

**Response of the French Autorité des marchés financiers (AMF)
to the European Commission's consultation
on the operations of the European Supervisory Authorities**

From the AMF's point of view, the creation of ESMA has certainly been a very positive step towards improving the functioning of the internal market and enhancing the quality and consistency of supervision. The interconnectedness of European financial markets calls for harmonized regulation and supervision at an increasingly technical level. The European System of Financial Supervision plays a key role in respect of this objective, by involving ESMA and the national competent authorities in the formulation of EU legislation and regulation in a more direct and active manner.

The efficient implementation of European Directives and Regulations could not be achieved without ESMA providing detailed measures through the development of draft standards, guidelines or other texts and ensuring a follow-up to their implementation.

In our view, ESMA should play a central role in establishing a common supervisory culture by making full use of its powers to ensure effective and convergent application of the single rulebook. In the short term, there is room for improvement, as further described below, for more convergence regarding the implementation of European rules and the supervision of financial markets. In this context, it is important that ESMA carries on working in order to ensure that there is a consistent implementation of the guidelines it issues across the European Union. There are strong expectations from national competent authorities as well as from market participants. Furthermore, there is a need to clarify the legal status of ESMA's tools such as Q&As, supervisory briefings and opinions and the expectations concerning their implementation. In addition, ESMA should make full use of its powers including those linked to mediation or breach of European Union Law.

In the medium term, the scope of ESMA's intervention could be enlarged. There are areas where ESMA should play a stronger role, such as in the fields of direct transaction reporting, and data collection and transmission in Europe. It would also be very valuable if ESMA could be better associated during the Level 1 negotiations in order to feed in expertise from an early stage of the process and to facilitate the timely development of consistent standards and guidelines and an effective implementation of EU legislation.

1. Governance

The public consultation on the ESA review states that the current configuration of ESMA governance may lead to conflicts of interests, may fail to deliver solutions mainly in the field of supervisory convergence and may lack a supranational orientation in the decision making process. Based on its experience of the functioning of ESMA, the AMF comes to partially different conclusions. ESMA has reached its initial goal by completing to a large extent a single rulebook for financial markets thanks to the current organization of the Board. The fact that all NCAs have participated in the adoption of

the implementing rules and standards contributes to the acceptability of European rules in all Member States.

Supervisory convergence is a far more difficult task, given the heterogeneity of the supervisory practices among NCAs, and the work done so far by ESMA cannot be judged so quickly since it has just started. Further steps should be taken to foster supervisory convergence, first by promoting common interpretation of texts between NCAs, and second by strengthening the decision-making process related to convergence tools including enforcement.

In order to improve the effectiveness of the decision-making powers of ESMA, the AMF suggests 3 amendments to ESMA regulation.

Extend qualified majority voting to all important decisions of the Board. Currently, qualified majority voting – which has proven to be a very effective evolution in the decision making process – is limited to some important decisions of the Board (adoption of technical standards, guidelines, budget). However, many other decisions are also important and may be postponed or blocked when simple majority voting is used. Therefore, qualified majority voting should be extended to the adoption of all strategic decisions of the Board, for example the election of the members of the Management Board or the expression of an opinion (of whatever nature: letters to external parties, opinions and questions & answers), i.e. texts which are a significant part of ESMA's document production and often have a strong impact on market participants as well as on NCAs. It should also apply to other types of decisions in the area of supervisory convergence such as opening a breach of Union law case, a binding mediation, deciding on a peer review or its follow-up, as well as the launch of projects such as in the IT area.

Empower the Chairperson in order to promote a more supranational orientation. This could be done by (i) modifying the nomination process (Council and Parliament would nominate the Chairperson on the basis of a shortlist elaborated by the Commission or the Board of ESMA after a call for expression of interests), (ii) giving the Chairperson a voting right on the Board¹, and (iii) delegating some tasks from the Board to the Chairperson for example in the field of supervisory convergence. It should also be noted that the current regulation could be clarified with regard to the renewal of the term of the Chairperson, in order to encourage an open process of the call for candidates.

Modify the composition and the powers of the Management Board. In order to improve supervisory convergence and optimize existing tasks and powers, it could be envisaged to modify the governance of ESMA based on the model of the Single Supervisory Mechanism. **The Management Board could thus be composed, on the one hand, of permanent members, and on the other hand, of representatives of NCAs on a rotating basis.** This new composition of the Management Board would strengthen ESMA's supranational orientation while preserving the contribution and the expertise of practicing national supervisors, each of which having the opportunity to become a member on a rotating basis. The permanent members, for instance 3 or 4, would be independent qualified persons. These members should necessarily have sufficient supervisory experience in order to be operational. As in the Supervisory Board of the SSM, they could be part-time members if the powers delegated to the Management Board do not justify full-time. This new Management Board would also include representatives of NCAs, between 4 and 6, on a rotating basis, like the rotation system currently in place in the Steering Committee of the Supervisory Board of the SSM. The speed of rotation would depend on the size of NCAs. This new composition of the Management Board

¹ The voting rights system of the Supervisory Board of the SSM (Single Supervision Mechanism) could be taken as an example. When the Board needs to take a decision implying qualified majority, each of the four representatives of the ECB appointed by the Governing Council have a vote equal to the median vote of the other members (article 26 (7) of Regulation 1024/2013).

should necessarily be set in the ESMA Regulation since it would be linked to a new system of funding as well.

In parallel, it would be necessary to **delegate more powers to the Management Board in its new composition in two fields: direct supervision** (the power of decision could be transferred from the Board of Supervisors to the Management Board on all individual decisions concerning credit rating agencies, trade repositories and new directly supervised entities) and **supervisory convergence** (all decisions in the area of breach of Union law, binding mediation, peer reviews and their follow-ups should be transferred to the Management Board, the Board of Supervisors itself retaining a decision-making power only on the last step ie adoption of individual decisions including market participants when an NCA does not comply with the previous recommendation).

2. Funding

The AMF is in favor of an evolution of ESMA funding in 4 directions.

ESMA should be mostly funded by the industry: ESMA would continue to receive fees from entities under direct supervision (credit rating agencies and trade repositories). There would also be a subsidy from the EU budget corresponding to regulatory activities, which could represent approximately 40 % of the remaining budgetary needs of ESMA, as currently. The last part of ESMA budget, which is currently paid by the NCAs on the basis of the voting rights, would be deeply modified and paid by the industry through NCAs on the basis of a Member State key.

The contribution from the industry to ESMA should reflect the size of each Member State's financial industry ("Member State key") in order to be fairer towards smaller countries: the size of each national industry could be evaluated by taking into account, for instance, the total amount of cleared financial transactions, the amount of assets under management and the market capitalization of issuing companies. In order to have a well-accepted and stable contribution key, the ESMA Regulation could give a third party (independent consultant or ESRB) the power to assess the size of national financial markets on the basis of the data provided by NCAs and ESMA depending on where these data are held. This assessment would be updated every 3 to 5 years. This would guarantee an independent assessment. On the other hand, using an "entity-based key", ie basing the contribution on the entities operating in each sector of financial markets, would lack a legal basis and thus cannot be envisaged if there is no direct supervision of ESMA over these entities.

Fees should be collected by NCAs as it is currently the case. This solution generates less administrative and recovery costs than direct collection by ESMA because many NCAs already collect fees from their industry. It is also the simplest solution to design, introduce in the Regulation and would rapidly be operational.

Voting modalities on the budget should be changed in order to reflect the size of the contributions coming from each Member State. The governance of ESMA should also be changed by putting in place a rotation system for NCAs representatives in the Management Board in its new composition.

3. Powers

a/ Desirable changes

The AMF supports an increase of ESMA's role in the following fields:

Supervisory convergence: after the completion of the single rulebook, supervisory convergence is the next challenge that ESMA needs to address. Convergence will not be reached mainly by using enforcement tools such as breach of law or binding mediation, but rather by fostering a common culture and common practices of supervision. One of the main problems encountered in this field is

the lack of a shared interpretation of texts, since the rules are now mainly harmonized throughout the EU. It could be imagined to set up a **formal mechanism that could be inscribed in the ESMA Regulation and that would enable ESMA and NCAs to share a common interpretation of rules** where needed, ie on significant matters or matters subject to regulatory arbitrage. Two methods could be used and provided for in the ESMA Regulation. On the one hand, when there is evidence of different interpretations between NCAs leading to different practices, ESMA should be required to elaborate a statement that clarifies what interpretation should apply and, after a period of time, should automatically launch a breach of law case or a binding mediation if NCAs do not comply with EU law as collectively interpreted. On the other hand, on the model of ESMA's current EECS (European Enforcers Coordination Sessions in the field of IFRS enforcement), any NCA that has a significant question of interpretation should report it in dedicated and regular sessions of standing committees in order to seek guidance from ESMA. This guidance would then give rise to regular peer reviews and to the use of enforcement tools should Union law be breached.

Enforcement tools should be used exceptionally, in the last resort, and not as a day-to-day tool to foster supervisory convergence. Nevertheless, the AMF is strongly in favor of a greater use of the powers that ESMA already has in this field since no case of breach of law or binding mediation has come to conclusion since the creation of ESMA. To this effect, **some provisions on the breach of law procedure could be added in ESMA Regulation:** (i) specifying that any decision by ESMA not to open a breach of law case should be motivated and made public, (ii) giving ESMA a power of on-site inspections in NCAs in order to find evidence in the context of its investigations on a breach of law case.

In parallel, revising the ESMA Regulation could be the occasion to **grant ESMA the power to publish no action letters**, ie giving the possibility to ESMA and NCAs to temporarily suspend the implementation of rules when they can lead to harmful consequences.

International aspects: the role of ESMA should be strengthened in the initial equivalence assessment of a third country's regulatory and supervisory framework as well as in the follow-up of the equivalence decision. Concerning the involvement of ESMA in the equivalence process, despite the fact that Article 33 (2) of the ESMA Regulation stipulates that ESMA shall assist in preparing equivalence decisions pertaining to supervisory regimes in third countries, in practice, the European Commission does not have recourse systematically to ESMA when assessing the equivalence of every third country's legislative framework. The AMF believes that **the European Commission should systematically rely on a technical advice prepared by ESMA when deciding on the equivalence** of a third country's legislative framework.

Concerning the follow-up to equivalence decisions, **ESMA's role should be strengthened in the ESMA Regulation to allow it to monitor the equivalence decision on an on-going basis** so that it can ensure that such a decision is still valid in case of relevant regulatory changes in European legislation as well as in the case of changes in the legislative framework of the third country. Technically, every 2 or 3 years, ESMA should issue a report analyzing those significant changes and their impact on the equivalence decision. The rigor and frequency of this analysis should be proportionate to the size of the third country's entities or activities concerned.

ESMA could also be in charge of ensuring that adequate supervision is exercised by the third-country authority in charge of the supervision of the concerned entity. This would ensure a consistent approach on a pan European basis.

On the other hand, the AMF does **not consider it necessary to empower ESMA to monitor supervisory cooperation agreements** between EU NCAs and third countries as this type of cooperation agreements concerns mainly the access to information needed to supervise entities by both parties and there would be no added value.

Access to data: ESMA's power to access data directly from market participants could be strengthened in order to better perform its tasks linked to supervisory convergence, consumer protection and direct supervision. However this should be done without creating additional reporting burdens for market participants that already report data to NCAs.

Reporting – Data strategy: ESMA should be given the power to directly collect data that is today collected and used by NCA for the supervision of markets and investment services providers through an enhanced Transaction Reporting Exchange Mechanism. ESMA would thus become a central hub of transaction reporting, whereas such data collection is now a competence of NCAs. This would support closer market integration and reduce market participants and NCAs IT costs. Consequently, ESMA would be playing a more meaningful role with regard to data quality as well. However, detection and enforcement of market abuse would remain a competence of NCAs because of the link with the local legal framework.

In addition, the AMF strongly supports the idea of creating a role for ESMA to consolidate reporting data and to simplify the processes applied to reporting, disclosure and benchmarking requirements. Whereas these requirements are currently specified in excessively detailed implementing acts, it could be envisaged that the implementing acts only draw the main lines of reporting requirements and that **ESMA is granted the power to adopt more detailed and technical guidelines and recommendations defining the precise format of data.** This would help eliminating the overlaps and inconsistencies currently observed, adopting these requirements more quickly and making changes easier since updates, corrections and clarifications are often needed in the area of data quality.

Direct supervision: the AMF strongly supports the reinforcement of ESMA's direct supervisory powers in relevant fields such as data reporting services providers. Since it favors a greater role for ESMA to collect directly financial transaction data, it is totally relevant to grant it the powers to **directly supervise data reporting services providers** within the meaning of MiFID II, such as APAs (Approved Publications Arrangements), i.e. firms which make public the details of transactions in financial instruments, ARMs (Approved Reporting Mechanism) which report the details of transactions to regulators for the purpose of market abuse surveillance and CTPs (Consolidated Tape Providers) which provide consolidated trading data from across the whole of the EU.

ESMA could also be granted **direct supervisory powers on critical benchmark administrators**, given their obvious pan-European importance.

Concerning post trading market infrastructures, CCPs are currently supervised by NCAs at national level through colleges of supervisors given their cross-border dimension. There are sometimes divergences of approach between colleges of supervision, for example in the determination of substantial changes on the risk models of CCPs. Considering the specific nature of CCPs and the critical role they play in the current environment, the ESA's review offers an opportunity to seek 1) a better coordination between market supervisors, prudential supervisors and central banks, which are involved in monitoring financial stability, systemic risk, and may provide central bank liquidity, as well as 2) common approaches among colleges of supervision, on significant changes in risk models among key areas of supervisory focus. To this end, it could be envisaged to **grant ESMA the chairmanship of colleges of supervision of CCPs and a voting right in these colleges.**

Advising on level 1 legislation : consulting ESMA as part of the lawmaking process would help build consistency between the principles set out in the legislation and the implementing measures. In addition, when making rules, the European Parliament and the Council must clearly settle in level 1 legislation those aspects requiring political decisions and avoid ambiguity or delegating to level 2 such rules, which leads to political issues having to be settled by non-political bodies.

Consumer and investor protection: As a preliminary remark, it should be clear that the present balance between ESMA and NCAs powers in the field of investor protection should be preserved. Retail investor protection is better guaranteed by **keeping this competence at a national level**, given the proximity of NCAs with the investors whose interests they are taking care of.

Reinforcing ESMA powers should thus be made in parallel of NCAs powers, with ESMA intervening when an NCA demonstrates its unwillingness to tackle a serious issue. In this context, it is worth underlining that ESMA already has broad powers under article 9 of the current Regulation (data analysis, adoption of guidelines and recommendations, warnings, temporary ban). The challenge is now more to use these powers in concrete cases pertaining to retail investor protection (for example towards highly speculative products that are today sold cross border), rather than to extend them.

There is one case where ESMA could be granted additional powers for investor protection purposes: it should have the right to **temporarily prohibit or restrict certain financial activities that threaten investor protection as provided under MIFIR**. Indeed, in the present regulation, ESMA may use this power when the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system are threatened (see art. 9.5 of the ESMA founding Regulation). The ESAs review is also an opportunity to consider the operation of the Joint Committee to date, which has not proven fully satisfactory. Experience has shown indeed that initiatives to set up consumer protection rules within the Joint Committee are often difficult to implement. For instance, only ESMA has approved cross-selling guidelines that are also relevant for products other than financial instruments. Establishing proposals under the Joint Committee's remit regarding PRIIPS has also been particularly difficult.

b/ Unnecessary or inappropriate changes

It would not be right to reinforce ESMA's powers in the following topics:

Direct supervision of ESMA on investment funds: the AMF is firmly opposed for several reasons. First, even if the rules of several types of funds are harmonized by EU laws, some large areas remain regulated by national law such as taxation and investors access to the courts. Second, there is no such thing as pan-European or systemic funds as opposed to others. Here the parallel with the banking system and the distinction between systemic and non-systemic banks is not relevant. Almost all funds are distributed to both retail customers and wholesale markets. Third, giving a central role to ESMA would also be detrimental to the necessary proximity to be maintained for supervisory purposes between the supervisory authority and local investors, especially regarding the control of distribution modalities and marketing. Fourth, there is no added-value to separate the examination of communication (that could remain a task for NCAs) and the authorization process as a whole (that in theory could be transferred to ESMA). Supervision of funds should be global and include all dimensions in order to have accurate knowledge of each entity and put in place sound risk-based supervision. Last, separating the authorization process between ESMA and NCAs could only lead to longer delays and heavy administrative costs for the industry and for ESMA (recruiting staff to deal with the administrative tasks and dealing in all languages in the EU for instance), which are not in the interest of European supervision.

Guidelines and recommendations: these non-binding measures have proven effective so far. The comply and explain mechanism that requires NCAs and market participants to explain whether they respect or not a non-binding measure when the guideline or the recommendation states it, can be an effective tool to ensure that guidelines and recommendations are taken into account. However the AMF seizes this opportunity to recall that measures likely to have a major impact must be taken via guidelines rather than Q&As (for which ESMA does not trigger a public consultation nor ensure translation). The review of the ESMA Regulation should also be the occasion to introduce the possibility for ESMA to make public consultations not only on guidelines but also on opinions or

Q&As where deemed appropriate, for example when a large number of stakeholders ask for it or when it has a direct impact on the preparation for the implementation of new legislation (e.. reporting requirements).

Financial reporting: It is not necessary to grant ESMA a formal advisory role in the adoption and endorsement of accounting standards or audit standards. Recent legislative amendments have been made following the Maystadt report. The new organization put in place with the EFRAG (European Financial Reporting Advisory Group) on one side and the CEAOB (Committee of European Audit Oversight Bodies) on the other side **should be given the time to show that it functions adequately before making new legislative changes** and thinking about reinforcing ESMA's formal role. In fact, in the current organization, ESMA already has an informal role by being an observer in EFRAG and CEAOB that has proven sufficient so far. In addition, giving ESMA a greater role in the endorsement of standards could hamper its independence as the enforcer of accounting standards.

On the other hand, **ESMA could play a stronger role in the field of accounting standards enforcement.** The work carried out by ESMA in the context of its European Enforcers Coordination Sessions (EECS) has proven beneficial for the homogeneous application of IFRS throughout the European Union. While avoiding any interpretation of international standards by ESMA (this should be done exclusively by the IASB, in close cooperation with national standard setters and other parties in order to take into account local contexts), it is important that ESMA uses all tools at its disposal to ensure a consistent level of enforcement of IFRS in the EU, including the possibility of launching a procedure of breach of law against an European Enforcer if need be. For this reason, the ESMA Regulation should be amended in order to include article 1 paragraph 3) within the scope of current article 17.

c/ Other recommended changes

Finally, it is important to recall that there is a need to complete the EU supervisory framework by ensuring consistent powers of national competent authorities. Experience over the last few years and events in other countries have drawn attention to this issue. While international standards set by IOSCO govern issues related to the responsibility, accountability, governance, powers and resources of competent authorities, there is no such principle in European legislation. Some recitals in sectorial legislation require Member States to designate competent authorities "of a public nature, guaranteeing their independence from economic actors and avoiding conflicts of interest and ensuring that they are adequately financed" (reference to MIFID for instance). This gap should be filled, in order to guarantee that NCAs can carry out their mission with adequate resources and the independence required, as well as in order to harmonize the powers of these authorities, most notably in the field of sanctioning powers. **Such a step would strengthen the overall efficiency of market supervision at EU level and ensure a level playing field among authorities in the area of enforcement, which is key to the credibility of the overall system.**