

RULE No. 28/2016

for the application of ESMA Guidelines on alternative performance measures

Pursuant to the provisions of art. 1 paragraph (2), art. 2 paragraph (1) letters a) and d), art. 3 paragraph (1) letter b), art. 6 paragraph (2) and art. 14 of the Government Emergency Ordinance no. 93/2012 on the establishment, organization and functioning of the Financial Supervisory Authority, approved with amendments and additions under Law no. 113/2013, with subsequent amendments and additions,

In accordance with the provisions of art. 16 paragraph (3) of art. 30 paragraph (3) of 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,

According to the deliberations of the Financial Supervisory Authority's Board of 16 June 2016,

The Financial Supervisory Authority issues this rule:

Art. 1. - The Financial Supervisory Authority applies the *ESMA Guidelines on alternative performance measures*, set out in the appendix, which is an integral part of this rule.

Art. 2. - Issuers and/or persons responsible for the prospectus have the obligation to observe the guidelines referred to in art. 1, in connection with alternative performance measures disclosed by them when publishing regulated information and prospectuses or modifications thereof.

Art. 3. - In applying this rule, the terms "alternative performance measures", "issuer", "regulated information" and "prospectus" used in art. 2 are defined by the guidelines referred to in art. 1.

Art. 4. - Failure to comply with this rule is punishable under the provisions of Title X of Law no. 297/2004 on the capital market, with subsequent amendments and additions.

Art. 5. - This rule shall be published in the Official Gazette of Romania, Part I, and shall enter into force on 3 July 2016.

PRESIDENT

Mișu NEGRIȚOIU

Bucharest, 16 June
No. 28

Guidelines Alternative performance measures

Table of contents

- I. Scope
- II. References and definitions
- III. Purpose
- IV. Compliance and reporting obligations
- V. Guidelines on alternative performance measures

I. Scope

To whom do they apply?

1. These guidelines are addressed to:
 - issuers who are individuals or legal entities governed by public or private law, other than States, whose securities are admitted to trading on a regulated market and which must publish regulated information provided by the Transparency Directive.

In case of depository receipts admitted to trading on a regulated market, the issuer means the issuer of the securities represented, whether those securities are admitted to trading on a regulated market or not.

 - persons responsible for the prospectus pursuant to article 6 paragraph (1) of the Prospectus Directive.
2. These guidelines shall apply to all competent authorities (CAs) under the Transparency Directive, the Market Abuse Regulation or Prospectus Directive.

What does apply?

3. These guidelines apply in relation to alternative performance measures (APM) published by issuers or persons responsible for the prospectus when issuing regulated information and prospectuses (and supplements). Examples of regulated information covered are management reports, which are published on the market under the Transparency Directive, and publications issued as required by article 17 of the Market Abuse Regulation, for example ad hoc publications including gains on financial results.
4. Notwithstanding the above paragraph, these guidelines shall not apply to alternative performance measures (APM):

- presented in financial statements, as they are defined in section II of these guidelines;
- presented under the applicable law, other than the applicable financial reporting framework¹, which sets out specific requirements to regulate the establishment of such measures. Therefore, the guidelines shall not apply to measures included in prospectuses, such as indicative financial information, transactions with related parties, predictions of profit, estimates for profit, declarations of working capital, capitalization and indebtedness for which the specific requirements of the prospectus system apply. Similarly, the guidelines should not be applicable to prudential measures including measures defined in Regulation and Directive on capital requirements - CRR/CRD IV.

When do they apply?

5. These guidelines apply in relation to alternative performance measures (APM) published by issuers or persons responsible for the prospectus when issuing regulated information or prospectuses on 3 July 2016 or thereafter.

II. References and definitions

Legislative references

<i>ESMA Regulation</i>		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.
<i>Market Abuse Regulation</i>		Regulation (EU) no. 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (Market Abuse Regulation).
<i>Transparency Directive</i>		Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonization of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC ² .
<i>Directive the Directive</i>	<i>implementing the Transparency Directive</i>	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 harmonization of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market.
<i>Prospectus Directive</i>		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

Abbreviations

¹ Although these guidelines do not apply to financial statements, they apply to other sections forming yearly and half-yearly financial reports, specifically the management reports or interim management reports, as appropriate.

² As last amended by Directive 2013/50/EU. Where relevant, until the end of the period for transposition of Directive 2013/50/EU references to the Transparency Directive shall be read as references to the provisions in force before being amended by Directive 2013/50/EU

APM	Alternative performance measure
EEA	European Economic Area
ESMA	The European Securities and Markets Authority
GAAP	Generally Accepted Accounting Principles
IASB	The International Accounting Standards Board
IFRS	International Financial Reporting Standards
CA	Competent authorities

Definitions

Unless otherwise stated, terms used and defined in the Transparency Directive, the Prospectus Directive and the Market Abuse Regulation shall retain the same meaning in these guidelines. Some of the defined terms are mentioned below to facilitate consultation. Moreover, the following definitions shall apply:

<i>Applicable financial reporting framework</i>	<p>For the purpose of these guidelines, any of the following shall apply:</p> <ul style="list-style-type: none"> (i) The International Financial Reporting Standards (IFRS), as they were adopted in the EU according to Regulation (EC) no. 1606/2002 on the application of international accounting standards or (ii) accounting requirements arising from transposing the Accounting European Directives (78/660/EEC and 83/349/EEC or 2013/34/EC) in the legal system of the Member States of the European Union or (iii) The Generally Accepted Accounting Principles (GAAP), which provide for requirements equivalent requirements under Regulation (EC) No. 1569/2007 of the Commission establishing a mechanism for the determination of equivalence of accounting standards applied by third country issuers of securities pursuant to Directives 2003/71/EC and 2004/109/EC of the European Parliament and of the Council for issuers exempt from the requirement to produce IFRS, as was approved in the EU.
<i>Financial statements</i>	<p>For the purpose of these guidelines, the financial statements refer to annual, half-yearly financial statements and additional periodic financial information prepared according to the financial reporting framework applicable and published by issuers or persons responsible for the prospectus according to the Transparency Directive or the Prospectus Directive.</p>
<i>Prospectus</i>	<p>For the purpose of these guidelines, the prospectus refers to a document drawn up under Directive 2003/71/EC.</p>
<i>Issuer</i>	<p>For the purpose of these guidelines, an issuer is an individual or legal entity governed by public or private law, other than States, whose securities are admitted to trading on a regulated market. In case of depository receipts admitted to trading on a regulated market, the issuer means the issuer of the securities represented, whether those securities are admitted to trading on a regulated market or not.</p>
<i>Regulated information</i>	<p>All information which the issuer or any person who has submitted an application for the admission of securities to trading on a</p>

regulated market without the issuer's approval must be published under the Transparency Directive, the Market Abuse Regulation or laws, regulations or administrative provisions of a Member State adopted under Article 3 (1) of the Transparency Directive (transposition of the Transparency Directive)³.

Securities

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) paragraph 19 of that Directive, having a maturity of less than 12 months, for which national legislation may be applicable.

III. Purpose

6. The guidelines aim to promote the usefulness and transparency of APMs included in prospectuses or regulated information. Compliance with the guidelines will improve the comparability, reliability and/or understanding of the APMs. Issuers or persons responsible for the prospectus complying with these guidelines will ensure a true representation of the financial information published on the market.
7. In ESMA opinion, issuers or persons responsible for the prospectus, who decide to provide APMs, must do so in an appropriate and useful way for the decision makers of users. In the framework of its powers under ESMA Regulation, ESMA may issue guidelines under Article 16 of ESMA Regulation in relation to the acts referred to in Article 1 (2) of ESMA Regulation, including the Transparency Directive, the Prospectus Directive and the Market Abuse Regulation.
8. Based on the objective of the Transparency Directive to ensure an equivalent level of investor protection at EU level and the underlying principle to provide a true and fair view of the assets, liabilities, financial position and profit or loss of the issuer, which are aimed by its provisions, ESMA considers necessary a common approach of APMs to ensure consistent, efficient and effective supervisory practices and uniform and consistent application of the Transparency Directive (and by extension, of the Market Abuse Regulation).
9. Consistent with the aim of promoting the protection of real and potential investors, Article 5 of the Prospectus Directive lays down the principle that all information contained in a prospectus must be presented in a form easy to analyze and understand. In the opinion of ESMA, if persons responsible for the prospectus decide to include APMs in a prospectus, this principle of facilitating comprehension assumes that all APMs are defined and provided with significant labels and compared with the financial statements, and their relevance and reliability must be explained.
10. Based on the above considerations, ESMA decided to issue these guidelines. The guidelines are a common approach of APMs and is intended to be beneficial for users and help promote market confidence.

IV. Compliance and reporting obligations

³Starting with 3 July 2016, references to Directive 2003/6/EC shall be construed as references to Regulation (EU) no. 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC and shall be read according to the correlation table in Annex II of this Regulation.

Status of the guidelines

11. This document contains guidelines issued under art. 16 of ESMA Regulation, addressing issuers or persons responsible for the prospectus and the competent authorities. In accordance with art. 16 (3) of ESMA Regulation, competent authorities and issuers or persons responsible for the prospectus shall make their best endeavors to comply with the guidelines.
12. For the avoidance of doubt, these guidelines do not remove any obligation of compliance with the requirements of the Regulations or Directives. Accordingly, one must comply with the requirements of Market Abuse Regulation, which refers to the timely disclosure of information on the market or the public, as required by applicable laws and regulations.
13. The competent authorities responsible for supervision of the requirements of the Transparency Directive and of the Market Abuse Regulation should integrate these guidelines into their supervisory practices and monitor their compliance by issuers.
14. The competent authorities with responsibilities for approving prospectuses must integrate these guidelines into their supervisory practices to ensure compliance by persons responsible for the prospectus.

Reporting requirements

15. Within two months from the date of publication by ESMA, the competent authorities to whom these guidelines are addressed must notify ESMA whether they comply or intend to comply with the guidelines, specifying the reasons for non-compliance, at corporate.reporting@esma.europa.eu. In case of no response by this deadline, the competent authorities shall be deemed as non-compliant. A model for notifications is available on ESMA website.

V. Guidelines on alternative performance measures

16. These guidelines present the principles in bold text, with further explanatory, detailed and illustrative paragraphs. In order to comply with these guidelines, issuers or persons responsible for the prospectus must comply with the guidelines entirely.

What is an APM?

17. **For the purpose of these guidelines, an APM is understood as a financial measure of the historical or future financial performance, of the financial position or cash flows, other than the financial measure defined or mentioned in the applicable financial reporting framework.**
18. Usually, APMs come from or are based on financial statements prepared according to the applicable financial reporting framework, most often by adding or subtracting amounts from the figures presented in the financial statements. Examples of APMs include: operating earnings, cash earnings, earnings before application of the single tax, earnings before interest, taxes, depreciation and amortization (EBITDA), net debt, autonomous growth or

similar terms signifying line items adjustments of complex statements of income, statements of financial position or cash flow statements.

19. As defined in point 17, these guidelines do not apply in the following cases:

- measures defined or specified in the applicable financial reporting framework, such as income, profit or loss and earnings per share;
- physical or non-financial measures such as number of employees, number of people registered, sales per square meter (when sales figures are extracted directly from the financial statements) or social and environmental measures, such as emissions of greenhouse gases, classification of workforce by contract type or geographic location;
- information on major shareholders, acquisition or disposal of treasury shares and the total number of voting rights;
- explanatory information regarding compliance with the terms of an agreement or a legislative requirement, such as loan commitments, or basis for calculating the remuneration for the director or executive management.

Principles of publication

20. **Issuers or persons responsible for the prospectus must define the APMs used and their components, as well as the basis for calculation adopted, including details regarding any assumptions or presumptions used. Issuers or persons responsible for the prospectus must also indicate whether APM or any of its components refer to the performance (expected) of past or future reporting period.**

Presentation

21. **Issuers or persons responsible for the prospectus must publish the definitions of APMs used in a clear and easy to read manner.**
22. **APMs published must have significant labels assigned, reflecting their content and basis for calculation, to avoid sending misleading messages to users.**
23. For example, issuers or persons responsible for the prospectus must not use excessively optimistic or positive labels, such as "guaranteed profit" or "protected income".
24. Issuers or persons responsible for the prospectus must not use labels, titles or descriptions of measures defined in the applicable financial reporting framework that are identical or confusingly similar when they refer to APMs.
25. Issuers or persons responsible for the prospectus must not mistakenly label the items as being non-recurring, infrequent or unusual. For example, items that affect past periods and will affect future periods are rarely considered non-recurring, infrequent or unusual (such as restructuring costs and impairment losses).

Reconciliation

26. **A reconciliation of an APM to the most directly reconcilable line item, presented as subtotal or total in the financial statements of the corresponding period, should be published, with separate identification and explication of material reconciling items.**
27. **Issuers or persons responsible for the prospectus must also present the most directly reconcilable line item, as subtotal or total in the relevant financial statements for the respective APM.**
28. If financial statements include reconciling items, users should be able to identify them in those financial statements. When from the financial statements one cannot directly extract a reconciling item, reconciliation must indicate the way in which the value is calculated.
29. If APM cannot be directly identified from the financial statements, it is not necessary to establish reconciliation. For example, it is valid when an APM represents a total or subtotal in the financial statements.
30. If the financial statements of the corresponding period are not published yet, reconciliation must be established between APMs and the most directly reconcilable line item, subtotal or total, which will be included in those financial statements when they are published (e.g., earnings results presented before the financial statements).
31. If the financial statements of the corresponding period are not published, reconciliation must be established between APMs and the most directly reconcilable line item, subtotal or total, which will be included in those financial statements if they are published. The most directly reconcilable line item, subtotal or total, used to establish reconciliation with APM must be calculated and presented in reconciliation with the corresponding line item, subtotal or total included in the annual financial statements of the issuer, which were published most recently.
31. If reconciliation with an APM presented cannot be established because it is not derived from financial statements, such as estimating profits, future projections or predictions of profit, the issuer must explain compliance of the respective APM with accounting policies applied by the issuer in the financial statements prepared in accordance with the applicable financial reporting framework.

Explication of using the APMs

33. **Issuers or persons responsible for the prospectus must explain the use of APMs to allow users to understand their relevance and reliability.**
34. Issuers or persons responsible for the prospectus must explain why they believe that an APM provides useful information regarding the financial position, cash flows or financial performance, as well as the purposes of using the respective APM.

Projection and presentation of APMs

35. APMs should not be displayed more prominently, accentuated or authoritarian than measures arising directly from the financial statements.

36. The presentation of APMs should not distract from the presentation of measures arising directly from the financial statements.

Comparative values

37. **APMs must be accompanied by comparative figures for the corresponding prior periods. In situations where APMs refer to projections or estimates, comparative amounts should be reported to the latest available historical information.**
38. **Issuers or persons responsible for the prospectus must present reconciliation for all the comparative values presented.**
39. If it is not possible to provide comparative values, issuers or persons responsible for the prospectus must publish the respective impossibility and explain why it is not possible to provide those comparative values.
40. If issuers or persons responsible for the prospectus restate comparative values, they must use only information available at the end of the financial period for which APM was presented and should not integrate effects of events that occur after that date, i.e. no need to resort to an understanding of the situation when presenting the restated comparative figures.

Consistency

41. **The definition and calculation of an APM should be consistent over time. In exceptional situations in which issuers or persons responsible for the prospectus decide to restate an APM, the issuer should:**
- i. explain changes;**
 - ii. explain reasons why these changes determine reliable and more relevant information regarding the financial performance and**
 - iii. provide restated comparative values.**
42. **If an issuer stops publishing an APM, it must explain the reason why it believes that the respective APM no longer provides relevant information.**
43. When a certain APM is replaced with another that reaches better the same objectives, issuers must explain why the new APM provides reliable and more relevant information compared to the previously used APM.
44. APMs included in prospectuses should be used consistently for the financial periods included in the prospectus. These guidelines should not extend to cases where persons responsible for the prospectus decide to replace an APM or cease presenting an APM in various prospectuses in terms of time or nature of the securities issued (e.g., persons responsible for the prospectus should not explain why they use different APMs in a prospectus for the issuance of equity securities and a prospectus for the issuance of securities other than equity, considering the fact that the relevance of performance measures may be different depending on the type of securities issued).

Compliance by reference

45. **Except prospectuses that are regulated by a separate integration system by reference⁴ and except those Member States which do not allow compliance by reference, the principles of publication referred to in these guidelines can be replaced with direct reference to other documents previously published, containing these cases of publishing APMs and are easily and immediately accessible to users. In this case, compliance with the guidelines will be assessed through the collective reading of documents. However, compliance by reference should not cancel the other principles of these guidelines.**
46. APMs must be accompanied by corresponding comparative figures for previous periods and thus compliance by reference should not be understood as permission to remove these comparative values and replace them with references.
47. References must guide users to the information requested in these guidelines, such as hyperlinks to documents where information is available. These references must be sufficiently precise, such as identification of the specific page, section or chapter in documents where this information can be read.
48. For the purpose of these guidelines, immediate and easy access to documents implies that investors do not need to register on websites, pay fees for access to such information or seek these documents by means of search or a sequence of links.

⁴ Article 11 of Directive 2003/71/EC