



## REVIEW OF THE EUROPEAN SUPERVISORY AUTHORITIES

### Position of the Autorité des marchés financiers (AMF)

**T**he AMF welcomes the European Commission's legislative proposal to review the European Supervisory Authorities (ESAs), and the Commission's choice to move towards more integrated supervision across the continent, where ESAs, and ESMA in particular, would play a more decisive role.



#### AN IMPORTANT REFORM FOR THE EU27

The ongoing review of the ESAs is a unique opportunity to give ESMA the means to harmonise supervision and to further enhance the EU's single market in financial services.

To move towards a **true Capital Markets Union** that fosters competitive and stable capital markets and improves the financing of the EU's economy, it is essential to further strengthen **supervisory convergence**. After significant progress towards a single rulebook, the immediate priority is now convergence in the interpretation and implementation of these rules.

The reform of European supervision has become even more important in the context of **the UK's withdrawal from the EU**, which makes cohesion among the remaining 27 regulators critical. The EU27 needs a solid and consistent set of rules to be able to occupy its rightful place, and make its voice heard, on the international scene.

The Commission's proposals to give ESMA a central role, strengthen its governance and increase its powers represent a **major step forward**. The challenges ahead impose an **ambitious but realistic timetable**, allowing ESMA to gradually build up its strength via additional staff with the appropriate skills and with adequate funding. ESMA will be able to rely on the expertise of existing national competent authorities with which a meaningful split of responsibilities needs to be found.



## WHAT ROLE COULD ESMA PLAY IN POST-BREXIT FINANCIAL REGULATION?

The EU needs a stronger ESMA, that directly supervises a larger part of EU regulated activities, and that is credible when it speaks on behalf of the EU national authorities to international supervisors.

The Commission rightly wishes to strengthen ESMA's direct and indirect powers of supervision. The AMF strongly supports both these aims: the strengthening of ESMA's existing powers with regard to supervisory convergence; and the significant extension of ESMA's direct supervision powers of pan-European activities and entities.

Further, ESMA is the most legitimate body to deal with third countries, their firms and their authorities, as well as to play an active role in monitoring the ongoing equivalence of these third countries' regulatory frameworks.

### ➤ Stronger powers to ensure supervisory convergence

The convergence tools granted to ESMA (peer reviews, binding mediation, breach of Union law) need to be made more effective and ESMA must make more use of them in practice.

Giving ESMA stronger powers to ensure supervisory convergence is key to enhance harmonisation across the EU. This will promote a uniform interpretation of European regulations in the various Member States and a convergent supervision by the different national authorities of the implementation of these rules at domestic level.

**Reforming peer reviews, binding mediation, breach of law procedures;** creating a **strategic supervisory plan at European level;** establishing **control by ESMA of arrangements for delegation/outsourcing** of activities to third countries (an institutionalised continuation of the convergence work informally done within the ESMA in the context of Brexit to avoid regulatory arbitrage) are welcome proposals: they **will foster stronger convergence** of practices across Member States, to the benefit of all stakeholders.

However, the AMF considers that a number of **adjustments to the current proposals are needed** to make them workable in practice and in particular the following:

- The Commission's proposal to consolidate ESMA's role in the assessment of delegation arrangements of critical functions or of significant activities outside of the EU is a necessary step that the AMF supports, while fully acknowledging the need for EU entities to be able to continue to have recourse to delegation and outsourcing arrangements. We are therefore supportive of changes to the draft proposal in order to (i) better clarify the situations where ESMA is intended to be solicited and (ii) smoothen the process to avoid unnecessarily burdensome processes.

- National competent authorities should continue to have the ability to set their own domestic strategic supervisory priorities notwithstanding ESMA's **strategic supervisory plan**, to be able to address risks that are specific to their jurisdiction;
- ESMA's **binding mediation** between national authorities should not be limited to the cases currently foreseen by sector-specific regulations.

The AMF strongly supports the **central role** the Commission's proposal confers to ESMA in relation to **third country firms and regulators**. It will help avoid regulatory arbitrage between Member States by harmonising the treatment of such stakeholders. Making ESMA the single entry point to the EU will also offer third country firms and regulators more clarity and ease of access.

Furthermore, ESMA should be directly involved in dealing with equivalence decisions as well as their follow-up. It should systematically provide technical advice to the Commission in the course of the equivalence assessment process, not only on request, and be in charge of monitoring evolutions over time.

### ➤ More direct supervisory powers

ESMA should become the competent authority for products and entities that have a cross-border dimension or a systemic importance for the EU.

In many ways this goes beyond the current proposals. It is the case for example for market infrastructures, so-called "wholesale" products, European-labeled products and critical benchmarks. ESMA should also consistently structure all data requests to the industry within a unified mechanism in the Union for the collection and centralisation of data.

#### □ DATA

The AMF fully supports the centralisation of functions related to data collection and processing with ESMA, but calls for caution over the implementation timetable for such a transfer of competence (considering the projects already launched).

**In principle, such centralisation is a move in the right direction** that the AMF has always supported. This would seem sensible in view of a deeper integration of European markets, and would be also rational in practice in that it would reduce the IT cost for national supervisors and reporting entities, as well as help improve data quality. Furthermore, it is appropriate to set this centralisation at legislative level rather than by delegation agreements as is currently the case, which ends up in a heavy and inefficient process.

**From an implementation standpoint, it will be important to pay attention to the timetable and scalability** of the Commission's proposals considering the investments and developments already carried out by market participants for the entry into application of MiFID II. It is indeed crucial that market surveillance remains operational and that reporting streams are not interrupted when the transmission channel will be changed. To propose to change the architecture of the transaction reporting system by 2021 may raise major challenges and it would seem more realistic to project a lengthier timescale.

The AMF also fully supports the proposal to centralise the authorisation and supervision of regulated data reporting service providers (APAs, CTPs and ARMs) with ESMA, since those providers offer their services across Europe.

**In the field of asset management, the AMF would also encourage giving ESMA a role in centralising the various reportings** prescribed under the European sectorial legislation (e.g. AIFMD reporting), as well as in centralising the **passport notifications** of EU funds and managers between Member States.

#### □ PROSPECTUSES

The AMF fully shares the Commission's analysis that wholesale debt prospectuses are prime candidates for a transfer of their approval to ESMA: they are highly standardised documents, drafted in English and often coupled with a cross-border private placement involving investors in several EU jurisdictions. Besides, they represent a non-negligible size of the overall number of prospectuses approved each year in the EU and their transfer to ESMA would confer to the latter a meaningful role of supervision.

The AMF notes that **the Commission**, when defining these wholesale debt prospectuses, **omitted to target prospectuses of non-equity securities with a denomination per unit of at least 100,000 €, which constitute the bulk of this category** of prospectuses (since there are currently only few cases of regulated markets reserved for qualified investors in the EU). The AMF is confident that such omission can be fixed by the co-legislators, failing which an empty shell would be transferred to ESMA.

Conversely, the AMF **does not agree that the transfer of competence to ESMA should extend to prospectuses drawn up by specialised issuers** (and advertisements related thereto) as proposed. In most cases, these will be equity prospectuses addressed to retail investors. These are not standardised and often refer to domestic company law which can differ significantly from one Member State to another. These prospectuses are therefore more efficiently supervised locally by the same authority that is already in charge of supervising the periodic financial disclosure of the issuers. If the Commission perceives a risk of diverging practices across Member States as regards the way specialist issuers disclose their information, such a risk could be addressed in the delegated acts which the Prospectus Regulation empowers the Commission to adopt by January 2019.

Lastly, the AMF welcomes the Commission's proposal to strengthen the third country equivalence regime of the Prospectus Regulation but calls for introducing a clause that provides for reciprocal recognition of EU prospectuses by the third country under assessment, as a precondition for declaring equivalent its prospectus framework.

#### □ INVESTMENT FUNDS

The AMF **supports giving ESMA a direct competence to authorise and supervise EU-labeled funds** (ELTIF, EuVECA and EuSEF) to foster convergence in the supervision of these funds, and stresses the need for appropriate and efficient cooperation between ESMA and the relevant national competent authorities to support effective oversight. However, this competence **should be circumscribed to the funds and should not extend to their managers** who should continue to be supervised by their national competent authority to avoid creating unwarranted complexity for the supervision of EU asset managers.

## □ BENCHMARKS

The AMF supports entrusting ESMA with the direct supervision of critical benchmarks administrators. This would apply to both critical benchmark indices managed in the EU, and those used in the EU but managed from outside the Union. The AMF would recommend maintaining the current Colleges of supervisors that would be chaired by ESMA and composed of the relevant national competent authorities. This would ensure coherence in the supervision of contributors to benchmark indices, as they may contribute to both critical and non-critical indices and in the latter case be submitted to their national competent authorities' supervision.

## □ INNOVATION AND ESG

The Commission's proposal to **give the ESAs a general coordination role in the field of innovation and ESG** is welcome and a **step in the right direction**. Looking ahead, it is essential that ESMA takes into account in its work and priorities these critical factors and the risks and opportunities they present for the future of the European financial services industry.



## OTHER FIELDS WHERE THE AMF FAVOURS GIVING MORE POWERS TO ESMA

### ➤ Supervision of market infrastructures

In the case of market infrastructures, the debate has focused on the supervision of clearing houses in the context of the discussions on EMIR's review. In this field specially, it seems fully legitimate to suggest a European supervision over infrastructures with European (and often global) reach. All the more so when it is ESMA, in the case of clearing houses that would be competent for third country CCPs. Mirroring the institutional setting for banking supervision (and to some extent what is rightly proposed for third country equivalent CCPs), ESMA should be directly in charge of the **supervision of the major European CCPs** (smaller CCPs remaining under direct supervision of national competent authorities).

**It would be inconsistent to grant supervisory responsibilities to ESMA on Tier2 third country CCPs without conferring to ESMA a major role on equivalent EU CCPs...**

Moreover, the Commission's proposal unfortunately fails to explore the question of the supervision of EU trading venues (regulated markets, MTFs, OTFs and their operators) and CSDs (in the T2S environment). The AMF encourages co-legislators to explore the benefits of **transferring to ESMA the supervision of trading venues**. In particular, this would allow for a harmonised supervisory approach to trading rules – especially those with a strong impact on the European market structure - hence an equal treatment for trading venues across the EU. Having a single set of trading rules would also offer market participants more simplicity and legibility of these rules, an equal market access in all Member States, and lower implementing costs. A typical example of the regulatory features applicable to trading venues, that would be better agreed and supervised at a central level, is the granting of transparency exemptions, as described below.

## ➤ Entrusting ESMA with the granting of pre- and post-trade transparency waivers

Practice has shown that greater convergence in the review of pre- and post-trade transparency exemptions ("waivers") under MiFIR, both for equity and non-equity securities, would be beneficial to all stakeholders by saving time and avoiding differences of interpretation between national regulators. The AMF is of the view that the **granting of such waivers would be best performed by ESMA** than by national competent authorities.

## ➤ Improving the rulemaking process

The AMF wishes to reiterate a proposal it made previously in response to the Commission's public consultation on the ESAs' review, whereby **ESMA should be mandated to consult stakeholders on Q&As that may have a material impact on the market. More generally, ESMA should be encouraged to engage more with stakeholders.**

Currently, stakeholders are insufficiently included by ESMA in the Q&As' development process. At a minimum, national competent authorities should be allowed to share with stakeholders in their jurisdiction the potential regulatory changes implied by such Q&As to be able to identify implementation challenges early on and gather feedback on their possible impact.

Similarly, in keeping with the AMF historical position, ESMA should be better **involved during the elaboration of Level 1 texts** and its views should be sought, by way of consultation, whenever empowerments for Level 2 implementing measures are contemplated by co-legislators in Level 1 texts. Careful consideration should be given to avoid shifting to implementing measures political matters that would be best dealt with in the Level 1 legislation.

## ➤ The ability to adapt the conditions of implementation of the rule, in a harmonised manner at European level

European authorities need the legal tools to avoid the deadlocks which may occur when texts are in practice unenforceable or require international coordination (*no action letters* or *exemptive letters*), such as those used in the United States or similar types of acts. The need for such tools has emerged, for instance in the context of the implementation of the variation margin rules required under EMIR (summer 2017). The implementation of MIFID II has also highlighted some unintended consequences which could have justified the recourse to such tools (tick size for dual listed securities, position limit on some commodity contracts ...).

Regulators in the EU must be entitled to provide targeted and legally sound answers in those specific occasions where it appears that a legislative requirement cannot be complied with for objective reasons, or when an intervention by the authorities is required to promote a coordinated approach with third country authorities. Such measures should be given to the European authorities (e.g., ESMA or the Commission on ESMA's proposal) and would include allowing for delayed implementation of the rules, with an appropriate mechanism to ensure homogeneous implementation across Member States (under the supervision of the European Commission for instance).



## WHAT ORGANISATIONAL CHANGES ARE NEEDED TO SUPPORT ESMA'S NEW POWERS?

An efficient governance structure and an adequate basis for funding will be necessary to ensure an effective implementation of ESMA's new powers.

### ➤ Governance

The AMF supports the creation of a new Executive Board composed of independent members and having greater responsibilities than the existing Management Board, but calls for clarifications about its interaction with the Executive Session for CCPs proposed under the EMIR II proposal. At a minimum the respective fields of competence of both bodies need to be better defined.

Moreover, **further thinking on the overall governance structure of ESMA** could be undertaken: the currently proposed model should be optimised and streamlined, with a **'tighter' and more agile organisation**. One could think for instance of merging the Executive Board and the permanent composition of the Executive Session; the Board could be composed of few members (for instance 3 + the Chair), amongst which there would be one CCP expert. Importantly, it should be ensured that permanent members are appropriately qualified and have a strategic vision for the authority's mission and the European financial markets.

As to the distribution of powers between the Executive Board and the Board of Supervisors, the decisions of authorising entities directly supervised by ESMA could be taken by the Executive Board, by delegation of the Board of Supervisors and with adequate reporting.

### ➤ Funding

The current financing system of ESMA has well-known limits that need to be tackled. The AMF agrees that **increasing the industry's share in the financing of the ESAs makes sense in principle**. It is however important to ensure that the proposals do not generate substantial costs for the stakeholders, are practicable and that the split of tasks between ESMA and the national competent authorities does not follow an overburdening procedure. In this respect, the proposals made by the Commission could be clarified.

**In sum**, the European Commission's proposal for the ESAs' review is timely, and the EU27 must seize this opportunity to reach more convergence in financial supervision. After the tremendous set of regulations adopted in recent years in the financial sector, the proposed reform of ESMA's powers, governance and funding will give the Union the additional tools it needs to fully establish an efficient Capital Markets Union and to be more competitive in the global context.

Nevertheless, some adjustments to the current draft legislative proposal are necessary, to find the appropriate balance between building on the national competent authorities' expertise and where it makes sense, to further empower the ESAs. Going forward, the AMF will continue to support all measures that can favour further consistency in the supervision of EU financial markets : give stronger convergence powers to the ESAs (especially through a more centralised role in dealing with third countries; and a harmonised approach of delegation/outourcing arrangements throughout the EU); more direct supervisory powers to ESMA where relevant (e.g., in the field of data) and when activities/products have cross-border reach (in particular CCP supervision and wholesale prospectuses); within a more independent and streamlined governance framework.

