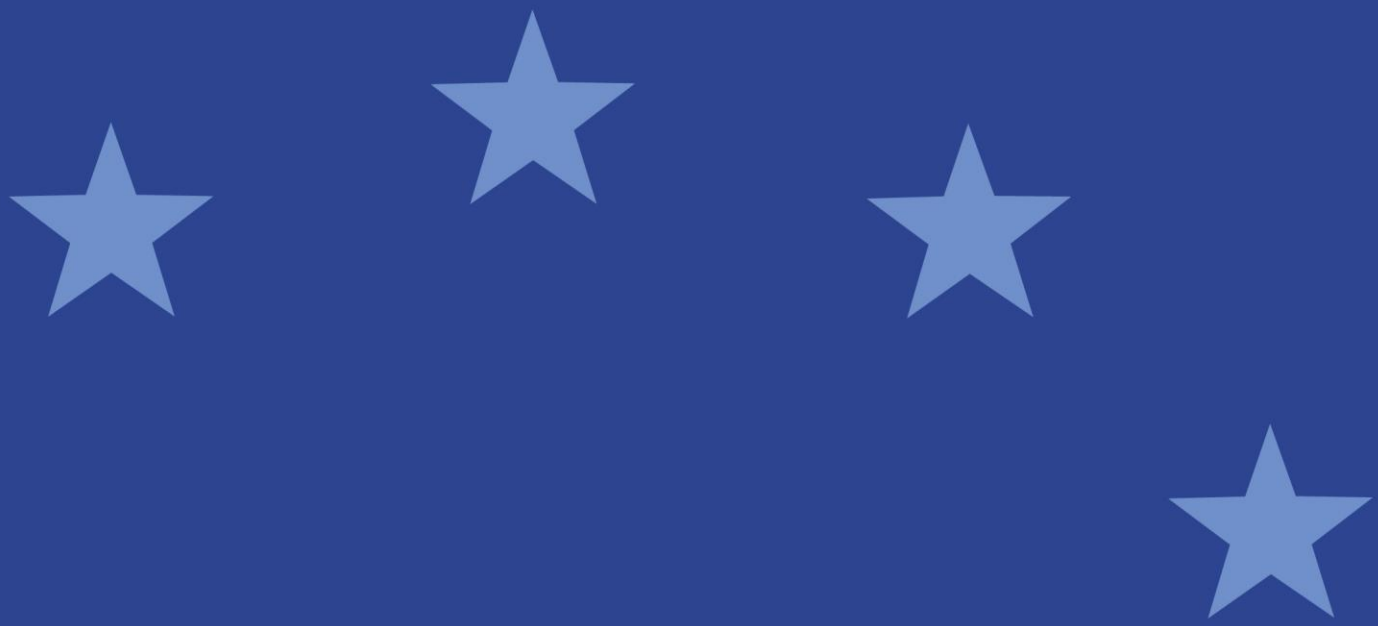
esma European Securities and Markets Authority

Consultation Paper

ESMA Guidelines on Alternative Performance Measures



13 February 2014 | ESMA/2014/175

European Securities and Markets Authority

Date: 13 February 2014
ESMA/2014/175

Responding to this paper

The European Securities and Markets Authority (ESMA) is seeking comments on all matters covered in this paper and in particular on the specific questions summarised in Annex 1. Comments are most helpful if they:

- respond to the question stated;
- indicate the specific question to which the comment relates;
- contain a clear rationale; and
- describe any alternatives ESMA should consider.

ESMA will consider all comments received by 14 May 2014.

All contributions should be submitted online at www.esma.europa.eu under the heading 'Your input - Consultations'.

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 'Legal Notice'.

Who should read this paper

All interested parties are invited to comment on this consultation paper. It will primarily be of interests to those charged with the governance of issuers preparing financial information, users of financial information, auditors, and other parties who have a particular interest in financial reporting.

Table of Contents

I. Executive Summary ____ 7
II. Introduction ____ 8
III. Scope and purpose of the [draft] guidelines ____ 9
IV. Compliance and reporting obligations ____ 11
V. [Draft] Guidelines on alternative performance measures (Background) ____ 12

Annex I: Cost-benefit analysis ____ 16
Annex II: Summary of questions ____ 21
Annex III: [Draft] guidelines on alternative performance measures ____ 22

Acronyms and definitions used

APM	Alternative Performance Measure
CESR	Committee of the European Securities Regulators
EU	European Union
EEA	European Economic Area
GAAP	Generally Accepted Accounting Principles
IFRS	International Financial Reporting Standards
NCA	National Competent Authority

ESMA Regulation	Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC.
Transparency Directive	Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are traded on a regulated market and amending Directive 2001/34/EC. On the 6 of November 2013, the Directive 2013/50/EU of the European Parliament and of the Council of 22 October 2003 amending Directive 2004/109/EC was published. Taking into account that Member States have 24 months to transpose this directive, all references in this document in relation to the Transparency Directive, articles and implementing directives should be read in relation to the Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004.
Transparency Directive implementing directive	Directive 2007/14/EC, of 8 March 2007, laying down detailed rules for the implementation of certain provisions of Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market.
Market Abuse Directive	Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse).
Market Abuse implementing directive	Directive 2003/124/EC of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the definition and public disclosure of inside information and the

	definition of market manipulation.
Prospectus Directive	Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC.
Prospectus Directive implementing regulation	Commission Regulation (EC) No 809/2004 of 29 April 2004 implementing Directive 2003/71/EC of the European Parliament and of the Council as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements
Securities	Transferable securities as defined in Article 4(1), point 18, of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments with the exception of money-market instruments, as defined in Article 4(1), point 19, of that Directive having a maturity of less than 12 months, for which national legislation may be applicable.
Issuer	For the purposes of this consultation paper an issuer is a legal entity governed by private or public law, other than Member States or Member State's regional or local authorities, whose securities are admitted to trading on a regulated market, the issuer being, in the case of depository receipts representing securities, the issuer of the securities represented.
Regulated information	All information which the issuer, or any other person who has applied for the admission of securities to trading on a regulated market without the issuer's consent, is required to disclose under the Transparency Directive, under Article 6 of the Market Abuse Directive, or under the laws, regulations or administrative provisions of a Member State adopted under Article 3(1) of the Transparency Directive (transposition of the Transparency Directive).
Applicable financial reporting framework	For the purposes of this consultation paper any of the following: (i) IFRS as adopted in the EU pursuant to Regulation (EC) No 1606/2002 on the application of international accounting standards or (ii) the accounting requirements stemming from the transposition of the European Accounting Directives (78/660/EEC, and 83/349/EEC or 2013/34/EC) into the legal system of Member States of the European Union or (iii) Generally Accepted Accounting Principles (GAAP) laying down equivalent requirements in accordance with Commission Regulation (EC) No 1569/2007 establishing a mechanism for determination of equivalence of accounting standards applied by third country issuers of securities pursuant to Directive 203/71/EC and 2004/109/EC of the European Parliament and of the Council, for issuers that are exempted from the requirement of using IFRS as endorsed in the EU.

Financial statements	For the purposes of this consultation paper financial statements refer to annual and interim financial statements prepared in accordance with the applicable financial reporting framework.

I. Executive Summary

Reasons for publication

In October 2005, the Committee of European Securities Regulators (CESR), ESMA's predecessor body, published a Recommendation on Alternative Performance Measures *("CESR Recommendation"* CESR/05-178b*)*. The CESR Recommendation was issued mainly in order to reinforce the objectives of Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards.

Given the CESR Recommendation has now been in force for more than 8 years, ESMA has decided to review it with the objective of strengthening the principles contained in it. ESMA now plans to re-issue the principles as ESMA [draft] guidelines thus ensuring that issuers and NCAs will make every effort to comply with them.

Contents

ESMA is issuing this Consultation Paper (CP) to inform market participants about the background to its decision to revise the CESR Recommendation and seek their views on such revision.

Section II "*Introduction"* indicates the reasons for which ESMA believes that these [draft] guidelines on APMs should be issued.

Section III "*Scope and purpose of the [draft] guidelines*" indicates when the [draft] guidelines apply and how these [draft] guidelines interact with financial statements.

Section IV *"Compliance and reporting obligations"* describes how issuers and NCAs should comply with the [draft] guidelines.

Section V "*[Draft] Guidelines on APMs (Background)*" describes the rationale followed in preparing the [draft] guidelines and explanations on the principles provided, which are included in full in Annex III.

ESMA would appreciate any comments and answers from stakeholders on the questions contained in the consultation paper. For your convenience, the questions are summarised in annex II.

Next steps

ESMA will consider the feedback it receives to this consultation in 2014 and expects to publish final guidelines in the fourth quarter of 2014.

II. Introduction

1. ESMA was set up with the objective of helping foster investor protection and contribute to the establishment of high-quality common regulatory and supervisory standards and practices. ESMA achieves this aim by building a single rule book for EU financial markets and ensuring its consistent application across the EU. One of ESMA's areas of responsibility is to promote the effective and consistent application of the European legislation with respect to financial reporting with the overall objective to ensure that users are provided with high quality financial information that enables them to make informed decisions.

2. Users of financial information (users) expect information to be presented in accordance with the applicable financial reporting framework. Financial reporting frameworks ensure that financial statements present information that is relevant and reliable to users' decision-making process. Consequently, ESMA is of the view that financial information prepared and presented in accordance with the applicable financial reporting framework is of primary relevance to users when assessing the financial performance of an issuer.

3. Though the applicable financial reporting framework should result in relevant and reliable financial information, there may be a demand from users or a desire from issuers to make available other information that they feel put users in a better position to understand particular aspects of an issuer's performance, including information on the drivers of the business and on the effects of external influences, or simply providing more information on individual items within the reported result. This information is often included in financial statements, documents accompanying the financial statements, press releases, market announcements, presentations to users, briefings to analysts or prospectuses. Such information may consist of re-statements or re-calculations based on information already disclosed in financial statements or may include entirely new metrics designed to give users information on the performance of the reporting entity.

4. As a result, issuers whose securities are admitted to trading on a regulated market in the EU/EEA and issuers under the Prospectuses Directive can often be seen publishing widely diverse financial data, called for the purpose of this paper, Alternative Performance Measures (APMs) in press releases, other documents containing regulated information or prospectuses. In some cases this financial data cannot be easily derived from or reconciled back to financial statements. Over and above this, such additional information is in many cases described in terms which are neither defined by issuers nor included in accounting literature and, consequently cannot be easily recognised by users. Even where terms are defined, issuers can often be seen to depart from those definitions rendering the measure concerned difficult to contextualise or compare. Finally, comparatives are lacking or, if they are provided, it is not possible to derive them from or reconcile them back to the comparatives in the financial statements.

5. ESMA acknowledges the importance of APMs to assist users in making investment decisions, as they allow them to gain a better understanding of an entity's financial statements, evaluate the entity through the eyes of the management and may be an important instrument to more easily compare entities in the same sector, market or economic area. Therefore, ESMA does not wish to prevent issuers from presenting APMs, which can help users making better informed decisions. However, in some cases APMs may appear to be used by issuers to present a confusing or optimistic picture of their performance by removing certain negative aspects. Even if this is not the case, APMs can be misleading if they are inconsistently calculated or presented.

6. ESMA is of the view that issuers who decide to provide APMs should do so in a way that is appropriate and useful for users' decision-making. Within the scope of its powers as set out in the ESMA Regulation, ESMA may issue guidelines under Article 16 of the ESMA Regulation in relation to the acts referred to in Article 1(2) of the ESMA Regulation, which include the Transparency Directive1. Notably, based on the objective of providing equivalent investor protection at EU level and the underlying principle of providing a true and fair view of an issuer's assets, liabilities, financial position and profit or loss pursued by the provisions of the Transparency Directive, ESMA considers that consistent, efficient and effective supervisory practices and a common, uniform and consistent application of the Transparency Directive imply a common approach to be adopted by NCAs and issuers towards the use of APMs and has thus decided to issue these [draft] guidelines.

7. The [draft] guidelines relate primarily to:
   a. Concept and Labels of APMs
   b. Guidance for the presentation of APMs
   c. Consistency in using APMs

8. In October 2005, the Committee of European Securities Regulators (CESR), ESMA's predecessor body, published a recommendation on APMs. These [draft] guidelines are based primarily on that recommendation and aim to strengthen the principles contained in the CESR Recommendation on APMs.

III. Scope and purpose of the [draft] guidelines

9. The [draft] guidelines apply to NCAs and to issuers, the latter being defined as a legal entity governed by private or public law, other than Member States or Member State's regional or local authorities, whose securities are admitted to trading on a regulated market, the issuer being, in the case of depository receipts representing securities, the issuer of the securities represented.

10. Consistently with article 8 (1) (a) of the Transparency Directive, ESMA decided to exclude from the definition of an issuer set out in the Transparency Directive, Member States and a Member State's regional or local authorities, in order to avoid doubts in the application of these [draft] guidelines to documents published by these entities. ESMA points out that the applicable reporting framework and documents published by these entities are subject to rules and principles that are not harmonised at European level and in relation to which NCAs have limited powers of enforcement. Nevertheless, ESMA believes that issuers not covered in the definition set out in the [draft] guidelines should consider them when including APMs in documents made available publicly to investors with the objective to allow them to obtain relevant, reliable and understandable information when they take investment decisions.

11. The [draft] guidelines apply to APMs which are included in all issued documents containing regulated information that are made publicly available. Therefore, the [draft] guidelines apply to the presentation of APMs by issuers in publications such as financial statements and management re-

[1] These Guidelines apply to "regulated information" as defined in the Transparency Directive. This definition also includes information to be disclosed under Article 6 of the Market Abuse Directive. The Market Abuse Directive is also listed among the acts mentioned in Article 1(2) of the ESMA Regulation.

ports issued under the Transparency Directive and public disclosures issued under the requirements of the Market Abuse Directive.

12. Regulated information includes all information which the issuer, or any other person who has applied for the admission of securities to trading on a regulated market without the issuer's consent, is required to disclose under the Transparency Directive and Market Abuse Directive.

13. The aim of these [draft] guidelines is promoting transparency on APMs used by issuers by ensuring their adherence to general qualitative characteristics that enhance usefulness of financial information to users.

14. Compliance with these [draft] guidelines should not impede a prompt disclosure of information to the market. In published press releases, the disclosure requirements as set out in these [draft] guidelines may be replaced by a reference to another document which contains these disclosures and is readily and easily accessible to users. In this case compliance with the [draft] guidelines is to be assessed reading the documents together.

15. As set out in more detail further in this consultation paper, an APM is any numerical measure of historical, current or future financial performance, which relates to the financial position, comprehensive income or cash flows, other than a measure defined by applicable financial reporting frameworks.

16. Where there is doubt as to whether the particular measure concerned is defined by the applicable financial reporting framework, ESMA expects issuers to apply the principles contained in these [draft] guidelines.

Prospectus Directive, Prospectus Directive implementing regulation and annexes

17. The CESR Recommendation on APMs applied to financial performance figures of listed companies focusing on issuers reporting under IFRS. It explicitly excluded information contained in prospectuses published in accordance with EU legislation on prospectus which was subject to the CESR Recommendation (CESR 05-054b) on the consistent implementation of the European Commission's Regulation on Prospectuses No 809/2004 reissued and updated by ESMA update of the CESR recommendations (ESMA/2013/319)2 which includes a special section on 'financial data not extracted from issuers' audited financial statements (paragraphs 95 to 97). ESMA is of the view that these [draft] guidelines are not only consistent with the content and objective of the ESMA's Update of the CESR Recommendation, but increase the transparency of financial information for users as they set out further elements enabling users to better assess the financial performance of an issuer.

18. ESMA acknowledges that in other jurisdictions, such as Australia, Canada, New-Zealand and the United States, the principles on transparency and comparability that direct the use of APMs are applicable to prospectuses (or filing documents). When deciding to revise and replace the CESR Recommendation, ESMA decided to consult market participants whether these [draft] guidelines should also apply to APMs published in prospectuses and related documents. Nevertheless, these [draft] guidelines should be applicable to financial statements that are included either directly or by reference in prospectuses if the issuer that prepares the prospectus meets the definition of issuer as set

[2] http://www.esma.europa.eu/system/files/2013-319.pdf

out in these [draft] guidelines. Based on the scope of these [draft] guidelines, they do not govern specific requirements on the procedure followed by NCAs when performing prospectuses' examinations or approvals.

Q1: Do you agree that the ESMA [draft] guidelines should apply to all issuers defined as a legal entity governed by private or public law, other than Member States or Member State's regional or local authorities, whose securities are admitted to trading on a regulated market, the issuer being, in the case of depository receipts representing securities, the issuer of the securities represented regardless of the financial reporting framework they use to report? If not, why?

Q2: Do you agree that the ESMA [draft] guidelines should apply to APMs included in:
a) financial statements prepared in accordance with the applicable financial reporting framework, that are made publicly available, and
b) all other issued documents containing regulated information that are made publicly available?
If not, why?

Q3: Do you believe that the ESMA [draft] guidelines should also be applicable to prospectuses and other related documents, which include APMs (except for pro-forma information, profits forecasts or other measures which have specific requirements set out in the Prospectus Directive or Prospectus Directive implementing regulation)? Please provide your reasons.

IV. Compliance and reporting obligations

19. The [draft] guidelines are addressed to NCAs and financial market participants. In accordance with Article 16(3) of the ESMA Regulation, NCAs and financial market participants must make every effort to comply with the [draft] guidelines. NCAs are expected to incorporate the [draft] guidelines into their supervisory procedures and practices and monitor whether issuers comply with them.

20. In accordance with Article 16 (3) of the ESMA Regulation NCAs to whom the [draft] guidelines apply must notify ESMA whether they comply or intend to comply with the guidelines, with reasons for non-compliance, within two months of the date of publication by ESMA. In the absence of a response by this deadline, NCAs will be considered as non-compliant. A template for notifications is available on the ESMA website. Any change in the status of compliance must also be reported to ESMA.

Q4: Do you believe that issuing ESMA guidelines constitute a useful tool for dealing with the issues encountered with the use of APMs? If not, why?

V. [Draft] Guidelines on APMs (Background)

Concept and labels of APMs

21. For the purpose of the [draft] guidelines, ESMA considers APMs as any numerical measure of historical, current or future financial performance, which relates to the financial position, comprehensive income or cash flows, other than a measure defined by the applicable financial reporting framework.

22. APMs are usually derived from, or based on, financial statements prepared in accordance with the applicable financial reporting framework, most of the time by adding or subtracting amounts from the figures presented in financial statements. This definition intends to include the following: (i) all measures of financial performance not specifically defined by the applicable financial reporting framework (e.g. EBIT, EBITDA, free cash flow, underlying profit, net debt etc.); (ii) all measures designed to illustrate the physical performance of the activity of an issuer's business (e.g. sales per square metre), and (iii) all measures disclosed to fulfil other disclosure requirements (e.g. pro-forma financial information or a profit forecast) included in public documents containing regulated information. If law requires the presentation of an APM and sets out specific requirements that govern its determination, the applicable law must be applied instead of these [draft] guidelines.

23. The term APM as used in the [draft] guidelines is intended to include most measures, including those presented in graphs or tables. When in doubt, issuers should assume a particular measure is included in this definition. ESMA has taken this inclusive approach, and has not chosen to limit APMs in order to avoid controversy over which measures should be included or not.

24. However, these [draft] guidelines may require different treatment for different types of APMs depending on the information they are designed to communicate. For instance, some APMs are designed to demonstrate the physical context of an issuer's business (e.g. sales per square meter). ESMA concedes that when complying with these [draft] guidelines, issuers may not follow all the principles defined therein because it may not be practicable (when the cost of providing this information outweighs the benefit obtained) or the information provided may not be useful to users. In this context, ESMA considers that it would not be valuable to users to receive information about how physical performance measures relate to the financial statements as a whole and therefore an issuer complying with these [draft] guidelines is released from the need to provide reconciliations between those APMs and figures included in financial statements.

25. Issuers should define the APM used and its components as well as the basis of calculation adopted. APMs should be given meaningful labels reflecting their methodology and basis of calculation in order to avoid conveying misleading messages to users. Issuers should disclose all APMs used and their definition in an appendix to the publication.

Q5: Do you agree with the suggested scope of the term APM as used in the [draft] guidelines? If not, why?

Q6: Do you believe that issuers should disclose in an appendix to the publication a list giving definitions of all APMs used? If not, why?

Reconciliation to amounts presented in the financial statements

26. ESMA believes that understandability and reliability of APMs for users are achieved by providing a reconciliation of the APM to the most relevant amount presented in the financial statements, separately identifying and explaining each reconciling item.

27. The underlying principle of these [draft] guidelines is that information contained in financial statements and prepared in accordance with the applicable financial reporting framework is relevant and reliable and results in the most appropriate information on which users should base their decisions in relation to the performance of an issuer. This is because the applicable financial reporting framework prescribes the presentation and calculation of such information. It is also the information that is subject to the supervision and enforcement of NCAs.

28. In addition, financial information included in the annual financial statements is subject to audit conducted in line with the auditing standards that are applicable on the regulated markets where an issuer's securities are admitted to trading. Consequently these audited figures give users additional assurance on the consistency and the reliability of the amounts presented.

29. It is therefore appropriate that any APM presented is accompanied by reconciliations showing how figures in the financial statements are aggregated, subtracted and/or recalculated to determine APMs.

30. However, if an APM is a total or subtotal presented in the financial statements and includes items that are directly readable from financial statements, the issuer is released from providing reconciliations. ESMA believes that a subtotal or a total that is included in financial statements is, by definition reconciliation, and thus issuers are not required to provide reconciliations between these APMs and the most relevant amount in the financial statements.

Q7: Do you agree that issuers should disclose a reconciliation of an APM to the most relevant amount presented in the financial statements? If not, why?

Explaining the use, prominence and presentation of APMs

31. ESMA believes that clear disclosure is key for the understandability of an APM and its relevance for users. Therefore, issuers should explain the context of any APM disclosed so that users can understand what information the APM concerned is meant to provide them with.

32. For the reasons mentioned in the section above, ESMA believes that APMs that are presented outside financial statements should be displayed with less prominence, emphasis or authority than measures directly stemming from financial statements prepared in accordance with the applicable financial reporting framework.

33. Should an issuer provide performance analysis using APMs presented outside financial statements a similar analysis should also be presented using corresponding figures stemming from financial statements again with greater prominence than that given to the analysis using APMs.

Q8: Do you agree that issuers should explain the use of APMs? If not, why?

Q9: Do you agree that APMs presented outside financial statements should be displayed with less prominence, emphasis or authority than measures directly stemming from financial statements prepared in accordance with the applicable financial reporting framework? If not, why?

Comparability and consistency

34. In general, applicable reporting frameworks require the presentation of comparative information in order to enable users to assess the performance of an issuer over time. Similarly, ESMA believes that when an issuer chooses to present APMs, it should also provide comparatives for corresponding previous periods. If reconciliations between an APM and amounts presented in financial statements are required in accordance with these [draft] guidelines, the issuer should also provide reconciliations for the comparatives presented.

35. In situations where APMs are reported in the form of forecasts or estimations the comparatives to be provided should be in relation to the last historical information available.

36. In order to ensure comparability of financial information, the definition and calculation of the APM should be consistent over time. However, if that is not the case, an issuer should explain the reasons for which the definition and/or calculation of an APM has changed.

37. If under any circumstances, an APM is redefined, a prior period is corrected, or the calculation of the APM changes, an issuer should provide additional information to explain those changes, the effect of the change compared to the former APM and restated comparative figures.

38. Hindsight should not be used when presenting restated comparatives. When restating comparatives, an issuer should only use information available at the end of the prior period presented, and should not incorporate effects of events occurred after the end of the prior period presented.

39. If an issuer is not able to provide comparatives or restatements, it should disclose that providing comparatives or restatements is impracticable and explain the reasons.

40. If an APM ceases to be used, the issuer should explain its removal and the reasons for which any newly defined APM replacing the previous one provides more reliable and relevant information on the financial performance compared with the previous one.

Q10: Do you agree that issuers should explain the reasons for changing the definition and/or calculation of an APM? If not, why?

Q11: Do you believe that issuers should provide comparatives and/or restatements when an APM changes? If not, why?

Q12: Do you believe that issuers should provide explanations when they no longer use an APM? If not, why?

41. These [draft] guidelines are intended to assist issuers improving their communication on how they manage their businesses and which indicators they believe should be taken into account by users when analysing their performance.

42. Finally, it is the objective of these [draft] guidelines to foster comparability and unbiased financial information in all documents containing regulated information that are made available by issuers by establishing disclosure principles intended to improve the understanding of users of each performance measure used.

Q13: Do you agree that the [draft] guidelines will improve transparency, neutrality and comparability on financial performance measures to users? If not, please provide suggestions.

Annex I - Cost-benefit analysis

Cost-benefit analysis

1. Introduction

1. Pursuant to Article 16 of the ESMA Regulation, ESMA is empowered to issue guidelines addressed to NCAs and/or financial market participants with a view to establishing consistent, efficient and effective supervisory practices within the European System of Financial Supervision, and to ensure the common, uniform and consistent application of Union law. The same article obliges ESMA to conduct open public consultations regarding guidelines to analyse the related potential costs and benefits, where appropriate. Such consultations and analyses shall be proportionate in relation to the scope, nature and impact of the guidelines.

2. Procedural issues and consultation process

2. ESMA is seeking feedback from stakeholders on its proposals for the [draft] guidelines through this consultation paper. In October 2005, CESR, ESMA's predecessor body, published the CESR Recommendation.

3. In 2012, ESMA decided to review the CESR Recommendation with a view to strengthening the principles contained in it. ESMA now plans to re-issue the principles as ESMA [draft] guidelines asking NCAs and issuers to make every effort to comply with them.

4. This consultation paper represents the next stage in the development of [draft] guidelines for this topic in order to enhance market confidence in financial information provided to the market. These [draft] guidelines propose a principle based concept of APMs, and set out disclosure principles to steer the use of these measures.

5. This cost-benefit analysis assesses from a qualitative and quantitative perspective, the costs and benefits that will potentially arise from the application of these [draft] guidelines. Stakeholders' views are sought on this assessment; quantitative data would be particularly useful in helping ESMA reaching a final decision.

3. Problem Definition

6. Issuers often publish financial data which are not defined by the applicable financial reporting framework as part of their financial statements, press releases, management reports, analyst's presentations, prospectuses and other documents. These financial data, named APMs for the purpose of this consultation paper, are frequently used by issuers to provide users with a better understanding of the performance, the drivers of the business or the effects of external influences over the activity of an issuer.

7. Over the years, divergent practices could be observed in relation to the presentation of APMs in issuers' public documents. It is ESMA's view that in some circumstances users may not even understand the information provided or its relevance.

8. In some cases, APMs cannot be easily derived from or reconciled back to financial statements, which should constitute the most relevant information to be considered by users in making informed decisions. In other cases, APMs are described in terms which are not defined by issuers or by the applicable financial reporting framework and, consequently cannot be easily understood by users. Even where terms are defined, issuers can often be seen to depart from those definitions rendering the measure concerned difficult to contextualise.

9. Over and above, APMs also appear to be used by some issuers to present a confusing or optimistic picture of their performance to users by removing certain negative aspects. APMs can be misleading if they are inconsistently calculated or presented.

10. Taking into account the above mentioned facts, ESMA considered the need to issue [draft] guidelines to improve the presentation of APMs in order to ensure that users of financial information are provided with relevant and appropriate information.

4. Objectives of the [draft] guidelines

11. The [draft] guidelines are aimed at promoting the publication of transparent, neutral and comparable information of financial performance to users. These [draft] guidelines should contribute to the creation of a level playing field and the reduction in information asymmetry among financial markets participants and increase market confidence in financial information that is provided to the public.

12. It is the objective of these [draft] guidelines to increase the level of disclosures on APMs so that users are enabled to better understand the financial data that is provided by issuers with regards to their performance.

5. Policy options

13. In order to address the problem and comply with the objectives identified above, ESMA has considered the possibility of no ESMA action. However, taking into consideration the CESR Recommendation and the problems identified above that continue to be observed, ESMA believes that keeping the status quo should be disregarded. In addition, considering the past experience obtained with the implementation of CESR Recommendation, ESMA does not believe that this problem will be solved by market forces and competition environment among issuers.

14. Furthermore, ESMA also believes that the overall costs do not outweigh benefits, and therefore a regulatory action on this subject is justified. ESMA is of the opinion that issuing [draft] guidelines is the best solution to improve market confidence with low costs to financial market participants and NCAs.

6. The likely economic impacts

15. The implementation of these [draft] guidelines on APMs should bring benefits to users and issuers; however, it will probably introduce some additional costs. ESMA has analysed the costs and benefits of the application of these [draft] guidelines and concluded that applying these [draft] guidelines will affect issuers, users and NCAs as described below.

Issuers

Benefits

16. The application of these [draft] guidelines will improve the communication with users by increasing the understandability, relevance and comparability of the APMs provided. Supplementing public documents containing regulated information, with the disclosure principles set out in these [draft] guidelines will enhance the transparency of APMs used in documents containing regulated information that are made available to the public. Moreover, it will reduce the asymmetry of information between users particularly between capital owners and management, which may lead to increased users' confidence since they will be able to evaluate more effectively the issuer's performance.

17. In the long term, ESMA also believes that the improvement of disclosures resulting from the application of these [draft] guidelines will reduce the cost of capital, as the increase of transparency of information normally leads to more efficient capital allocation due to a better assessment of risks and better pricing.

Costs of compliance

18. The application of these [draft] guidelines will only affect issuers that disclose APMs in documents containing regulated information that are made available to the public. The costs associated with the implementation of these [draft] guidelines may increase depending on the number of APMs reported.

19. Issuers will most likely incur both one-off costs (implementation costs) and ongoing costs.

(i) One-off costs (costs of implementation)

20. Issuers may incur costs with the implementation of these [draft] guidelines such as adaptation of the reporting system and reporting processes. However, such costs should be mitigated on the basis that:

    a. some disclosure principles were already included in the CESR Recommendation, and therefore some issuers already put them in place;
    b. the disclosure principles were not included in the CESR Recommendation or were not complied with by the issuer require information that is already available to issuers.

21. ESMA is of the view that, when an issuer decides to disclose an APM, it has already collected information regarding the components of that APM, has an easy access to historical information that allows to provide comparatives and already acknowledges its relevance to users.

22. Therefore, ESMA is of the opinion that the costs related to the implementation of these [draft] guidelines will not be significant.

(ii) Ongoing costs

23. As previously mentioned, ESMA believes that most of the information required by these [draft] guidelines is already collected for internal management purposes. However, ESMA acknowledges that data gathered for management purposes may not be in the format needed to satisfy the disclosure principles set out in these [draft] guidelines which may result in ongoing costs.

24. ESMA is of the view that these costs will not be significant because APMs should generally not change over periods. Therefore, ongoing costs will relate almost exclusively to updating information for every reporting period which will be limited once the reporting system and reporting procedures are in place.

Users

Benefits

25. ESMA is of the view that the application of these [draft] guidelines will improve the understandability, relevance and comparability of APMs provided in documents containing regulated information that are made available to public by issuers.

26. Users will be able to understand the link between the financial statements prepared under the applicable financial reporting framework, which in the case of annual financial statements are audited, and the performance measures used by management. The reconciliations required in these [draft] guidelines will provide an increased level of assurance on the quantitative information communicated through APMs.

27. Moreover, these [draft] guidelines will allow users to understand the relevance of each APM in the management decision process. Therefore, the qualitative disclosures required on the relevance of each measure will permit users to choose those APMs which are of most relevance for their investment decisions.

28. Similarly, full disclosure of all components of APMs used will enable users to understand the adjustments done by management to figures presented in the financial statements. ESMA is of the opinion that this information will help users to make better grounded projections and estimates of future cash flows and assist them in performing equity analysis and valuations.

29. It is also expected that the application of the [draft] guidelines will contribute to enhancing the comparability and consistency in the use of APMs. Users will be able to understand the changes in APMs' components, the reasons for these changes and their relevance.

30. These disclosures will allow users to compare information between periods and will help them in comparing the performance of issuers in the same sector or market.

31. Finally, ESMA also believes that these [draft] guidelines may also help users in evaluating management performance more effectively.

Costs

32. The information provided by issuers in complying with these [draft] guidelines will increase the level of disclosures in the documents made available to issuers with the potential effect of increasing the time spent in analysing the information provided.

33. On the other hand, the application of these [draft] guidelines may lead issuers to provide more qualitative information in order to avoid providing disclosures on quantitative measures. This situation might have a negative effect on the understandability of the information disclosed and it can potentially impair their access to quantitative information that may be useful to make their investment decisions.

Nevertheless, ESMA believes that this situation is unlikely to occur since APMs have been widely used over time and competition between issuers together with users' demands for this information will prevent this situation from occurring.

National Competent Authorities (NCAs)

Benefits

34. NCAs will have to implement these [draft] guidelines as part of their supervisory activities. These [draft] guidelines provide NCAs with a clear framework against which they can require issuers to provide information regarding APMs disclosed in documents containing regulated information that are made available to public which are subject to their supervision. It is likely that NCAs will be able to check more easily the completeness and the relevance of the information that should be provided by analysing the compliance to these [draft] guidelines instead of requiring individual information to each APM that is disclosed in documents containing regulated information that are made available to the public by issuers. Therefore, the [draft] guidelines should help reducing the need for one-off and on-going requests for further guidance and clarification from users, and may reduce costs of supervision as the resources required to analyse the compliance of these [draft] guidelines may also reduce compared with resources that are necessary to analyse nowadays each APM disclosed.

Costs

35. The [draft] guidelines may also lead to some additional costs to the extent that NCAs will be required to incorporate them into their supervisory practices. This implies that NCAs may need to provide training to existing staff or hire additional staff to analyse the compliance of these [draft] guidelines. However, it is also likely that costs related to complaints of users requiring this information will be reduced, as users will have more information regarding these APMs which will enable them to make their own assessment of the risks of their investments if all information required in these [draft] guidelines is provided.

Q14: Do you agree with the analysis of the cost and benefit impact of the [draft] guidelines? Please provide any evidence or data that would further inform the analysis of the likely cost and benefits impacts of the proposals.

Annex II – Summary of questions

Q1: Do you agree that the ESMA [draft] guidelines should apply to all issuers defined as a legal entity governed by private or public law, other than Members State or Member State's regional or local authorities, whose securities are admitted to trading on a regulated market, the issuer being, in the case of depository receipts representing securities, the issuer of the securities represented regardless of the financial reporting framework they use to report? If not, why?

Q2: Do you agree that the ESMA [draft] guidelines should apply to APMs included in:
a) financial statements prepared in accordance with the applicable financial reporting framework, that are made publicly available, and
b) all other issued documents containing regulated information that are made publicly available?
If not, why?

Q3: Do you believe that the ESMA [draft] guidelines should also be applicable to prospectuses and other related documents, which include APMs (except for pro-forma information, profits forecasts or other measures which have specific requirements set out in the Prospectus Directive or Prospectus Directive implementing regulation)? Please provide your reasons

Q4: Do you believe that issuing ESMA guidelines constitute a useful tool for dealing with the issues encountered with the use of APMs? If not, why?

Q5: Do you agree with the suggested scope of the term APM as used in the [draft] guidelines? If not, why?

Q6: Do you believe that issuers should disclose in an appendix to the publication a list giving definitions of all APMs used? If not, why?

Q7: Do you agree that issuers should disclose a reconciliation of an APM to the most relevant amount presented in the financial statements? If not, why?

Q8: Do you agree that issuers should explain the use of APMs? If not, why?

Q9: Do you agree that APMs presented outside financial statements should be displayed with less prominence, emphasis or authority than measures directly stemming from financial statements prepared in accordance with the applicable financial reporting framework? If not, why?

Q10: Do you agree that issuers should explain the reasons for changing the definition and/or calculation of an APM? If not, why?

Q11: Do you believe that issuers should provide comparatives and / or restatements when an APM changes? If not, why?

Q12: Do you believe that issuers should provide explanations when they no longer use an APM? If not, why?

Q13: Do you agree that the [draft] guidelines will improve transparency, neutrality and comparability on financial performance measures to users? If not, please provide suggestions.

Q14: Do you agree with the analysis of the cost and benefit impact of the [draft] guidelines? Please provide any evidence or data that would further inform the analysis of the likely cost and benefits impacts of the proposals.

Annex III – [draft] Guidelines

I. Scope

Who?

1. These [draft] guidelines apply to issuers defined as a legal entity governed by private or public law, other than Members State or Member State's regional or local authorities, whose securities are admitted to trading on a regulated market, the issuer being, in the case of depository receipts representing securities, the issuer of the securities represented. However, ESMA expects that issuers that are out of the scope of these [draft] guidelines consider the principles contained in these [draft] guidelines if they decide to include alternative performance measures (APMs) in their public documents.

2. NCAs should incorporate these [draft] guidelines into their supervisory procedures and practices and monitor whether issuers comply with them. This implies in the absence of the adoption of binding provisions under national law reflecting the content of these [draft] guidelines NCAs should examine whether issuers comply with article 16 (3) of the ESMA Regulation.

What?

3. These [draft] guidelines apply to APMs disclosed by issuers in all documents containing regulated information made publicly available. Therefore, the [draft] guidelines apply to the presentation of APMs by issuers in publications such as financial statements, management reports and public disclosures issued under the requirements of the Market Abuse Directive.

4. The [draft] guidelines are aimed at promoting transparency on APMs used by issuers by ensuring their adherence to the general qualitative characteristics that enhance usefulness of financial information to their users.

When?

5. These [draft] guidelines shall apply from [date]

II. Definitions

6. Unless otherwise specified, the terms used in the Transparency and Market Abuse Directives have the same meaning in these [draft] guidelines. In addition, the following definitions apply:

ESMA Regulation	Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC.
Transparency Directive	Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency require-

	ments in relation to information about issuers whose securities are traded on a regulated market and amending Directive 2001/34/EC. On the 6 of November 2013, it was published the Directive 2013/50/EU of the European Parliament and of the Council of 22 October 2003 amending Directive 2004/109/EC. Taking into account that member states have 24 months to transpose this directive, all references in this document in relation to the transparency directive, articles and implementing directives should be read in relation to the Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004.
Transparency Directive implementing directive	Directive 2007/14/EC, of 8 March 2007, laying down detailed rules for the implementation of certain provisions of Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market.
Market Abuse Directive	Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse).
Market Abuse implementing directive	Directive 2003/124/EC of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the definition and public disclosure of inside information and the definition of market manipulation.
Securities	Transferable securities as defined in Article 4(1), point 18, of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments with the exception of money-market instruments, as defined in Article 4(1), point 19, of that Directive having a maturity of less than 12 months, for which national legislation may be applicable
Issuer	For the purpose of these [draft] guidelines an issuer is a legal entity governed by private or public law, other than Member States or Member State's regional or local authorities, whose securities are admitted to trading on a regulated market, the issuer being, in the case of depository receipts representing securities, the issuer of the securities represented.
Regulated information	All information which the issuer, or any other person who has applied for the admission of securities to trading on a regulated market without the issuer's consent, is required to disclose under the Transparency Directive, under Article 6 of the Market Abuse Directive, or under the laws, regulations or administrative provisions of a Member State adopted under Article 3(1) of the Transparency Directive (transposition of the Transparency Directive).

Applicable financial reporting framework	For the purpose of these [draft] guidelines any of the following: (i) IFRS as adopted in the EU pursuant to Regulation (EC) No 1606/2002 on the application international accounting standards or (ii) the accounting requirements stemming from the transposition of the European Accounting Directives (78/660/EEC, and 83/349/EEC or 2013/34/EC) into the legal system of Member States of the European Union or (iii) Generally Accepted Accounting Principles (GAAP) laying down equivalent requirements in accordance with Commission Regulation (EC) No 1569/2007 establishing a mechanism for determination of equivalence of accounting standards applied by third country issuers of securities pursuant to Directive 203/71/EC and 2004/109/EC of the European Parliament and of the Council for issuers that are exempted from the requirement of preparing IFRS as endorsed in the EU.
Financial statements	For the purposes of these [draft] guidelines, financial statements refer to annual and interim financial statements prepared in accordance with the applicable financial reporting framework.

III. Purpose

7. The [draft] guidelines contain principles to be followed by issuers who provide APMs in order to ensure their usefulness for the decision making process of users. The [draft] guidelines are expected to benefit users and to promote market confidence in financial information released by issuers.

8. Compliance with these [draft] guidelines should not impede a prompt disclosure of information to the market. In published press releases, the disclosure requirements as set out in these [draft] guidelines may be replaced by a reference to another document which contains these disclosures and is readily and easily accessible to users. In this case compliance with the [draft] guidelines is to be assessed reading the documents together.

9. The [draft] guidelines are not to be applied to APMs that are disclosed in accordance with other applicable law that sets out specific requirements governing the determination of such measures.

IV. Compliance and reporting obligation

10. This document contains [draft] guidelines issued under Article 16 of the ESMA Regulation and are addressed to NCAs and issuers. In accordance with Article 16(3) of the ESMA Regulation, NCAs and issuers must thus make every effort to comply with these [draft] guidelines.

11. The [draft] guidelines set out ESMA's view on practices to be followed by issuers or how Union law should be applied in a particular area. ESMA expects that all issuers to whom these [draft] guidelines apply will comply with the [draft] guidelines.

12. NCAs are expected to incorporate these [draft] guidelines into their supervisory procedures and practices and monitor whether financial market participants comply with them as issued under article 16 (3) of the ESMA Regulation.

13. In accordance with Article 16 (3) of the ESMA Regulation, NCAs to whom these [draft] guidelines apply must notify ESMA whether they comply or intend to comply with the guidelines, with reasons for non-compliance, within two months of the date of publication by ESMA to [email address]. In the absence of a response by this deadline, NCAs will be considered as non-compliant. A template for notifications is available from the ESMA website. Any change in the status of compliance must also be reported to ESMA.

14. These [draft] guidelines are principles based with the main principles in black lettering and explanatory, elaborating and exemplifying paragraphs in grey lettering.

V. [draft] Guidelines on APM

Concept and labels

15. **For the purpose of these [draft] guidelines an APM is any numerical measure of historical, current or future financial performance, which relates to the financial position, comprehensive income or cash flows, other than a measure defined by the applicable financial reporting framework.**

16. APMs are usually derived from (or based on) the financial statements prepared in accordance with the applicable financial reporting framework, most of the times by adding or subtracting amounts from the figures presented in financial statements. Examples of APMs include: operating earnings, cash earnings, earnings before one-time charges, earnings before interest, taxes, depreciation and amortisation (EBITDA), net debt, or similar terms denoting adjustments to line items of statements of comprehensive income, statements of financial position or cash flow statements.

17. An APM can also be based on other sources or calculated using alternative methodologies to conventional accounting and representing additional performance indicators reflecting business activity (e.g. production or activity levels), projection of future cash flows (e.g. embedded value in the insurance sector) or forward-looking indicators.

18. **Issuers should define the APMs used and their components as well as the basis of calculation adopted, including details of any hypotheses or assumptions used. Issuers should also indicate whether the APM or any of its components relate to the (expected) performance of current, past or future reporting period.**

19. **Issuers should disclose a list of definitions of all APMs used in an appendix to the publication. This list should be included in each document containing regulated information that includes APMs.**

20. Clear disclosure is key for the understandability of APMs and their relevance. Compliance with these [draft] guidelines implies providing a definition of the measure and its components as well as their basis of calculation. However, some APMs may require a different treatment depending on the information they are designed to communicate. ESMA concedes that when complying with these [draft]

guidelines, issuers may not follow all the principles defined herein because it may not be practicable or because the information provided may not be useful to users. For instance, some APMs disclosed are designed to demonstrate the physical context of an issuer's business (e.g. sales per square meter). In this context, ESMA considers that, it would not be valuable to users to receive information about how physical performance measures relate to the financial statements as a whole and therefore in these particular situations an issuer complying with these [draft] guidelines is released from the need to provide reconciliations between those APMs and figures included in financial statements.

21. **APMs disclosed should be given meaningful labels reflecting their basis of calculation in order to avoid conveying misleading messages to users. An issuer should not use titles or descriptions of measures defined in the applicable financial reporting framework that are the same or confusingly similar when referring to APMs.**

Reconciliation to amounts presented in the financial statements

22. **A reconciliation of the APM to the most relevant amount presented in the financial statements should be disclosed, separately identifying and explaining each reconciling item.**

23. Where reconciling items are components of financial statements as defined by the applicable financial reporting framework, users should be able to identify them in the financial statements. Where a reconciling item cannot be extracted directly from the financial statements, the issuer should rather show how the number is calculated.

24. ESMA acknowledges that there may be some APMs that do not derive from the financial statements directly, as they may represent future projections or forecasts. In those circumstances the reconciliation is not mandatory, but the issuer should provide explanation about the consistency of those APMs with the applicable financial reporting framework, such as, consistency with policies and measurement basis that the entity follows in the financial statements.

25. When an APM is a total or subtotal presented in financial statements, the issuer is released from providing reconciliations, if the totals or subtotals include items that are directly readable from financial statements.

Explanation on the use of APMs

26. **Issuers should explain the use of APMs in order to make users understand their relevance. This explanation should be provided for each APM used. A statement disclosing the reasons for which an issuer believes the presentation of APMs provides useful information to users regarding the financial position, cash-flows and results of the operations of the issuer and a statement disclosing the purposes for which an issuer uses the APM should be made.**

Prominence and presentation of APMs

27. **APMs that are presented outside financial statements should be displayed with less prominence, emphasis or authority than measures directly stemming from financial statements prepared in accordance with the applicable financial reporting framework.**

28. Where an issuer presents APMs and corresponding figures from its financial statements the latter should be disclosed with greater prominence.

29. Should an issuer provide performance analysis using APMs presented outside financial statements, a similar analysis should also be presented using corresponding figures from financial statements again, the latter with greater prominence.

Comparability

30. **When an issuer presents APMs, it should provide comparatives for the corresponding previous periods. In situations where APMs relate to forecasts or estimations, the comparatives to be provided should be in relation to the last historical information available.**

31. **If reconciliations between APMs and figures included or presented in the applicable financial reporting framework are required in accordance with these [draft] guidelines, the issuer should also provide reconciliations for the comparatives presented.**

32. ESMA acknowledges that in some circumstances there is a change on the APM or/ and their components. In order to preserve the comparability and understandability, in addition to restating comparatives, issuers should provide clear and objective disclosures regarding each APM used, and their components and every change that has been made to the previous defined measures. These disclosures should be complemented with explanations of its relevance to the users' decision making process.

33. Hindsight should not be used when presenting restated comparatives. When restating comparatives, an issuer should only use information available at the end of the prior period presented, and should not incorporate effects of events occurred after the end of the prior period presented.

Consistency

34. **The definition and calculation of an APM should be consistent over time. In exceptional circumstances where an issuer decides to redefine or no longer use an APM, the issuer should explain the changes and the reasons these changes provide reliable and more relevant information on the financial performance.**

35. If an issuer changes the definition or calculation method of an APM, an issuer should explain the changes and the reasons for which the newly defined APM provides reliable and more relevant information on the financial performance compared with the previous APM. The newly defined or calculated APMs should be presented in line with the requirements of these [draft] Guidelines.

36. If under any circumstances, an APM is redefined, a prior period is corrected, or the calculation of the APM changes, an issuer should provide additional information to explain those changes, the effect of the change compared to the former APM and provide restated comparative figures.

37. An issuer should disclose if providing comparatives or restatements is impracticable and the reasons for not providing comparatives.

38. If an issuer decides to stop using an APM, the issuer should explain the reason for considering that the APM no longer provides decision-useful information and whether other information that fills the gap better achieves the same objectives.