

Response Form to the Consultation Paper

Draft Guidelines on Enforcement of Sustainability Information (GLESI)



Responding to this paper

ESMA invites comments on all matters in *Consultation Paper – Draft Guidelines on Enforcement of Sustainability Information* (ESMA32-992851010-1016) and in particular on the specific questions summarised in Annex III of the Consultation Paper and included in this response form. Comments are most helpful if they:

- respond to the question stated;
- contain a clear rationale; and
- describe any alternatives ESMA should consider.

ESMA will consider all comments received by 15 March 2024.

All contributions should be submitted online at www.esma.europa.eu under the heading “Open consultations” → “Consultation on draft Guidelines on Enforcement of Sustainability Information”.

Instructions

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

1. Insert your responses to the questions in the Consultation Paper in the present response form.
2. Please do not remove tags of the type <ESMA_QUESTION_GLESI_1>. Your response to each question has to be framed by the two tags corresponding to the question.
3. If you do not wish to respond to a given question, please do not delete it but simply leave the text “TYPE YOUR TEXT HERE” between the tags.
4. When you have drafted your response, name your response form according to the following convention: ESMA_GLESI_nameofrespondent_RESPONSEFORM. For example, for a respondent named ABCD, the response form would be entitled ESMA_GLESI_ABCD_RESPONSEFORM.
5. Upload the form containing your responses, **in Word format**, to ESMA’s website (www.esma.europa.eu under the heading “Open consultations” → “Consultation on draft Guidelines on Enforcement of Sustainability Information”).

Publication of responses

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publicly disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with ESMA's rules on access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by ESMA's Board of Appeal and the European Ombudsman.

Data protection

Information on data protection can be found at www.esma.europa.eu under the heading '[Data protection](#)'.

Who should read this paper?

This consultation paper will be of interest to listed undertakings required to publish sustainability information by the Corporate Sustainability Reporting Directive and Article 8 of the Taxonomy Regulation, to investors and other users of sustainability information and to auditors and independent assurance services providers.

General information about respondent

Name of the company / organisation	Institut der Wirtschaftsprüfer in Deutschland e.V. [Institute of Public Auditors in Germany, Incorporated Association (IDW)]
Activity	Audit/Legal/Individual
Are you representing an association?	<input checked="" type="checkbox"/>
Country / region	Germany

Questions

Q1 Do you have comments on the proposed scope of the GLESI? If yes, please explain your views and provide alternative suggestions where needed.

<ESMA_QUESTION_GLESI_1>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_GLESI_1>

Q2 Should any further legislative references be added to section 2.1 of the GLESI? If yes, please explain which ones and why.

<ESMA_QUESTION_GLESI_2>

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<ESMA_QUESTION_GLESI_2>

Q3 Should any other abbreviations be added to section 2.2 of the GLESI? If yes, please explain which ones and why.

<ESMA_QUESTION_GLESI_3>

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<ESMA_QUESTION_GLESI_3>

Q4 Do you agree with the definitions ESMA proposes for inclusion in section 2.3 of the GLESI? Has ESMA covered all the concepts that need to be defined? If not, please explain your concerns and propose how to address them.

<ESMA_QUESTION_GLESI_4>

To foster a common understanding amongst national competent authorities, there should be references to existing definitions in the EU legislation (of terms such as “material” and “double materiality” in ESRS). GLESI should not contain definitions of terms with regard to

sustainability reporting requirements, that are not used in EU legislation, as GLESI cannot fill the gaps of missing definitions in ESRS.

From an assurance perspective, according to the standards developed by the International Audit and Assurance Board (IAASB) the term “misstatement” includes “omission” (see in particular: ISAE 3000 (Revised) para. 12 (o) and ED ISSA 5000 para. 17 (aa). The term “misstatement” is also defined by ISA 200 para. 6 and ISA 450 para. A1, although the latter two will not be applicable for the assurance on sustainability reporting). However, we are concerned that requiring enforcers to adopt the same terminology (material misstatement) but with a different meaning will cause confusion in the market. Without alignment, the same phenomenon will be referred to as a material misstatement in an assurance report and an infringement by an enforcer.

<ESMA_QUESTION_GLESI_4>

Q5 Do you agree with the proposed purpose of the GLESI? If not, please explain why and make a proposal for what should change.

<ESMA_QUESTION_GLESI_5>

We agree the guidelines’ objectives should ensure consistent application of the relevant legislation. However, para. 7 of the explanatory text refers to the GLESI helping enforcers in “discovering potential infringements with issuers’ sustainability information, for example in relation to greenwashing”. In practice there are still uncertainties and issues that involve interpretation leeway to foster a common understanding of the new reporting rules. Enforcers must be aware of these issues when performing their enforcement work.

<ESMA_QUESTION_GLESI_5>

Q6 Do you have any remarks on the compliance and reporting obligations?

<ESMA_QUESTION_GLESI_6>

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<ESMA_QUESTION_GLESI_6>

Q7 Do you agree with the proposed objective of the enforcement of sustainability information? If not, please explain why and provide suggestions for amendments.

<ESMA_QUESTION_GLESI_7>

The wording of the proposed objective “contribute to a consistent application of the sustainability information framework” in Guideline 1 para. 13 is questionable, because it does not reflect the fact that, particularly for first time application of new reporting requirements, there is interpretation leeway, which will only be minimized over time. Narrowing interpretation leeway will not be achieved by enforcement actions alone. In our view, solutions can only be established by way of dialogue between reporting undertakings, enforcers and assurance practitioners. Furthermore, the focus should not only be on consistent application but also on appropriate application as well.

<ESMA_QUESTION_GLESI_7>

Q8 Do you agree with the draft Guideline 2 on how enforcers should ensure that they have an effective process for enforcing sustainability information? If not, please explain why and provide suggestions for amendments.

<ESMA_QUESTION_GLESI_8>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_GLESI_8>

Q9 Do you agree with the draft Guideline 3 on enforcement of sustainability information prepared under equivalent third country sustainability reporting requirements? If not, please explain why and provide suggestions for amendments.

<ESMA_QUESTION_GLESI_9>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_GLESI_9>

Q10 Do you agree with the draft Guideline 4 on the independence of enforcers? If not, please explain why and provide suggestions for amendments.

<ESMA_QUESTION_GLESI_10>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_GLESI_10>

Q11 Do you agree with the draft Guideline 5 on the mixed selection model? If not, please explain why and provide suggestions for amendments.

<ESMA_QUESTION_GLESI_11>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_GLESI_11>

Q12 Do you agree with the draft Guideline 6 on the timing of the selection model? If not, please explain why and provide suggestions for amendments.

<ESMA_QUESTION_GLESI_12>

ESMA acknowledges the importance of ensuring convergence in the way enforcers concretely carry out their selection (para. 47 of the consultation). We note that Guideline 6 para. 42 purportedly contains a new sentence (not taken from the GLEFI) allowing the enforcer to select a period to ensure sufficient frequency of selection. We question this approach, as it is unclear to us how this can ensure harmonization between GLESI and GLEFI or between member states.

<ESMA_QUESTION_GLESI_12>

Q13 Do you agree with the proposed Guideline 7 on the selection universe? If not, please explain why and provide suggestions for amendments.

<ESMA_QUESTION_GLESI_13>

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<ESMA_QUESTION_GLESI_13>

Q14 Do you agree with the draft Guideline 8 on the four types of examination enforcers can use when they examine sustainability information? If not, please explain why and provide suggestions for amendments.

<ESMA_QUESTION_GLESI_14>

We have concerns that para. 55 a) ii) addresses an anticipation that a desktop examination alone can lead an enforcer to conclude that there is an infringement. As a minimum we suggest prior to publication the issuer be informed and given the opportunity to provide supporting documents to challenge such findings.

Furthermore, we are not convinced that desktop examinations can be fully effective without taking into account the role of the issuer's materiality assessment process – without this they would often have to be restricted to an examination of whether mandatory information is adequately reported.

In our opinion, companies should be obliged to inform their auditors of any enforcement activities.

<ESMA_QUESTION_GLESI_14>

Q15 Do you agree with the draft Guideline 9 which addresses the enforcer's examination process? If not, please explain why and provide suggestions for amendments.

<ESMA_QUESTION_GLESI_15>

If a matter has been identified by the NCA during the examination process, issuers be given the possibility to bring up and potentially challenge the preliminary findings.

Documenting the discussions and their outcomes and sharing them amongst the NCAs can also be helpful in terms of fostering transparency.

As mentioned in our response to q.14, companies should be obliged to inform their auditors of any enforcement activities.

<ESMA_QUESTION_GLESI_15>

Q16 Do you agree with the draft Guideline 10 which presents the conditions which enforcers should apply when they offer their issuers pre-clearance of sustainability information? If not, please explain why and provide suggestions for amendments.

<ESMA_QUESTION_GLESI_16>

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<ESMA_QUESTION_GLESI_16>

Q17 Do you agree with the draft Guideline 11 which requires enforcers to undertake quality reviews of their enforcement processes? If not, please explain why and provide suggestions for amendments.

<ESMA_QUESTION_GLESI_17>

We support the idea of carrying out periodic quality reviews of the enforcement processes in order to identify areas for improvement and achieve consistency.

However, IDW suggests that the results of these quality reviews be discussed at a sufficiently high level. We would also like to suggest these conclusions to be shared with ESMA in order to foster further harmonisation across EU Member States. Finally, for transparency purposes, we would encourage these quality reviews (or a summary thereof) to be made publicly available.

<ESMA_QUESTION_GLESI_17>

Q18 Do you agree with the draft Guideline 12 which presents the considerations enforcers should apply when they identify an infringement in the sustainability information and have to determine which enforcement action to use? If not, please explain why and provide suggestions for amendments.

<ESMA_QUESTION_GLESI_18>

As a matter of principle, we strongly disagree that any immaterial matter should be treated as if it were material (see Guideline 12, para. 64).

We appreciate the notion that when an issuer has “wilfully” not corrected an immaterial departure in order to achieve a particular presentation such an action might demand further consideration. However, an individual immaterial finding needs to be considered in conjunction with further immaterial misstatements (also see here the issue raised in our response to q. 4) and only if in combination their impact in terms of achieving a particular presentation is material should the enforcer take the appropriate action for a material matter – i.e., when two or more uncorrected immaterial misstatements result in a biased presentation of a material matter or in their sum become material. The audit profession uses the notion of performance materiality to address this phenomenon (see ED ISSA 5000 para. 17 (gg) and ISAE 3410 para. 14 (p); the concept is also used in ISA 320 “Materiality in Planning and Performing an Audit”, para. 9, although the latter will not be applicable for the audit of sustainability reporting). In this context, we do not understand the reference to materiality in para. 66 at all, as it seems contradictory.

<ESMA_QUESTION_GLESI_18>

Q19 Do you agree with the draft Guideline 13 which clarifies the approach to materiality in the enforcement of sustainability information? If not, please explain why and provide suggestions for amendments.

<ESMA_QUESTION_GLESI_19>

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<ESMA_QUESTION_GLESI_19>

Q20 Do you agree with the draft Guideline 14 which establishes that enforcers should check whether issuers took appropriate action when they were subject to an enforcement action? If not, please explain why and provide suggestions for amendments.

<ESMA_QUESTION_GLESI_20>

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<ESMA_QUESTION_GLESI_20>

Q21 Do you agree with the proposed requirements for how to coordinate enforcement of sustainability information at a European level in draft Guidelines 15, 16, 17, 18, 19 and 20? If not, please explain why and provide suggestions for amendments.

<ESMA_QUESTION_GLESI_21>

Sustainability reporting under ESRs (and future third country sustainability reporting frameworks deemed equivalent) is a new area to all players in the corporate reporting ecosystem, so we fully support ESMA's desire to foster a high level of harmonization. To this end, we support requiring all enforcers to be members of ESMA's SRWG in Guideline 15 and the clarification in Guideline 16 that neither ESMA nor the enforcers issue application guidance – this being the role of standard setters. In Guideline 17 we also fully support the mechanism (para. 79) to alert the EU Commission to material controversial reporting issues and further matters as outlined in para. 70 of Guideline 16 and the stipulation in para. 81 of issues to be brought to the attention of ESMA for discussion in the SRWG.

However, in the public interest, and especially in regard to Guideline 17, we see a role for ESMA's SRWG to confer with standard setters, representatives of issuers and the assurance profession(s) regarding – at least – key matters or emerging issues of significant importance for the internal market (para. 80 b) when determining 1.) common views as to what constitutes a consistent approach (para. 76), 2.) outcomes of discussions of an emerging issue on the same or similar reporting issue (para. 80 c and d and also referred to in para. 81), 3.) cases where there is an identified risk of significantly different reporting practices by issuers across Europe (para. 80d), and 4) when further guidance from other enforcers in relation to a complex matter is desired (para. 83).

<ESMA_QUESTION_GLESI_21>

Q22 Do you agree that it is useful to publish extracts of decisions taken by enforcers, as required by draft Guideline 21, and to report on enforcement activities at national and European level, as required by draft Guideline 22? If not, please explain why and provide suggestions for amendments.

<ESMA_QUESTION_GLESI_22>

We support Guideline 21 as we strongly support the regular publication of decisions taken by enforcers. In our opinion this will help to better reconcile the perspectives of the enforcers to those of the issuers and assurance practitioners.

<ESMA_QUESTION_GLESI_22>

Q23 Do you agree that the proposed policy option 1 is preferable from a cost-benefit perspective? If not, please explain. If yes, have you identified other benefits and costs which are not mentioned above?

<ESMA_QUESTION_GLESI_23>

We agree with the proposed policy option 1, provided due effort is made to ensure that GLESI is fit-for-purpose for the enforcement of sustainability information. Therefore, in our opinion, finetuning is needed in the transition from GLEFI to GLESI.

<ESMA_QUESTION_GLESI_23>

Q24 If you advocate for a different policy option, how would it impact the benefits and costs? Please provide details.

<ESMA_QUESTION_GLESI_24>

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<ESMA_QUESTION_GLESI_24>

Q25 Do you wish to raise any other points which ESMA should consider as it finalises the guidelines?

<ESMA_QUESTION_GLESI_25>

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<ESMA_QUESTION_GLESI_25>