in terms of importance over a possible economic substance.

158. BaFin has within its organisation an independent department, to whom issuers can object in case they do not agree with the view of the BaFin EFI team, which reviews the case from a legal perspective. All the 21 cases prepared by the EFI team brought forward to this other department (12 with regard to the error identification and 9 with regard to error publication) were confirmed. In addition, the court has, until now, always confirmed BaFin's decisions in both the issuers' notice errors findings (4 decisions) and the errors publication (6 decisions).

(a) where FREP has carried out an examination and the issuer accepts the outcome

159. The power to order a publication of an error is reserved to BaFin, whether the error is identified by BaFin or arises from the process of FREP with the consent of the company. BaFin orders the company to publish the error identified together with the primary grounds for identifying the error. The financial reporting enforcement procedure require that the capital market be expressly informed of the identified accounting error, including all material grounds.

160. BaFin must examine, without being requested by the company, whether there is a public interest in the error being published. An example of cases where no public interest may exist are those where there are only trivial matters are concerned which "obviously represent insignificant violations of accounting rules". Time delay will not significantly diminish any public interest in publishing (because of, for example, the length of time of the two-tier enforcement system).

161. Public interest in publication cannot be excluded either by the fact that the market may have been informed by other means. Interestingly, the Higher Regional Court of Frankfurt has also decided that merely a correction of objectionable accounting violations (without mentioning the financial reporting enforcement procedure) in the next financial statements under no circumstances constitute sufficient grounds for an order to publish an error to be waived.

162. BaFin may waive the publication of an error if, upon the application of the company, BaFin comes to the opinion that publication would be likely to damage the legitimate interests of the company. Generally, though, priority will be given to the publication of the error. Consequences

which typically result from the publication of an error and which are unavoidable can never be successfully asserted as legitimate interests: a loss of confidence in the company's accounting practices and the related adverse effects for the reputation and valuation of the company's securities are, BaFin says, typical consequences of financial reporting enforcement which are deemed acceptable and which are therefore not unreasonable for a company.

163. Historically, non-publication on the basis of legitimate interest arguments has occurred only 3-5 times. And in all cases the information would have been corrected and so BaFin was satisfied that there was no dilution of the public interest in publication. No instances occurred in the last few years.
164. Publications must include not only the error but also the primary grounds for identifying the error. BaFin's requirements regarding the content of a publication are binding, but there is certain flexibility for the issuer with regard to the wording of the publication. The wording of the publication must enable the market to be informed about the identified error as well as the primary grounds for identifying the error.
165. The company is required to make the dissemination cumulatively in: the electronic Bundesanzeiger (Federal Gazette) and additionally in national newspapers for statutory stock exchange announcements or in an electronic information system which is broadly used in the financial industry. The publication must be made without undue delay.
166. BaFin can sanction a company that fails to comply with a publication order and it can publish the notice itself if the issuer refuses to do so. Sanction can also apply if there are unpermitted additions to the publication notice. Sanctions can be up to €2,500,000. This has been threatened, but there was never need to get through with it. In those cases where it was threatened, the issuer (re)published under order of BaFin.
167. FREP/BaFin have reported that publishing by ESMA of the decisions notified to EECS is not allowed under German law. The decisions notified to EECS contain much more information than are contained in the publication notices that are ordered by BaFin. As a result, if the EECS decisions were published, this would in effect amount to publication of confidential information of a German issuer. This is prohibited by German law. When asked about the possibility of extending the amount of information contained in a publicity notice, BaFin said that the law would restrict them from requiring an issuer to publish anything more than the bare minimum.
168. If an issuer accepts a FREP finding, publication follows within about 3-4 weeks. After findings from FREP are accepted, BaFin still has to have a hearing before it orders publication. This is due to the fact that German Law provides the issuer with the possibility to point out reasons that in the issuer's opinion would be likely to damage the legitimate interests of the company. Then publication without undue delay is ordered in a letter sent to the issuer (this actual publication part usually takes about 2 weeks). Also, BaFin states, the issuer has a certain discretion on how to formulate the publicity notice.

169. FREP sends the error formulation to BaFin along with their conclusions. BaFin normally follows this text in more than 90% of cases.

170. BaFin, when asked, agreed that the error information could be price-sensitive, but did point out that considering publication as soon as possible under market abuse law is not within the remit of the EFI unit. When FREP indicates to BaFin that they have arrived at error conclusions, one of the duties of BaFin financial reporting is to inform the market abuse team. The division working within BaFin on the oversight of *ad hoc* publications decides about the next steps. Often, the market abuse team make enquiries of the financial reporting team for understanding the item.

(b) where FREP has carried out an examination but the issuer does not accept the outcome;

171. BaFin commences its examination by making an initial analysis of the documents from the FREP procedure. BaFin states that it builds on the findings of FREP to gain an overview of the previous examination. BaFin will then focus its efforts on further clarifying the case by issuing requests for information using its powers. The issuer's arguments are analysed in further detail in discussions with issuers or with their representatives. BaFin may meet these in person or discuss in correspondence. BaFin may also get some additional expert opinions.

172. BaFin uses checklists for all examinations processing. Other units (in BaFin) are informed to be able to carry out investigations in their own remit, but these units do not assist in accounting enforcement. In the BaFin financial reporting unit though, there is some banking experience, and a budget for outside expertise if needed.

173. The examination of the individual issues is not set out in a procedure due, BaFin, says, to the differing nature of the issues identified by FREP.

174. From time to time BaFin discusses the progression of their assessments with FREP and the issues that arise during BaFin's examination of the issues.

175. BaFin states that its examination when it commences, as with FREP's, will always cover only selected parts of the financial statements to be audited. BaFin identifies that these are normally the areas in which indications of errors in accounting have been found or in which FREP has already found errors in accounting at the first-tier level.

176. However, in the discussions between BaFin representatives and the AG, the examination procedure by BaFin was described in the following way: BaFin has no right to look at issues beyond those found by FREP, unless it specifically identifies some other issue. It a focused examination on the issues identified by FREP.

177. BaFin stated that it often explores other issues that were not focused on by FREP. Wholly new accounting areas are very rarely examined. However, in many cases that BaFin undertakes a review of FREP's findings, they will base the error judgment differently than by FREP.

(c) where the issuer refuses or fails to cooperate with the examination process of FREP;

178. BaFin's process states that an error exists if an accounting practice violates the legal provisions including the relevant generally accepted accounting principles or other accounting standards permitted by law. In order to determine that accounting is erroneous the violations need to be significant either on their own or on an aggregate view. This is the case when investors consider such errors to be of relevance to them i.e. the errors are notably capable of influencing the company's performance that can be derived therefrom. Therefore, even several minor cases of non-compliance may produce an accounting practice which is deemed to be deficient if the overall picture of accounting is impaired thereby.
179. In carrying out the examination, BaFin, comparable to FREP, asks the company to provide documentation from the date of the financial statements and, where appropriate, supplementary explanations, provided that the information requested does not emerge from the documents. If necessary, BaFin executes this procedure several times.
180. BaFin takes into account FREP's enforcement priorities. In its examinations, BaFin focuses on the same issues as FREP (including ECEP). The reason for this is that a company which refuses to participate in the examination should not be treated differently than a company that participates. Otherwise, incentives could be created that would make it preferable for companies to refuse to participate in the examination by FREP.
181. An example was given by BaFin: BaFin was confronted with an issuer who introduced a number of different figures to FREP and later BaFin, each claimed as a possible "fair value". The issuer further claimed that this would illustrate the impossibility to determine one appropriate fair value. To handle this BaFin prepared a matrix in which the following information was given: method of valuation, basic assumptions and date of introduction into examination.
182. BaFin does not have a database of accounting issues that have been looked at. BaFin refers to their electronic filing which gives direct access and is, in their view, sufficient in the light of the small number of cases dealt with.
183. In response to views expressed by the AG that BaFin's approach might be regarded as being a bit overly legalistic, BaFin confirmed that it sets the highest priorities in winning enforcement procedures on the second tier in court. BaFin stated that given that in more than 20% of cases BaFin's conclusions are not accepted and appeals are filed, this aim has a high practical relevance.
184. The members of the AG got the impression that BaFin is rather reluctant when it comes to establishing infringements if there would only be a small probability that a court might come to a different conclusion than BaFin.
185. BaFin argues that on the contrary,

- it examines on the second tier enforcement cases in which FREP did not establish any infringements and draws its own conclusions;
- it takes decisions that are in contrast to almost the entire German accounting literature;
- it establishes infringements in cases where FREP only made recommendations;
- it establishes infringements in areas previously examined by FREP to which the latter did not object; and
- on the basis of FREP's findings, BaFin establishes infringements that might have a more disadvantageous effect on issuers in terms of nature and extent.

186. BaFin states that all these cases occur on a regular basis, and there is a high risk that a court will not agree with BaFin's conclusions.

187. BaFin states that, in fact, it is true that due to the priority of its success in court, BaFin makes every effort in order to achieve the highest quality of its decisions. This also includes meeting all legal procedural requirements in order to successfully defend decisions deemed materially correct by BaFin.

3. Main conclusions of the onsite visit

Positive aspects

Guideline 2 requires that the manpower should be professionally skilled taking into consideration the characteristics of issuers under review and complexity of financial statements.

188. The AG acknowledges that larger issuers, of which there are many in DE, usually have more resources available to them than smaller issuers, specifically in terms of staff and financial resources for preparing financial statements. In addition, financial statements of larger issuers are usually more complex as they often entail different lines of business and complex transactions. In a market as exists in DE, it is important that FREP/BaFin are able to compete in terms of excellence and know-how of its team as well as the financial resources with their interlocutors. The AG considered that FREP and BaFin Staff, including the Board and directors, are highly professionally skilled in the relevant financial reporting frameworks used by issuers.

189. The AG considers that FREP and BaFin staff is also highly experienced. The average relevant experience is high, 23 and 11 years of professional experience on average for FREP and BaFin respectively.

190. The AG also considers that the different experience backgrounds of Panel Members in FREP is good feature of enforcement system in place, as it allows FREP to analyse issues and discuss with issuers different perspectives of an accounting issue under examination.

Guideline 5: Enforcement normally uses selection. The selection model should be based on a mixed model whereby a risk based approach is combined with a sampling and/or a rotation approach.

191. FREP has recently changed its selection model. The new selection model in place uses a mixed model combining risk, rotation and random approaches. The risk approach considers both concrete risk (when a specific risk/ area/infringement is identified) and abstract risk (when the risk identified in, for instance, the media is not restricted/specific to an area). Entities subject to abstract risk are also subject to random selection (i.e. not all issuers where an abstract risk is identified are selected for an unlimited scope examination on that basis). The AG believes that the risk-approach followed ensures that companies subject to high risk of misstatement are selected for examination. To a lower degree, the impact of a misstatement on financial markets is also covered in the risk assessment. Entities with higher capitalisation and higher impact on financial markets are exposed to greater attention from the media, and thus are more likely to be selected based on the abstract risk than smaller issuers.

192. The rotation in place ensures that during a certain period of time all issuers are subject to an unlimited scope examination. Companies included in the main indexes are subject to rotation whereby all issuers should be reviewed every 4/5 years; other companies are reviewed at least once every 8/10 years.
193. By ensuring that companies belonging to main indices are reviewed every 4/5 years, the rotation approach in place complements the lower weight given to the impact of a misstatement on financial markets on the risk approach. At the same time, smaller issuers are not scoped out, as these are also subjected to an unlimited scope examination although during a longer period.
194. The random approach of the selection model together with the fact that the rotation cycle does not repeat indefinitely (i.e. once the rotation cycle closes, a new cycle begins with different order of selection of issuers) ensures that issuers are not able to predict when they will be examined once again.
195. Based on the above, the AG considers that the selection model in places ensures that there is a real possibility that an issuer is selected for review by FREP.

Guideline 6 states that as part of the enforcement process, European enforcers should identify the most effective way for enforcement of financial information. In addition, this guideline provides a list of examples of examination procedures that enforcers may follow when performing an examination. It also notes that the examination techniques as well as the related conclusions should be documented appropriately.

196. As part of the examination procedures, FREP uses both unlimited scope and focused examinations. The AG considers a good practice to always raise questions and/or request documentation in the context of an unlimited scope examination. If the examination covers the whole financial information, FREP will generally focus on the main key issues, even if no indication of errors have been encountered or irrespective of the quality of the disclosures. This overall approach clearly demonstrates that FREP examinations go beyond a review of the disclosures as the questions raised deal with recognition, presentation and measurement issues. AG considers a good practice to send letters to issuers, prioritised based on the key areas identified, as well as the fact that FREP also issues recommendations for minor issues encountered on disclosures during the review contributing to improving the quality of financial information.
197. FREP starts its examination by analysing the auditor's long-form report as well as to the list of unadjusted audit differences. and it also takes into account issues referred to them by other authorities. The AG believes that reviewing the auditor's long-form report and the unadjusted audit differences gives FREP a clear advantage when performing a specific examination as it provides Panel Members with relevant information about the issuer, the selected financial information, which helps them to identify accounting issues to raise with issuers.

198. The procedures in place in FREP ensure an appropriate level of review on the findings and conclusions reached by the Panel Member in charge of an examination. Before each letter is sent, the findings and conclusions are shared with the Panel Member responsible for the quality review who provides feedback and exchanges information with the Panel Member in charge for the examination. In addition to the quality review Panel Member, the Chamber (which usually includes the President, Vice-President and third Panel Member) ensures the consistency of the decisions taken considering other cases and opinions of three other experts not directly involved in the examination. This procedure ensures that different aspects are considered and that all relevant arguments are analysed.

Other aspects of enforcement:

199. Although the AG believes that more decisions and emerging issues could be brought forward by FREP/BaFin to ESMA and to the EECS³, the AG also acknowledges FREP and BaFin's contribution to the discussions of cases (emerging issues and decisions), very often bringing new points of view on the topics under discussion, sharing experiences, and participation/leadership in the ESMA groups.

200. The AG also acknowledges FREP/ BaFin engagement with the EECS, notably its contribution when presenting emerging issues or decisions of high complexity and providing comments to the cases presented by other enforcers. The AG considers that the meetings held by FREP before and after each EECS meeting contributes positively to sharing knowledge amongst the Panel Members and ensuring that issues discussed in EECS are considered when performing their own examinations.

Aspects to improve

Guideline 2: Enforcers should have sufficient human and financial resources to carry out their activities in an effective manner.

201. The AG notes that contractual arrangements of Panel Members in FREP are unusual among the enforcers selected for an onsite visit. Currently, all Panel members have 4 years renewable contracts. Even in the situation when a Panel Member agrees to extend the contract and has demonstrated the quality of the work performed, the nomination committee has the final decision (e.g. power to block the renewal of contracts). FREP should consider to extend the contracts for longer periods when Panel Members have demonstrated their motivation, intention to continue and the quality of the work performed. AG is of the view that longer term contracts or no term contracts, in some cases, could ease the management of conflict of interests (e.g. Panel members in some cases continue to hold a contract with an audit firm which

³ Please refer to the following section

is problematic regarding independence at least in appearance). It could also release the pressure of Panel Members' motivation and commitment when the contract term is close to the end.

Guideline 5 – The selection model should be based on a mixed model whereby a risk based approach is combined with a sampling and/or rotation approach.

202. During the onsite visit, FREP confirmed that most of the risk factors identified for the abstract risk assessment are based on the information extracted from the media. The AG is of the view that, although external factors sources should always be taken into account, specific factors relating to the intrinsic risk profile of an issuer should also be considered.

203. In this respect, AG notes that not all the companies are exposed to the same level of attention by the media, and not all complaints received by FREP may be sufficiently detailed to prompt an examination. Therefore, FREP and other enforcers should consider enhancing the procedure leading to the identification of abstract risks. For instance, by obtaining specific financial information of issuers available at the time of the selection such as financial indicators extracted from databases such as Bloomberg, or by analysing equity research reports where trends or significant deviations of market expectations from reality, may be identified.

204. In addition, it is advisable that the interaction with BaFin when selecting issuers for examination is reinforced. For example, BaFin could share information with FREP concerning their work when monitoring the market for the purposes of the market abuse regulation and on grounded complaints received by them on issuers.

Guideline 6 Guideline 6: As part of the enforcement process, European enforcers should identify the most effective way for enforcement of financial information.

205. BaFin never carries out a first examination of financial information. BaFin always carries out a review when FREP has not been able to adequately close its own examination (in case of absence of cooperation from the issuer or if the issuer does not accept FREP's conclusion or when BaFin disagrees with FREP conclusion).

206. In those cases, BaFin has always begun its own examination based on FREP identified issues (this approach may be extended if suspicions of other significant issues are encountered).

207. The approach followed by BaFin is then based on a procedures checklist to ensure that communication adequately flows within the organisation and that every legal aspect is respected. This approach can be explained by the fact that BaFin does not deal with issuers in the normal enforcement process but is in charge of the exceptional cases, namely those issuers who have refused to cooperate with FREP or to accept their decision. The fact that those issuers might appeal to court may play a role on the approach followed.

208. It is the impression of the AG that BaFin often takes a legalistic approach in the way it deals with accounting issues. Based on the discussions held with BaFin and the cases presented/discussed in EECS over the period under analysis, it seems to the AG that, notwithstanding what BaFin represented to the AG (set out in paragraphs 186 *et seq.*), BaFin has a higher threshold than other enforcers when identifying infringements and thus might be reluctant to take a decision about a misstatement if there is a risk that a court might decide otherwise. However, as IFRS are principles based standards, in most cases enforcers should give more weight to the economic substance of an issue rather than its legal form.

Database

209. FREP described the database in place to support the work undertaken. The AG considers that it is fundamental that there is a record of the enforcement cases, infringements found and most relevant accounting treatments accepted. This enables Panel members not in charge of a specific examination to obtain information on the cases encountered by examiner, areas covered, and whether the accounting treatment followed by the issuer was considered acceptable or not and eventually apply similar judgements in similar cases. For this reason, the AG considers that the database in place could be improved to include information about the most relevant issues raised with issuers which were accepted by FREP.

Other aspects of enforcement:

Publication

210. When reviewing the way decisions related to discovered infringements are communicated to the market, the AG is of the view that the contents, the timing and the means of dissemination could be improved.

Content/confidentiality

211. The contents of the publication are often quite poor in terms of information disclosed (e.g. about the rationale of the decision or the details of the errors) because of the confidentiality regime in Germany. This makes it difficult for investors to understand the implication of the misstatement. It would help investors if the issuer could be requested to issue a corrective note with the corrective information. In addition, publications of error findings on the German Federal Gazette are often only in German. The AG believes that this procedure also does not ensure that all investors are treated on an equal footing. Although the TD does not require that issuers disclose information in a language other than the language(s) accepted by the Home member State⁴, the AG believes that where errors are detected, issuers should be required to publish corrective notes in all the languages used by the issuer when publishing and disseminating its annual/interim financial reports to the market (i.e. if the issuer published the annual

⁴ In the cases where securities are admitted to trading on regulated market only in the home member state (article 20 (1) of the TD). Please also refer to article 20 (2) of TD for other cases.

financial report in English and German, then this issuer should also publish corrective notes in both languages). This would ensure a non-discriminatory publication/dissemination of information to all investors regardless of its nationality or knowledge of German language.

212. The AG believes that the confidentiality regime in Germany also affects a consistent application of IFRS in Europe. As the legal framework in Germany prevents FREP and BaFin to fully comply with the ESMA Guidelines (i.e. notably with Guideline 17), European issuers cannot fully benefit from the knowledge gathered by these two authorities when enforcing IFRS. Regardless of its technical merit, whether divergent application is identified or the complexity of the accounting issue, ESMA's extracts of EECS decisions cannot contain decisions taken in Germany (even if these decisions are published on an anonymous basis). Consequently, European issuers cannot take into account the infringements made by other issuers and the rationale supporting the decisions taken by German enforcers when preparing their financial statements. This approach deprives the market of useful information that could prevent the occurrence of similar errors.

Timing

213. When the issuer and FREP agree with FREP errors' finding (in the vast majority of the cases), the process requires BaFin to order the publication of the error in the Federal Gazette. Such process could significantly delay the publication without any real added value. Quicker communication of errors to the market may indeed be useful as it may be relevant information for the purpose of the Market abuse regulation, and it will always be information that an investor would take into account i.e. the information is material. For instance, the AG considers that the system in place could be improved if FREP could discuss/agree with issuers the publication of the error findings at the same time they discuss whether the issuers' agree with their decisions. This could reduce the time needed to validate a publication between BaFin and issuers after an agreement of the issuer with FREP's findings of errors.

Independence/conflict of interest

214. While the AG is of the view that FREP has in place a sound policy of conflict of interests ensuring the independency of Panel Members involved in a given examination, it also considers that is paramount that the market acknowledges, recognises and perceives the enforcer as an independent organisation. FREP should be independent in appearance as well as in substance. For this purpose, the enforcer should not be unduly influenced by issuers, auditors, the government or other market participants. In accordance with paragraph 39 of the Guidelines, the independence from issuers and auditors should, amongst other things, be achieved through codes of ethics and through the composition of the Board of the enforcer. In the opinion of the AG, board members should not have any existing relationships (including non-monetary) with entities subject to enforcement or with auditors responsible for issuing opinions on issuers' financial statements while they are responsible for enforcement, if such relationship serves to undermine the necessary independence. FREP should consider if and to what extent this is a problem.

215. The FREP/BaFin could also consider implementing policies in case a Panel Member starts employment in an entity subject to enforcement or in an auditor of such entity. For instance, FREP could consider setting up cooling off periods to prevent that Panel Members terminate contracts with FREP and start immediately thereafter working for an issuer where they had a previous direct involvement in the examination of that issuer's financial statements (either as the examiner or as a member of the chamber). Similar rules could be applied when Panel Members terminate contracts and start working in audit firms. In the latter, Panel Members should be prevented of having any direct relationship with an audit performed to issuers subject to an examination where that Panel Member had direct involvement. Panel members could also be required to notify the Board in case they start employment negotiations with external parties subjected to enforcement and/or its auditor. These notifications would prevent that Panel members have access to information of issuers/auditors which they would not have if they were not working for FREP (e.g. a Panel member may have access to sensitive information related to a direct competitor of a party with which they are negotiating an employment contract).⁵

Communication between the two tier system authorities

216. FREP selection model of issuers could be enhanced if BaFin would exchange information with FREP in relation to issuers monitored for the purposes of the market abuse regulation. As financial information is usually price sensitive, abrupt movements in the price of securities may give an indication that financial information of a particular issuer may need to be examined.

217. The AG considers that there is room to improve the synergies between the different departments within BaFin. For instance, the AG believes that the work performed by FREP/BaFin EFI unit could further benefit if they could share the evidence acquired during onsite inspections organised by the departments in charge of the prudential supervision or at least to get information about the outcome of these investigations. This would allow the BaFin EFI team/ FREP to gather relevant information for the enforcement of financial information and to discuss accounting issues directly with issuers in their own environment and to see more directly how measurement principles are being applied.

EECS

218. The number of decisions submitted by the FREP/BaFin to the EECS database is also relatively low when compared with the total number of examinations performed during the period under review (177 examinations undertaken and 5 decisions submitted). The AG also noted that the ratio of decisions submitted to the EECS database when compared with the total of

⁵ In this respect please refer to the ECB code of conduct https://www.ecb.europa.eu/ecb/le-gal/pdf/oj_joc_2015_204_r_0004_en_txt.pdf as an example of code of cooling off periods and notifications. These examples would need to be adjusted to the circumstances of the contracts, work performed and the legal framework in Germany.

cases is inferior to that presented by other countries with less important markets. Although the DE market represents around 9% of the total number of IFRS issuers in Europe, the number of decisions submitted by the FREP to the EECS database during the period under review only represented 4%.⁶ The AG thinks that the authorities in DE could submit more decisions to EECS.

Non-compliance with Guideline 7

219. In addition to Guideline 7, BaFin has explained in their official comply-or-explain notification that they do not comply with Guideline 7 because:

- a. There is neither the possibility to require reissuance of financial statements nor to require a correction in the future financial statements
- b. The German system can only provide capital market participants with the corrected information where an infringement can be determined according to available accounting records. In all other cases, the publication of errors is restricted to the statement of the error without any corrective information.

220. While it is acknowledged that the powers to enforce financial information conferred on national competent authorities by the national law are not fully harmonised, the TD set outs the minimum powers that all competent authorities should have to ensure that the financial information published by issuers is in accordance with the relevant reporting framework.

221. Notably, article 24 (3) states that

“Each competent authority shall have all the powers necessary for the performance of its functions. It shall at least be empowered to:

(a) require auditors, issuers, holders of shares or other financial instruments, or persons or entities referred to in Articles 10 or 13, and the persons that control them or are controlled by them, to provide information and documents;

(b) require the issuer to disclose the information required under point (a) to the public by the means and within the time limits the authority considers necessary. It may publish such information on its own initiative in the event that the issuer, or the persons that control it or are controlled by it, fail to do so and after having heard the issuer;

(h) examine that information referred to in this Directive is drawn up in accordance with the relevant reporting framework **and take appropriate measures in case of discovered infringements.**”

⁶ Decisions taken based on Guideline 13 of the EFI Guidelines.

222. Overall, although all NCAs had to transpose the transparency directive into their domestic legislation, only BaFin reported its inability to comply with guidelines due to lack of enforcement powers.

223. Considering the importance of the Guidelines for ensuring the common, uniform and consistent application of Union law, which was confirmed by the European Parliament declaring that it “welcomes the fact that the Commission is encouraging Member States to follow the ESMA guidelines on the enforcement of financial information (ESMA Guidelines on enforcement); deplores that several Member States do not comply and do not intend to comply with the ESMA guidelines on the enforcement of financial information and calls on these Member States to work towards compliance (...);”⁷ it is important that the European Commission together with the BaFin analyse whether the issue that prompts the non-compliance of BaFin is due to an incorrect transposition of the TD into the national legislation and if so to act upon it to solve this issue.

⁷ <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A8-2016-0172&format=XML&language=EN>

Annex 1 Table of recommended actions

Paragraph(s)	Topic	Status
201	Contracts of Panel Members	For consideration
202-204	Risk profile of issuers	Open
205-208	Approach to EFI	For consideration
209	Improvement of database	Open
210-212	Content of publicity notices	For consideration
213	Timing of publicity notices	For consideration
214	Independence	For consideration
215	Cooling-off periods	For consideration
218	EECS	For consideration

Legend of the Status column:

Addressed: means that the finding has been acted upon in a satisfactory manner

For consideration: means that the relevant paragraph(s) contain observations that the NCA is expected to consider

Open: means that the finding should be acted upon