



**21 May 2021**

**Final ISDA – FIA – FIA EPTA Response to the European Commission's targeted consultation on the functioning of the European Supervisory Authorities**

**A. QUESTIONS FOR THE ASSESSMENT OF THE EUROPEAN SUPERVISORY AUTHORITIES (ESAs) AND THE RECENT CHANGES IN THEIR FOUNDING REGULATIONS.**

- I. How do you assess the impact of each ESA's activities on the aspects below? Please rate the ESAs impact on each aspect from 1 to 5, 1 standing for "less significant impact" and 5 for "most significant impact":

	1	2	3	4	5	No opinion
The financial system as a whole			X			
Financial stability						X
The functioning of the internal market			X			
The quality and consistency of supervision						X
The enforcement of EU rules on supervision						X
Strengthening international supervisory coordination			X			
Consumer and investor protection						X
Financial innovation						X
Sustainable finance			X			

Please explain your answer

- II. In your view, do the ESA(s)' mandate(s) cover all necessary tasks and powers to contribute to the stability and to the well-functioning of the financial system? If you

think that there are elements which should be added or removed from the mandate, please provide a substantiated answer.

YES?

NO?

## Introductions

FIA, ISDA and FIA EPTA (together the Associations) mostly focus on ESMA's powers in the response to the consultation as ESMA has been the main EU authority dealing with derivatives markets regulation.

The Associations have been fully supportive of the creation of the ESAs, which have played a crucial role in developing EU financial markets and we applaud the ESAs for all their achievements over the past 10 years. The ESAs will continue to be vital in furtherance of an effective Capital Markets Union (CMU), we hence provide our inputs intended in a thoroughly constructive spirit with a view to working closely with the European Commission (Commission) and the ESAs on an ongoing basis to continue to evolve safe and efficient EU capital markets.

The Associations are also liaising with the EBA on prudential rules that affect derivatives markets or non-prudential rule aiming at mitigating systemic risk (such as margin requirements for non-cleared derivatives) but ESMA remains the main interlocutor to the Associations.

The Associations rarely directly liaise with EIOPA and do not express views on how the powers of EIOPA should be looked at.

## Executive Summary

- The Associations consider that supervisory convergence and the removal of cross-border impediments should be the primary focus on the ESAs and that an extension of ESAs' powers should be considered once the supervisory convergence goals have been fully achieved;
- Should further direct powers be considered for ESMA, the Associations would support a targeted approach and suggest the following areas where ESMA has a strong direct role to play:
  - o Centralisation of data used for the consolidated tape under MiFID; Data consolidation/Golden source;
  - o Sustainable finance;
  - o European Single Access Point (ESAP) for EU-wide access to relevant information;
  - o Benchmarks.
- Competitiveness of EU markets
  - o Providing more flexibility is recommended when it comes to legislation deadlines and for setting regulatory and compliance deliverables.
  - o Markets would benefit from equipping ESMA with tools for more agility when it comes to the ESA's decision making to enable swifter reactions to changing market conditions.
  - o Timelines for Level 2 implementation should specify a period for ESA drafting rather than defining an absolute date. A combination of two timelines is recommended, such as a 12 to 18 month period from the finalisation of Level 1 to the finalisation of the Level 2, and subsequently another 12 to 18 month time period from the finalisation of Level 2 rules to final rule application dates
  - o Alternatively, it should be explored whether the date of application of Level 1 rules can be made conditional upon the publication into the Official Journal (OJ) of the EU of Level 2 rules in order to avoid legal uncertainty.
  - o A phased-in approach is recommended to avoid the numerous challenges of a big-bang implementation. Principles of prioritisation should be incorporated in Level 1 mandates in particular for legislation requiring a high number of Regulatory Technical Standards (RTS) (e.g. MiFID II/MiFIR).
  - o Industry engagement: Association's members recommend enhanced interactions and standard practices (during and post-consultation phases) with the industry and welcome increased

engagement with the industry in the form of roundtables, hearings for the industry before and during consultation processes, more visibility and transparency around roundtable invitations, etc.

- Covid -19 considerations
  - o The Covid-19 situation has been challenging for both the industry and regulators since March 2020 and the dialog between ESMA and the industry has been very positive. The industry welcomed the various de-prioritisation statements (to ensure co-ordinated supervisory actions by NCAs) by announcing a wide range of actions aimed at mitigating the impact of the Covid-19 outbreak on various market stakeholders and areas;
  - o However, given the extraordinarily disruptive nature of the crisis, the Associations' members note that the European Commission and ESMA could have considered a much more flexible agenda of review of certain fundamental pieces of legislation and did not sufficiently 'prioritise' between emergency regulatory intervention and longer-term review of existing legislation compared to the approach taken in many other jurisdictions.
- Obstacles: the Associations highly recommend ESMA to provide Cost-Benefit Analysis (CBA) so as to justify its proposals of regulatory measures, included in its consultation papers, which market participants have been called to comment on and which have been perceived as potentially generating material impact on them.
- Q&A process – are extremely helpful for the industry when implementing new requirements and regulations. While the process has improved it requires further development and should also include a variety of different stakeholders and consider feedback through roundtables.
- No-action letter: The no-action letter mechanism introduced in 2019 does not provide a sufficiently effective and binding tool to the ESAs as these still have limited authority. Therefore, the Associations recommend developing the mechanism further to provide necessary flexibility in the process of applying new regulations in certain cases or facilitate the maintenance of orderly markets and financial stability.
- Funding: while we supported direct industry funding under certain conditions in the past, the Associations view the topic of direct industry funding with more scepticism now.
- Consultation approach: while acknowledging that ESMA's deliveries are subject to Level 1 timelines, the Associations recommend ESMA to provide adequate timelines for consultation periods, and also allow sufficient time for the analysis of interconnectedness of related consultations and business impacts. In addition, we recommend more dialogue with stakeholders during

## Supervisory Convergence

The Associations strongly believe that it is important to recognise the very different nature of capital market supervision (which tends to be varied by product and participant, as well as global in nature) compared to bank supervision (which typically involves more similar institutions doing a smaller set of activities which are often more locally oriented) and ensure an appropriately differentiated policy approach at each ESA.

The Associations therefore consider that supervisory convergence and the removal of cross-border impediments should be the primary focus on the ESAs and that extension of ESAs' powers should be considered once the supervisory convergence goals have been fully been achieved.

## Direct Supervisory Powers

Beyond supervisory convergence, the question of whether the ESAs should obtain more powers generally triggers two comments or questions from the Associations' members:

- Should ESMA obtain direct supervisory powers over certain entities whose size or EU-wide provision of services implies concerns in several EU Member States (e.g. CCPs) ?;
- Would it be appropriate to add to ESMA's core missions the need to support the attractiveness of EU financial markets when producing technical advice to the European Commission in the view of level 1 legislation or when dealing with Level 2 and level 3 rules?

On the appropriateness of expanding direct supervisory powers of ESMA to certain entities, the Associations generally consider that any consideration to expand ESMA's direct supervisory powers should respect the

subsidiarity principle according to Article 5 of the Treaty of the European Union and would first require in-depth assessment, including corresponding cost/benefit analysis and ideally also preceding consultation of concerned entities.

In this context, the value of supervision by national authorities should be recognised, given their strong knowledge of local markets, with their particularities (specific products, client base, tax regimes and language capabilities), best practices and national legal frameworks. National supervisors also have the best understanding of practical operations and business models of supervised entities and have established networks of coordination between regulators.

Should further direct powers be considered for ESMA, the Associations would support a targeted approach and would like to give a few examples of where ESMA has a strong direct role to play:

- **Centralisation of data used for the consolidated tape under MiFID; Data consolidation/Golden source:** Subject to enhancements of data accuracy, the MiFID reporting system (FIRDS) should become the golden source of data for EU capital markets; we support the creation of a "golden source" listing all instruments in scope for transaction reporting and post-trade transparency under MiFID II/R. Provided FIRDS becomes more accurate and reliable, it should operate as a "golden source". Mutatis mutandis, the same considerations can be made about the ESMA register of "MiFID investment firms". Generally, it would be useful that all ESMA registers become golden sources i.e. unique and reliable databases which would: a) enable market participants to use the same sets of data; b) provide market participants with comfort that the same data is consistently applied by different reporting parties thereby reducing the risk of inconsistent/discretionary reporting and c) provide market participants with clarity regarding the scope of their reporting obligations (e.g. which financial instruments are eligible for reporting and which are not).
- **Sustainable finance:** setting up and managing the European Single Access Point (ESAP) for financial and non-financial information to help investors obtain easy, quick, and comparable access to European company data;
- **European Single Access Point (ESAP)** for EU-wide access to relevant information (including financial and sustainability-related) publicly disclosed by companies, provided that no additional disclosure requirement is introduced and this information is fit-for-the-purpose which ESAP intends to pursue (i.e. ESAP should cover only information which really helps investors making informed investment decisions in companies): the platform should be managed by ESMA (which at the EU level already maintains public registers, see point 2 below) with support from the National Competent Authorities (NCAs) which should be involved from the outset of the project. In particular, ESAP should be designed and implemented as a system where i) in a first stage, companies would submit information at national level and ii) in a second stage, this information would be collected, aggregated and reported by ESMA at EU level;
- The Associations' members also value the role that the ESAs played in the context of preparing relevant Level 2 legislation and the ongoing **dialogue between the ESAs and relevant stakeholders through webinars, hearings and bilateral discussions**. Furthermore, members appreciate ESMA's acknowledgement that the availability of reliable, auditable and comparable ESG data has to be facilitated in order to render the EU's Sustainable Finance framework workable, a prerequisite to mainstreaming sustainable finance;
- **Benchmarks:** The Associations have always supported a direct supervisory role for ESMA of administrators of critical, pan-European benchmarks and of third country administrators recognised by national competent authorities.

## Competitiveness of EU markets

We commend ESMA for recently applied useful flexibility to avoid fragmentation that would have been detrimental to the EU's competitiveness (around CCP transition, UK novation for margin).

Overall, more flexibility is recommended when it comes to legislation deadlines and for setting regulatory and compliance deliverables. The industry would favour a closer interaction between ESMA and the Commission when it comes to agreeing the Level 1 framework and suggest allowing ESMA as observer to the Level 1 discussions. In addition, markets would benefit from equipping ESMA with tools for more agility when it comes

to the ESA's decision making to enable swifter reactions to changing market conditions.

Regarding legislation deadlines, the Associations strongly believe that timelines for Level 2 implementation should specify a certain period for the ESAs rather than defining an absolute date. A combination of two timelines is recommended, such as a 12 to 18 month period from the finalisation of Level 1 to the finalisation of the Level 2, and subsequently another 12 to 18 month time period from the finalisation of Level 2 rules to final rule application dates. This would allow sufficient time for the ESAs to draft Level 2 measures as well as allowing sufficient time for national regulators and the industry to implement the regulatory changes. In the last few years EMIR (i.e. margin rules), EMIR REFIT (i.e. FRANDT requirements) CSDR, PRIIPs or MiFID II/MiFIR have proven how challenging, and sometimes impossible it is to meet absolute application dates. The implementation of the Market Abuse Regulation (MAR) was another example that demonstrated the negative impacts on implementation for both the industry and NCAs when Level 2 rules were finalised after the application date of the Level 1 Regulation.

Alternatively, it should be explored whether the date of application of Level 1 rules can be made conditional upon the publication into the Official Journal (OJ) of the EU of Level 2 rules in order to avoid legal uncertainty.

The Associations would also like to recommend that new Regulations/Directives that require a significant amount of changes to be implemented should be applied in a phased-in approach to avoid the numerous challenges of a big-bang implementation. Principles of prioritisation should be incorporated in Level 1 mandates in particular for legislation requiring a high number of Regulatory Technical Standards (RTS) (e.g. MiFID II/MiFIR).

## Industry engagement

An important aspect of developing capital and financial markets is a robust regulatory framework and constructive engagement with the industry, as effective markets are developed by openness, market forces and market participants. The Associations' members strongly recommend the ESA authorities to take a more forward-looking approach and to apply a communication line that is most fit for purpose to achieve those goals.

While we have observed increased and more active engagement over the past recent months in certain areas, there is room for further improvements when interacting with market participants. For instance, interactions with the industry in the post-trade area, in particular on Level 2 CCP Recovery & Resolution and Margin volatility Covid-19 discussions, were prime examples of good interaction and practice.

Generally, the Associations' members recommend the following necessary and enhanced interactions with the industry:

### - During consultation procedures

- We believe that keeping the dialogue with stakeholders open during consultation processes after consultation papers have been issued could assist market participants i) to grasp better the underlying rationale and the ultimate goals of ESMA ii) to lay their comments on more solid and reliable interpretive basis and, in the final analysis iii) to increase the effectiveness of the whole process to the benefit of both ESMA and of respondents.  
As an example, ESMA notes in the "Final Report on MiFIR review report on the obligations to report transactions and reference data" (published on 30 March 2021) that some respondents to consultations have misunderstood or misinterpreted specific questions or not fully understood the implications of specific proposals."
- We would welcome increased engagement with the industry in the form of roundtables, hearings for the industry before and during consultation processes, more visibility and transparency around roundtable invitations, etc.

## - Post-consultation process

- We are pleased to notice that the “Public Statement of Consultation Practices” specifically indicates that ESMA will consult, if possible, for a second time if the response to the first consultation reveals significant problems, or where revised proposals are radically different from the original proposals on which a consultation was based. Generally, the Consultation output would further benefit from more transparency when it comes to making decisions and providing technical advice to the Commission. It is not always comprehensible for the industry to establish of how ESMA arrived at certain conclusions following consultation feedback by the industry.
- We deem problematic that in some Final Reports adopted as an outcome of consultation procedures, ESMA has expressed its willingness to carry out some actions as a follow-up to a consultation exercise without providing any clear indication of how and when these follow-up actions are due to materialize
- It is extremely important that ESMA establishes, as standard practice, an effective and structured post-consultation process i.e. conducts outreach with stakeholders on a periodic basis in order to continue to receive inputs in relation to those issues not settled after a previous consultation procedure.

## COVID -19 considerations

Finally, the pandemic triggers questions as to how the ESAs, in particular ESMA, should adapt their agenda in a crisis situation. The Covid-19 situation has been challenging for both the industry and regulators since March 2020. The markets reacted with wide fluctuations and increased volatility. Financial Markets Infrastructures (FMIs) held up with the risks and market participants operated very well, which made the experience positive. During this time, ESMA held regular meetings with NCA representatives and included the UK to ensure that in case of any material decisions would have to be made during the transitional period, the UK FCA would be involved in good time. The dialog between ESMA and the industry has been very positive.

However, given the extraordinarily disruptive nature of the crisis for market participants and particularly for staff with the work from home environment and all associated technical and personal challenges, the Associations’ members note that the Commission and ESMA could have considered a much more flexible review agenda for certain fundamental pieces of legislation.

The general feeling among the industry was that ESMA and the EC did not sufficiently ‘prioritise’ between emergency regulatory intervention and longer-term review of existing legislation compared to the approach taken in many other jurisdictions.

On the positive side, the Associations welcomed the various “de-prioritisation” Public Statements whereby ESMA – in order to ensure/promote coordinated supervisory actions by NCAs – announced a wide range of actions aimed at mitigating the impact of the COVID-19 outbreak on various market stakeholders and related to various regulatory areas (SFTR, Transparency Directive, AIFMD, UCITS Directive, EuVECA Regulation, EuSEF Regulations, Benchmarks Regulation etc.). We also welcomed ESMA proposal included in its Final Report on draft regulatory technical standards (RTS) published on 28 August 2020 to postpone the date of entry into force of the Commission Delegated Regulation (EU) 2018/1229 (RTS on settlement discipline) until 1 February 2022 (this proposal was subsequently endorsed by the EC with Delegated Regulation 2021/70 of 23 October 2020)

On the other hand, whereas the industry welcomed the efforts made by EU legislators to draft and adopt rapidly the MiFID quick-fix, market participants felt that the many consultations relating to market structural issues under MIFID 2 and MiFIR (data, reporting, transparency, ...) could have been put on hold for a few months to enable a more comprehensive analysis of data and of fundamentals of markets. Although in the early months of the COVID pandemic some consultation response dates were deferred, which was greatly welcomed, throughout 2020 many further consultations were published. In a number of instances, market participants requested that extended deadlines be provided to allow for more considered responses, but these were declined on the basis that the ESAs had been set fixed dates to issue reports which had to be adhered to. As a result, market participants were faced with a significant volume of highly technical and impactful consultations to address at a time when

firms were still dealing with the response to COVID as well as finalising preparations for Brexit. In some instances, consultations were issued with statutory consultation periods that were not adjusted to account for the fact that they spanned major holiday periods.

It is vital that the development of European policy and regulation is pursued on the basis of robust analysis, led by data and evidence, and allowing for full and timely consultation of all impacted stakeholders. Market participants require sufficient time to review what are often very lengthy and complex consultation proposals comprehensively. Often, proposals will span multiple business lines within a single firm, as well as global activity. Analysing proposals and formulating insightful and constructive responses, supplemented with relevant data can take significant time and resource.

Further, for many proposals impacting global or pan-European markets, our Members find it vital to discuss and form consensus views within Trade Associations in order to provide the most helpful considered input to the ESAs or the Commission. All of this requires sufficient time. We note that the root cause for some of the issues encountered in providing for insufficient time are not due to specific failings of the ESAs but rather lie in the drafting of legislation, whereby scheduled review dates are mandated in the legal text, in turn setting deadlines for the ESAs to produce reports for the Commission to consider.

Accepting that such dates reflect the will of the co-legislators to ensure aspects of important legislation are reviewed to a schedule, these dates are often set many years in advance. They hence cannot account for either the particular circumstances which might arise in markets at the time they fall due, such as the COVID pandemic, or necessarily for where multiple reports across dossiers, but impacting the same ESAs and market participants, fall due over same the period of time. We recommend that before setting review deadlines in legislation, a specific assessment be undertaken of all existing reviews already due impacting the same ESAs or market participants, and all consultations to be issued either by the ESAs or the Commission.

Greater flexibility should be provided to the ESAs to defer delivery of reports where market circumstances indicate that this is necessary to ensure broad and deep engagement. Consultations should not be issued over significant summer or year-end holiday periods or should otherwise have the period extended by several weeks to account for times where many key staff may be unavailable within and between firms to discuss the proposals.

We welcome that the ESAs and the Commission publish in advance workplans which give some visibility to market participants on the pipeline of policy work they can expect to engage with. We would recommend this be developed further to produce a regular consolidated view and timeline across the ESAs and the Commission showing all impending financial services consultations, grouped by sector and/or theme. This would give the opportunity to identify early any significant areas of potential overlap and adjust timing as necessary to avoid this outcome. As a positive example of such coordinated advance planning, we draw attention to the UK's recently implemented Regulatory Initiatives Grid <https://www.fca.org.uk/publication/corporate/regulatory-initiatives-grid-may-2021.pdf>, which also assists in ensuring the appropriate co-ordination amongst all relevant regulatory authority. With specific reference to the ESMA Supervisory Convergence Work Programme which, inter alia, contains a list of the new guidelines to be elaborated in the year could also be a good starting point in this respect.

III. In your view, do the ESAs face any obstacles in delivering on their mandates? If the answer is yes, please explain what you consider to be the main obstacles.

YES

NO

The Associations would like to highlight their concerns about the lack of upstream Cost-Benefit Analysis (CBA) and broader concerns about EU approach to policy formation.

Typically, the review of MiFID 2/ MiFIR led ESMA to run many consultations and produce review reports and policy recommendations – many of which being material for firms – without running the necessary cost benefit

analysis.

The Associations highly recommend ESMA to provide CBA so as to justify its proposals of regulatory measures, included in its Consultation Papers, which market participants have been called to comment on and which have been perceived as potentially generating material impact on them. By mere way of an example, this invitation has been conveyed in the context of many consultations regarding the review of specific aspects of MiFID II/R regime conducted by ESMA in 2020.

Recently, in their final MiFIR review report on the obligations to report transactions and reference data, ESMA states in paragraph 16 that:

*“feedback to a few proposals, respondents recurrently expressed the need for a full Cost-Benefit Analysis to be produced before they could express an opinion on or support a proposal made in the Consultation Paper. However, ESMA would like to clarify that the provision of Cost-Benefit Analyses does not appear at this stage of the regulatory revision process (i.e. during the consultation and recommendation phase). Indeed, the Consultation Paper and the following Final Report contain ESMA’s recommendations to the European Commission and its suggestions of amendments that should be made to Level 1 legislation. It is if the European Commission were to move forward with the recommendations made by ESMA, that a full Cost-Benefit Analysis will be done on the proposals recommending to amend the relevant provisions of MiFIR. While ESMA’s role is not to produce Cost-Benefit Analyses at this stage of the regulatory revision process, ESMA does stand ready to provide further advice and clarifications on the proposals included in this Final Report<sup>1</sup>”.*

We have had similar experiences in the IFR/IFD process, which had as its main objective to achieve a fit-for-purpose and proportionate prudential regime for non-systemic investment firms. It has been our observation that the EBA in developing Level 2 measures has had a tendency to copy, without adequate impact assessment or CBA, existing Level 2 measures under CRR to also apply for the purposes of IFR/IFD Level 2, ignoring the fact that the recipients of those two rules have a materially different business model and risk profile. We consider that a clearly defined requirement for a more substantive cost benefit analysis and impact assessment to be undertaken would have ensured better outcomes which would have been more closely aligned with the Level 1 objectives.

The Associations appreciate that the full impact analysis of an eventual legislative review is also in the hands of the Commission. However, the ESAs play a vital role in informing the development of policy. Indeed, the report structure has been established precisely to ensure that the Commission develops proposals that are informed by expert technical input from the ESAs. ESA consultations can be highly technical, but with the potential for very broad impacts insofar as they may i) introduce new regulatory requirements or extend the scope of existing ones thereby introducing additional burden and ii) imply significant upfront and ongoing implementation costs and will often include a range of policy proposals on which input is sought. In finalising their reports to the Commission, the ESAs will then assess input from stakeholders before recommending technical policy outcomes. By this stage, the range of potential policy options under consideration is thereby already narrowed.

Given the material impact that many of the recommendations made by ESMA in such a report would have, market participants feel that an upstream CBA should be done at least to support the most material policy recommendations. It does not appear sufficient to expect that a detailed cost benefit analysis would be undertaken only as part of a subsequent Commission legislative review, when the detailed technical consultation has already been held. Due to a lack of analysis justifying the proposal under consultation, the participants in a consultation process could find themselves in a position not to provide constructive responses or to support none of the multiple proposals/options proposed by ESMA. By way of an example, as also recognized by ESMA in its Final Report “MiFIR review report on the obligations to report transactions and reference data” published in March 2021, a majority of respondents was not in the position to support any of the three alternative options for the potential extension of the scope of reporting proposed by ESMA in its Consultation Paper “MiFIR review report on the obligations to report transactions and reference data” published in September 2020 As well as in relation to ESMA’s final report on supervisory fees for Benchmark administrators. A CBA would benefit market participants making more informed decisions.

We note that ESMA’s founding regulation, as amended by the ESA’s review, states that: “[ESMA] shall, where appropriate, conduct open public consultations regarding the guidelines and recommendations which it issues

<sup>1</sup> [https://www.esma.europa.eu/sites/default/files/library/esma74-362-1013\\_final\\_report\\_mifir\\_review\\_-\\_data\\_reporting.pdf](https://www.esma.europa.eu/sites/default/files/library/esma74-362-1013_final_report_mifir_review_-_data_reporting.pdf)



and analyse the related potential costs and benefits of issuing such guidelines and recommendations.” (Art 16 (2)).

Moreover, under the newly added Article 8 par. 3, ESMA shall have due regard to the results of cost-benefit analysis:

- A) when carrying out the tasks referred to in Article 8 paragraph 1 and, namely, those related to, for what matters here most, i) contribution to the establishment of high-quality common regulatory and supervisory standards and practices, in particular by developing draft regulatory and implementing technical standards, guidelines, recommendations, and other measures, including opinions ii) development and updating of the supervisory handbook iii) contribution to a common supervisory culture iv) peer reviews v) fostering consumer and investor protection, and
- B) when exercising the powers referred to in Article 8 paragraph 2 e.g. i) development of draft regulatory and implementing technical standards ii) issuance of guidelines and recommendations iii) issuance of warnings in the event that a financial activity poses a serious threat to the objectives which ESMA pursues for the sake of the stability and effectiveness of the financial system iv) issuance of answers to questions within Q&A processes etc.

Finally, under the amended Article 29 par. 2., ESMA in order to promote the goal of a common EU supervisory culture and consistent supervisory practices shall analyse, where appropriate, the potential costs and benefits related i) to the opinions provided to National Competent Authorities as well as ii) to its new practical instruments and tools which are adopted in order to achieve the above-mentioned goal.

We hence believe that ESMA should be already under an obligation to analyse costs and benefits when making regulatory recommendations. However, if indeed ESMA is of the view that this obligation does not extend to such analysis in forming recommendations in reports to the Commission then the Associations consider that ESMA either gets a general mandate to run cost benefit analysis or that ESMA is required more explicitly to do so on a case-by-case basis when the EC requests technical input from ESMA.

Finally, the Associations would like to note that the review of the founding regulations of the ESAs introduced sustainability as an integral part of their respective mandates to promote the integrity and stability of financial markets and ensure investor and consumer protection. More specifically, the co-legislators agreed in March 2019 on an ambitious timeframe for the Sustainable Finance Disclosure Regulation (SFDR), requiring the joint development by the ESAs of most of the draft regulatory technical standards (RTS) by 30 December 2020 and the application of the Regulation’s provisions from 10 March 2021. However, as acknowledged by the EC in their letter to the ESAs of October 2020, *“it was clear from the outset that this would be a very challenging deadline, given the time needed for the adoption of the rules, scrutiny in accordance with the EIOPA, ESMA and EBA Regulations and subsequent publication in the Official Journal.”* Eventually, this challenging deadline was further exacerbated by the unprecedented economic and market stress caused by the Covid-19 crisis and resulted in an extension of the deadline for the public consultation on the draft RTS and in a delayed application of the Level 2 provisions under the SFDR. In this light, we fully agree with the ESA’s views as expressed in their joint letter to the Commission’s proposal on a Renewed Sustainable Finance Strategy that a) it is of utmost importance to assess the impact of newly implemented legislation before taking additional legislative steps and b) a proportionate approach should be taken across all legislative and regulatory initiatives considered within the Renewed Sustainable Finance Strategy.

## **1. The supervisory convergence tasks of the ESAs**

### **1.1. Common supervisory culture/supervisory convergence:**

- 1.1.1. To what extent the ESAs do contribute to promoting a common supervisory culture and consistent supervisory practices? Please rate in a scale from 1 to 5 (“5” being the most significant contribution and “1” the less significant contribution). Please explain your answer

and indicate if there are any areas for improvement.

	1	2	3	4	5	No opinion
Promote a common supervisory culture and consistent supervisory practices			X			

1.1.2. To what extent the following tasks undertaken by the ESA(s) have effectively contributed to building a common supervisory culture and consistent supervisory practices in the EU. Please rate each task from 1 to 5, 1 standing for "less significant contribution" and 5 for "most significant contribution":

	1	2	3	4	5	No opinion
Providing opinions to competent authorities						X
Promoting bilateral and multilateral exchanges of information between competent authorities						X
Contributing to developing high quality and uniform supervisory standards			X			
Contributing to developing high quality and uniform reporting standards			X			
Developing and reviewing the application of technical standards			X			
Contributing to the development of sectoral legislation by providing advice to the Commission			X			
Establishing (cross)sectoral training programmes						X
Producing reports relating to their field of activities			X			
Conducting peer reviews between competent authorities						X
Determining new Union strategic supervisory priorities			X			
Establishing coordination groups			X			
Developing Union supervisory handbooks			X			
Monitoring and assessing environmental, social and governance-related risks			X			
Adopting measures using emergency powers			X			
Investigating breaches of Union law						X

Coordinating actions of competent authorities in emergency situations (e.g. Covid-19 crisis)				X		
Mediating between competent authorities						X
Monitoring the work of supervisory and resolution colleges						X
Publishing on their website information relating to their field of activities				X		
Monitoring market developments			X			
(Only for the EBA) Monitoring liquidity risks in financial institutions						
(Only the EBA) Monitoring of own funds and eligible liabilities instruments issued by institutions						
Initiating and coordinating Union-wide stress tests of financial institutions						X
Developing guidelines and recommendations			X			
Developing Q&As			X			
Contributing to the establishment of a common Union financial data strategy			X			
Providing supervisory statements			X			
Other instruments and tools to promote supervisory convergence, please indicate						X

Please add any qualitative comments you may wish to explain your reasoning.

1.1.3. One of the roles of the ESAs is to promote and facilitate the functioning of supervisory colleges, where established by sector legislation, and foster the consistency of the application of Union law among them. Please rate the ESAs' contribution to the objectives below from 1 to 5, 1 standing for "less significant contribution" and 5 for "most significant contribution". Please explain your reasoning.

	1	2	3	4	5	No opinion
Promote the effective and efficient functioning of colleges of supervisors						X
Foster consistency in the application of Union law among colleges						X
Promote converging supervisory practices among colleges.			X			

1.1.4. In the framework of the 2019 ESAs review. How do you assess the new process for questions and answers (Article 16b)?

The Associations strongly believe that Q&As are extremely helpful for the industry when implementing new requirements and regulations.

The Associations could observe improvements in the process. However, while the industry in the past recommended to make the Level 3 guidance subject to a consultation processes with the industry, this has not substantively materialised. In particular, the Associations note that ESMA stakeholder group discussions are not necessarily sufficiently transparent (minutes of these meetings are not always provided).

Level 3 guidance issued by the ESAs is impactful on the day-to-day business of firms. Therefore, any consultation of Level 3 Q&As should be conducted for any Q&A that has material operational or compliance impact on markets participants. The process should also include a variety of different stakeholders and consider feedback through roundtables. We note, and welcome, that on some occasions Q&A will be issued with a specific expectation embedded around compliance dates to align to the new guidance, and would urge that this practice be more widely applied in issuance of impactful Q&A.

We also welcome the introduction by ESMA of an online form for submission of questions to be considered for a Q&A response but would like to have greater visibility around the pipeline of questions that ESMA is considering, with indicative dates of when they may be reviewed and addressed, or indeed if they have been rejected.

Furthermore, regarding Q&A prioritisation, the Associations note that the issue of the criteria which ESMA applies in order to prioritise Q&As was not addressed. The only indication in this field is provided by ESMA on its dedicated website where ESMA indicates that it will prioritise the questions received according to the following criteria: i) type of stakeholder ii) geographical origin iii) level of public attention and iv) relevance of the issue.

Lastly, on timeline for Q&As, the issue of the length of the timespan for ESMA to answer to the question was not addressed. The only indication in this field is provided by ESMA on its dedicated website where ESMA clarifies that it endeavours to reply within two months to factual questions received and within four to six months to questions that raise new policy issues. Again, more in-depth guidance would be required.

1.1.5. In your view, does the new process for questions and answers allow for an efficient process for answering questions and for promoting supervisory convergence?

YES Please identify areas for improvement, please explain

NO Please give reasons.

NO. See our answer to question 1.1.4. above

## 1.2. No action letters

1.2.1. In the framework of the 2019 ESAs review. In your view, is the new mechanism of no action letters (Article 9a of the ESMA/EIOPA Regulations and Article 9c EBA Regulation) fit for its intended purpose? Please justify your answer.

YES

NO

The no-action letter mechanism introduced in 2019 does not provide a sufficiently effective and binding tool to the ESAs as these still have limited authority, which results in the ESAs required to point out that any communication is a statement and the requirement to use soft language only. The mechanism does not incentivise the ESAs to use the tool. The obvious evidence that supports this statement is that rather than no-action letters, the ESAs, notably ESMA, have continued to release “deprioritisation of enforcement” statements.

The Associations also note that apart from its title, the no-action letter mechanism is not providing any commitments to suspend the operation of a provision of EU law similarly to no-action letters produced by the CFTC in the United States.

An effective tool could provide the necessary flexibility in the process of applying new regulations in certain cases or facilitate the maintenance of orderly markets and financial stability.

During the process, there was significant support from both the industry and NCAs for the introduction of no-action letters. In the end, the ESAs were equipped with two related powers:

- in exceptional circumstances, where the relevant ESA considers that the application of in scope legislative acts is liable to raise significant issues for specified reasons, it must, without delay, send a detailed account in writing to the competent authorities and the Commission of the issues which it considers to exist and the ESA shall provide, in some cases, the Commission with an opinion (to be made public by the ESA itself) on any action it considers appropriate, in the form of a new legislative proposal or a proposal for a new delegated or implementing act, and on the urgency that, in the Authority’s judgment, is attached to the issue; and
- where the relevant ESA considers, on the basis of information received that any of the relevant legislative acts raises significant exceptional issues pertaining to certain matters (market confidence, consumer, customer or investor protection, the orderly functioning and integrity of financial markets or commodity markets, or the stability of the whole or part of the EU’s financial system) it must without delay send a detailed account in writing to the competent authorities and the Commission of the issues it considers to exist and may provide the Commission with an opinion (to be made public by the ESA itself) on any action it considers appropriate, in the form of a new legislative proposal or a proposal for a new delegated or implementing act, and on the urgency of the issue.

In addition to the non-binding nature of no-action letters, the Associations note that today’s overcomplicated process is another weakness that needs to be addressed. There is no ‘fast-track’ process to accommodate the needs of market participants to get a rapid answer to the problem they are facing. Due to individual facts and circumstances, market participants are facing challenging situations in spite of their efforts to comply with specific EU provisions and to meet related deadlines. It is obvious that the opinion, which ESAs provide to the Commission accompanied by a new legislative proposal, does not trigger a “fast track” EU legislative procedure and, on the contrary, undergo the ordinary EU legislative procedure.

As a result of the abovementioned weaknesses in the no-action letters process, what can be observed is that since the introduction of no-action letters mechanism ESMA continued to produce *forbearance* (or ‘*de-prioritisation of enforcement*’) statements that promoted coordinated responses among NCAs, especially during the Covid crisis. This has resulted in forbearance statements becoming a well-established practice over time. The issuance of forbearance statements is generally welcomed as providing an indication of an expected convergent outcome across NCAs. But this tool is not binding and the industry cannot take full comfort that all NCAs will act in a harmonised way as they are not relieved of their obligation to enforce EU law and market participants are not relieved of their obligation to comply with directly applicable EU law.

For example, the No-Action letter of 29 April 2020 with respect to sustainability-related disclosures for benchmarks<sup>2</sup>, in light of the absence of relevant Level 2 legislation, is the only ESMA No-Action letter produced following the ESAs Review. The Associations members agreed with ESMA’s argument that the lacking specification of ESG disclosures in form of Level 2 legislation would have hampered the supervision of ESG disclosures for benchmarks. In addition, market participants would have not been able to implement the regulation in a consistent manner and would have been subject to double implementation efforts following the – delayed – entry into force of Level 2 measures. However, ESMA’s first no-action letter reveals significant shortcomings: The No-Action letter states that *‘From a legal perspective, neither ESMA nor the competent authorities possess any power to allow the disapplication of applicable Union law. In view of these exceptional circumstances, ESMA considers that it is necessary for competent authorities to address the absence of the delegated acts supplementing Articles 13(1)(d) and 27(2a) of Regulation (EU) 2016/1011 through consistent risk-based supervisory and enforcement practices.’* Therefore, market participants cannot be confident that NCAs will follow such statements.

According to the minutes of ESMA’s Board of Supervisors of 29 April 2020, the European Commission expressed opposition to the proposed use of the no-action letter tool, referring to the lack of justification and legal proposal as requested for in article 9a of the amended ESMA Regulation. Indeed, the provision in question stipulates that *“in the cases referred to in points (a) and (b) of paragraph 1, the Authority shall provide the Commission with an opinion on any action it considers appropriate, in the form of a new legislative proposal or a proposal for a new delegated or implementing act, and on the urgency that, in the Authority’s judgment, is attached to the issue”*.

The Associations believe that the requirement for ESMA to provide the Commission with an opinion on any action it considers appropriate in the form of a new legislative proposal or a proposal for a new or implementing act when certain conditions are met is disproportionate for the purpose of providing market participants with timely legal certainty in areas where significant operational challenges with respect to implementation are identified.

The Associations reiterate their strong support to no-action letters and strongly recommend the co-legislators to simplify the mechanism to make it an effective tool.

We also note that even though not satisfactory from a legal perspective, the many ‘*de-prioritisation of enforcement*’ statements produced by the ESAs (notably by ESMA) in the past few years have been helpful<sup>3</sup>. Where such tools are to be used, we recommend that the certainty which they can provide to market participants usefully be enhanced by introducing an “assumed agreement or public disagreement” approach. It could for instance be stated within the ESA public notice that all NCAs have agreed to apply the “de-prioritisation of enforcement” unless they publicly announce a divergence on their own website. We note that NCAs would have advance notice of intended use of such tools through ESA governance so would have time to consider their position before ESA publication.

### 1.2.2. In the framework of the 2019 ESAs review. How does the new mechanism, in your view, compare with “no action letters” in other jurisdictions?

<sup>2</sup> <https://www.esma.europa.eu/press-news/esma-news/esma-issues-no-action-letter-new-esg-disclosure-requirements-under-benchmarks>

<sup>3</sup> One typical example was the statement that accompanied the publication of the proposed revised Joint EBA; ESMA and EIOPA RTS on non-cleared margin rules under EMIR in December 2019 because the finalisation and publication of the revised margin rules took much longer than expected (publication in the Official Journal of the EU in February 2021).

The Associations have identified a few no-action letters mechanisms in other jurisdictions.

## US – CFTC

CFTC no-action letters are formally provided for in the CFTC’s regulations. 17 CFR (Code of federal Regulation) § 140.99 states the process by which a market participant may request relief from the CFTC (<https://www.law.cornell.edu/cfr/text/17/140.99>). 17 CFR 140.98 specifies the procedures for the CFTC in publishing the relief (<https://www.law.cornell.edu/cfr/text/17/140.98>).

The CFTC posts relief letters: <https://www.cftc.gov/LawRegulation/CFTCStaffLetters/index.htm>.

Technically, there are four categories of agency relief letters: (1) no-action, (2) exemptive, (3) interpretive and (4) staff advisories. The distinction between each is explained in the prior link. Former CFTC Chairman Tarbert issued in December a “directive” to CFTC staff “on the use of staff letters and guidance”. This statement goes to some length to explain that staff relief should be used judiciously, and should “supplement” rather than “replace” formal rulemakings (<https://www.cftc.gov/PressRoom/SpeechesTestimony/tarbetstatement102720>). The statement further explains the considerations that should go into each type of letter. The statements’ set more restrictive parameters on the issuance of relief could be interpreted, the statement is useful in setting forth the delineating factors for each type of relief letter.

The CFTC has also published FAQs on its website further explaining their practices w/r/t requests for relief and agency action in response thereto: <https://www.cftc.gov/Transparency/relieffaq>. The FAQs rely in part on Tarbert’s statement, referenced above.

It is important to appreciate that CFTC staff letters are simply acts of staff, distinct from the Commission. As such, they do not require a vote by commissioners to approve the letter. This has the benefit of enabling staff to respond quickly to an issue that arises for the market or a particular market participant.

While the CFTC no-action letter regime is also not a legally binding tool, it is a tool that the industry feels empowered through established practice to rely upon.

Asia - overview for some of the main APAC jurisdictions:

### Australia

ASIC’s general policy on ‘no-action’ positions and their status is set out in Regulatory Guide 108 - No-action letters (RG 108). RG 108 and the process to apply for relief can be found [here](#).

A ‘no-action’ position is an expression of regulatory intention about how ASIC will exercise its powers. But ASIC doesn’t represent that the conduct covered by the ‘no-action’ position will not be held to contravene the relevant legislation. Therefore, a ‘no-action’ position does not necessarily preclude third parties from taking legal action in relation to the same conduct or conduct of that kind. It also does not prevent a court from holding that particular conduct infringes the relevant legislation. ASIC will not undertake to intervene in an action brought by third parties in respect of such conduct.

### India

The concept of no-action letters is provided for in SEBI’s [Securities and Exchange Board of India \(Informal Guidance\) Scheme 2003](#). As the name suggests, the guidance provided is 'informal' and is not supposed to be construed as a conclusive decision of any question of law or fact by SEBI.

### Japan

Details of Japan FSA’s no action letter system, including scope and how to apply, can be found [here](#)

### Singapore

We are not aware that there is a specific piece of legislation providing for no-action letters. But they are provided for in various places like Section 321 of the Securities and Futures Act, Section 98 of the Business Trusts Act, Section 74 of the Trust Companies Act.

Generally, these letters do not have the force of law and they do not bind the MAS or the Public Prosecutor from instituting proceedings subsequently.

In practice, a market participant can present certain facts to the MAS for its opinion, MAS may then issue a no-action letter to state that it does not intend to institute proceedings against the market participant on the basis of those facts.

### Summary

The Associations note that not all of these no-action letters mechanisms are providing legally binding tools. However, we note that if a mechanism is easy to use, it becomes a well-established practice that the industry can rely upon and that such practice does not usually become subject to legal challenges.

In light of these examples, the Associations recommend to the Commission and Co-legislators to simplify the EU no-action letters mechanism to incentivise the ESAs to use the tool. The risk, if the framework remain the same, is that the ESAs continue to release ‘de-prioritisation of enforcement statements’, which will continue to trigger legal questions and concerns from i.e. non-EU market participants who are not familiar with the legal concepts used in the EU.

In the past ten years, ‘forbearance’ was required in many situations for many different reasons (e.g. level 2 RTS not finalised before the application date of a level 1 provision). An effective no-action letter mechanism has the ability to further contribute to the competitiveness of EU markets.

#### 1.2.3. In the framework of the 2019 ESAs review. Could you provide examples where the use of no action letters would have been useful or could be useful in the future?

One example of where a no-action letter would have been useful was the revision of the EMIR margin RTS because the framework was time sensitive (upcoming end of temporary exemptions, internationally agreed application dates of initial margin rules to non-cleared derivatives) and carrying major counterparty risk management and compliance risks concerns. The proposed revised Joint EBA, ESMA and EIOPA RTS was published in December 2019 but it took more than a year to finalise and publish the RTS (publication in the Official Journal of the EU in February 2021). The ESAs published a ‘de-prioritisation of enforcement’ statement in December 2019 on which the industry had to rely. However, many counterparties, notably those based outside of the EU, have raised concerns in the course of 2020 that the situation was not satisfactory and that they may have to adopt a conservative approach to regulation, i.e. stop trading on certain asset classes because they would breach the existing RTS in the absence of published and applicable revised RTS.

In the future, there will always be a risk as long as Level 1 legislation sets hard deadlines for the application of certain rules (and end of certain temporary exemptions) if the level 2 texts has not been finalised in time. This is one of the reasons why the Associations strongly recommend that, rather than setting fixed deadlines in the Level 1 texts, co-legislators should consider setting timelines based on achievable timeframes to start once the Level 2 texts have been finalised (i.e. 12 or 18 months after publication of the Level 2 text).

### 1.3. Peer reviews

#### 1.3.1. Please specify to what extent peer reviews organised by the ESAs have contributed to the convergence outcomes listed below.



Please distinguish between the situation before the 2019 review and afterwards. Please rate each outcome from 1 to 5, 1 standing for "less significant contribution" and 5 for "most significant contribution":

<b>Situation before the 2019 ESAs review</b>	1	2	3	4	5	No opinion
Convergence in the application of Union law						
Convergence in supervisory practices						
More wide spread application of best practices developed by other competent authorities						
Convergence in the enforcement of provisions adopted in the implementation of Union law						
Further harmonization of Union rules						
Other, please indicate						

<b>Situation after the 2019 ESAs review</b>	1	2	3	4	5	No opinion
Convergence in the application of Union law						
Convergence in supervisory practices						
More wide spread application of best practices developed by other competent authorities						
Convergence in the enforcement of provisions adopted in the implementation of Union law						
Further harmonization of Union rules						
Other, please indicate						

Please explain your reasoning/give examples.

- 1.3.2. How do you assess the impact of each of the changes below introduced by 2019 ESAs review in the peer review process? Please rate each change from 1 to 5, 1 standing for "less effective" and 5 for "most effective"

	1	2	3	4	5	No opinion
Ad-hoc Peer Review Committees (PRC) composed of ESAs' and NCAs' staff and chaired by the ESA are responsible for preparing peer review reports and follow-ups.						
The peer review report is now adopted by written procedure on non-objection basis by the Board of Supervisors.						
Transparency provisions: if the PRC main findings differ from those published in the report, dissenting views should be transmitted to the three European Institutions.						
PRC findings may result in recommendations to NCAs under Article 16 of the ESAs Regulations that are now distinguished from guidelines, addressed to all NCAs. The use of this type of individual recommendations entails the application of the "comply or explain" mechanism and allows a closefollow-up.						
Mandatory follow-up to peer reviews within two years after the adoption of the peer review report.						
The possibility to carry out additional peer reviews in case of urgency or unforeseen events (fast track peer reviews).						
The Management Board is consulted in order to maintain consistency with other peer reviews reports and to ensure a level playing field.						

Please explain your reasoning

1.3.3. Do you think mandatory recurring peer reviews, covering also enforcement aspects, could be introduced in some sectoral legislation? If the answer is yes, please specify the piece of legislation and concrete provision under which mandatory peer reviews could be introduced.

YES

NO

1.3.4. Are there improvements that could be made to the peer review process? Please specify which ones.

YES

NO

#### 1.4. Other tasks and powers

1.4.1. In your view, is the collection of information regime (Art 35 ESAs Regulations) effective? If you identify areas for improvement, please explain.

YES

NO

1.4.2. In the framework of the 2019 ESAs review, in your view, are the new Union strategic supervisory priorities an effective tool to ensure more focused convergence priorities and more coherent coordination (Article 29a ESAs Regulations)? If you identify any areas for improvement, please explain.

YES

NO

1.4.3. Do you think there is the need to amend or add a tool to the toolkit of the ESAs for achieving supervisory convergence? If yes, which ones.

YES

NO

1.4.4. Please assess in a scale from 1 to 5 the significance of the new ESAs' task of fostering and monitoring the supervisory independence of national competent authorities ("5" being the highest rate and "1" the lowest rate). Please explain.

	1	2	3	4	5	No opinion
fostering and monitoring supervisory independence						

1.4.5. What criteria would be the most relevant, in your view, for the ESAs to perform effectively their new task of fostering and

monitoring supervisory independence of national competent authorities? Please rate the relevance of each criteria in a scale from 1 to 5 (“5” being the most relevant criteria rate and “1” less relevant criteria).

	1	2	3	4	5	No opinion
operational independence						
financial independence						
appointment and dismissal of governing body						
accountability and transparency						
adequacy of powers and ability to apply them						
other, please specify						

1.4.6. What are, in your view, the main remaining obstacle(s) to allow for a more effective supervisory convergence?

1.4.7. Do you consider that the ESAs ensure that enough information on their activities and on financial institutions is available? If not, what changes should be made in this area?

YES

NO

1.4.8. Do you consider that the purpose and outcome of inquiries under Article 22.4 is clear? If the answer is no, please indicate what role such inquiries should play.

YES

NO

1.4.9. In your view, is there the need to add any tools or tasks in order to enhance supervisory convergence towards digital finance? If your answer is yes, please explain.

YES

NO

- 1.4.10. Please assess the effectiveness of supervisory convergence tools developed by the ESAs (e.g. common supervisory actions, real case discussions, etc.) for achieving supervisory convergence:

1.5. Breach of Union law and dispute settlement

- 1.5.1. Do you think that the ESAs' powers in relation to breaches of Union law (Article 17 ESAs' Regulations) and binding mediation (Article 19 ESAs' Regulations) are effective? Please explain your answer.

YES

NO

- 1.5.2. Do you think that the use of the breach of Union law procedure by the ESAs is adequate? Please consider both before and after the 2019 ESAs' review and explain your answer.

Before 2019 ESAs' review

YES

NO

After 2019 ESAs' review

YES

NO

- 1.5.3. Should there be other instruments available to the ESAs to address instances of non-application or incorrect application of Union law amounting to a breach ex-post? If the answer is yes, what would be those instruments?

YES

NO

- 1.5.4. Do you think that the new written non-objection procedure by the BoS and the new independent panels for the decisions on

breaches of Union law and dispute settlements introduced in the 2019 ESAs' review have improved these decision making processes? Please explain your answer.

YES

NO

1.5.5. Do you think that the ESAs have always acted, where needed, under Article 17 and Article 19 of the ESAs' Regulations? If the answer is no, please give concrete examples where you consider that the ESAs should have taken relevant action under these Articles.

YES

NO

1.5.6. Could you provide concrete examples where the introduction of further binding mediation provisions in sectoral legislation would be useful?

1.5.7. Why do you think the use of these ESAs' powers has been limited? Please explain how these processes could be improved.

#### 1.6. Emergency situations and response to COVID-19 crisis

1.6.1. Please rate the impact of the ESAs' response in the context of the COVID-19 crisis from 1 to 5, 1 standing for "less significant impact" and 5 for "very significant impact". Please explain your answer.

	1	2	3	4	5	No opinion
ESAs' response to the Covid-19 crisis				X		

1.6.2. Please rate in a scale from 1 to 5, the effectiveness of the ESAs' follow-up actions on the European Systemic Risk Board (ESRB) recommendations below in the context of the COVID-19 crisis. Please explain.

	1	2	3	4	5	No

							opinion
Market illiquidity and implications for asset managers and insurers							
Impact of large scale downgrades of corporate bonds on markets and entities across the financial system							
System-wide restraints on dividend payments, share buybacks and other pay-outs							
Liquidity risks arising from margin calls							

1.6.3. Do you think the coordinating activities carried out by the ESAs have successfully contributed to address the challenges posed by the COVID-19 crisis? If the answer is yes, please explain. If the answer is no, please give examples.

YES

NO

Derivatives markets have functioned well under severe pressure during the pandemic following an unprecedented market reaction and the extraordinary measures taken by governments across the globe, which in March 2020 led to not only significant market volume, but also periods of high volatility. Overall, financial market infrastructures and market participants managed to handle the situation well supported by the ESA's quick reactions.

During challenging and volatile times, ESMA prioritised the COVID-19 response and the issues arising from market volatility, as well as some of the big priorities that were there for 2020 – such as establishing some of ESMA's new responsibilities (like third-country CCP supervision) - and focusing its direct supervision effectively (i.e. rating business that had to react now to increased credit risk, the enhanced indebtedness of some companies). The Associations generally consider that ESMA played a very positive role in this respect.

One area where we feel the ESAs could have provided further support in allowing firms to focus on the COVID-19 crisis is policy development. Whereas in other major jurisdictions all non-essential policy work was deferred substantially during 2020, ESMA in particular continued to issue a significant number of reports and consultations through the year, at a time when firms were highly stretched dealing with both COVID and final Brexit preparations. We have set out in more detail in our response to sections A II and III above our concerns and recommendations in this respect, particularly regarding the review of MiFID II/ MiFIR.

1.6.4. Do you think that the ESAs have always acted effectively, where needed, in the context of the COVID-19 crisis? If the answer is no, please give concrete examples where you consider that the ESAs should have taken relevant action.

YES

NO

As noted above, whereas the general assessment of ESMA's work during the pandemic crises in 2020 is positive, we feel that one area that could have been improved upon would be greater accommodation to the needs of firms to prioritise daily operations during crisis periods rather than engage in work related to future policy development.

1.6.5. Do you think Article 18.2 of the ESAs Regulation (declaration of an emergency situation) is fit for its intended purpose? Please explain your answer. If the answer is no please suggest potential changes.

YES

NO

1.6.6. In case you identified areas for improvement in the ESAs' powers in emergency situations, do you have any suggestions on how to address them?



## 1.7. Coordination function (Art 31 ESAs' Regulations)

1.7.1. Do you think the coordination role of the ESAs is effective? If you identify areas for improvement, please explain.

YES

NO

1.7.2. Do you see a need for greater coordination between the ESAs and/or with other EU and national authorities as regards developing data requirements, data collection and data sharing? If yes, please explain your answer and indicate what changes you propose.

YES

NO

1.7.3. 2019 ESAs' review. Please rate the effectiveness, in your view, of the tools below in order to fulfil the new coordination role of the ESAs facilitating the entry into the market of actors or products relying on technological innovation. ("5" being the most effective and "1" the least effective tool)

	1	2	3	4	5	No opinion
exchange of information and best practices						
adopt guidelines						
adopt recommendations						

2019 ESAs review. [specific for ESMA]. Do you think ESMA's new coordination function (Article 31b ESMA Regulation) in relation to orders, transactions and activities that give rise to suspicions of market abuses and have cross-border implications for the integrity of financial markets or financial stability in the EU is an effective tool? If the answer is yes, please provide examples where this new function has been or could be useful. If the answer is no, please explain the reasons.

YES

NO

1.7.4. 2019 ESAs review. Do you think the new coordination groups (Article 45b of the ESAs Regulations) are effective tools to coordinate competent authorities regarding specific market developments? If the answer is yes, please provide examples where the new provision could be useful. If you identify room for improvement in this new provision, please explain.

YES

NO

1.7.5. In your view, does the coordination function of the ESAs, ensuring that the competent authorities effectively supervise outsourcing, delegation and risk transfer arrangements in third countries, work in a satisfactory way? Please explain your answer. If your answer is no, please indicate how the coordination function of the ESAs should be adjusted.

YES

NO

#### 1.8. Tasks related to consumer protection and financial activities.

1.8.1. What are, in your view, the ESAs' main achievements in the consumer and investor protection area?

1.8.2. Please assess the impact of the ESAs' work on analysis of consumer trends, reviewing market conduct, developing indicators, contributing to level playing field, financial literacy and follow up to work in this area. Please rate the ESAs impact on each item from 1 to 5, 1 standing for "less significant impact" and 5 for "most significant impact". Please explain:

	1	2	3	4	5	No opinion
analysis of consumer trends						
reviewing market conduct						
developing indicators						
contributing to a level playing field						
financial literacy						

follow up to work in this area						
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1.8.3. 2019 ESAs review. The ESAs can now, where sectoral legislation enables them, use their product intervention powers for practices and products that cause consumer harm and after two prolongations of six months, an automatic one-year prolongation of the prohibition is possible (Article 9.5). In your view, are these powers effective for their intended purpose? Please explain your answer.

YES

NO

1.8.4. Would you consider it useful if the ESAs could adopt acts of general application in cases other than those referred to in Article 9(5) of the ESAs Regulations?

YES Please specify which ones

NO Please give reasons

1.8.5. Could you provide concrete examples where enabling the use of the product intervention powers in sectoral legislation would be useful?

2019 ESAs' review. [specific for EBA]. Under the expanded scope of the competences as regards the consumer credit directive and the payment account directive, EBA will also be able to look at consumer issues across a range of activities, for example lending practices. How do you assess this change?

1.8.6. 2019 ESAs review. Please rate the new ESAs' task to coordinate mystery shopping activities of competent authorities, if applicable, according to its relevance to promote consumer protection at EU level (1 standing for "less relevant" and 5 for "most relevant"). Please explain your answer and indicate whether you consider enhancing national competencies for conduct supervision may be beneficial for the overall coordination of mystery shopping activities.

	1	2	3	4	5	No opinion
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EU-level coordination of mystery shopping						
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1.8.7. What are, in your view, the main strengths and weaknesses of the current framework on consumer protection (Article 9 ESAs Regulations) and what would you suggest to address any possible shortcomings?

1.8.8. Are there areas for improvement in the toolkit of the ESAs when it comes to coordinating supervisors in the area of consumer protection? Please explain your answer.

YES

NO

#### 1.9. International relations.

1.9.1. How do you assess the role and competences of each ESA in the field of international relations? Are there additional international fora in which the ESAs should be active? Please specify.

The Associations' members support ESMA's participation in the international fora. Beyond the European Union's jurisdiction, international consistency in the implementation of G20 commitments is critical for the effectiveness of the financial reform, particularly for derivatives markets, which by nature are global and not regional. We are of the view that the ESAs should continue to engage actively at an international level to ensure regulatory convergence. International standard setters such as the FSB, IOSCO and BCBS benefit from the expertise of the ESAs and also appreciate their experience in setting harmonised rules between many different sovereign states. We also underline that in organisations like IOSCO where national EU competent authorities are members and participate in governance and policy committees, ESMA's role should continue to be in an observing capacity. In other words, ESMA should be an important contributor to the discussions in international organisations but it remains important that NCAs play a critical role as they have been contributing local market expertise to the international fora over many years.

Regarding the relationship between the EU and the United Kingdom, we note and support the recent statement made by EU Commissioner Mairead McGuinness at ESMA's 10th anniversary conference: "*The UK and the EU need to work together, because it is good for the economy and the people.*" In a post-Brexit environment, the Associations believe that it is critical for both sides to maintain a high level of exchange of information and of dialog between the EU authorities and the UK authorities. Notably, efficient supervisory & regulatory co-operation remains a critical component of any cross-border market activity.

1.9.2. 2019 ESAs' review. How do you assess the new ESAs' role in monitoring the regulatory and supervisory developments, enforcement practices and market developments in third countries for which equivalence decisions have been adopted by the Commission?

1.9.3. Are the powers and competences in the field of international relations as set out in Article 33 of the ESAs' Regulations adequate

in light of the tasks conferred on each of the ESAs? If you identify areas for improvement, please specify.

YES

NO

1.9.4. How do you assess the role of each ESA in the development of model administrative arrangements between national competent authorities and third-country authorities? Should this role be further specified?

1.10. The role of the ESAs as enforcement actors/enforcers

1.10.1. Under Articles 17 (*breach of Union law*), 18 (*action in emergency situations*) and 19 (*settlement of disagreements between NCAs in cross-border situations/binding mediation*), in case a competent authority fails to ensure that a market participant or financial institution complies with requirements directly applicable to it, the ESAs have the power to investigate the alleged breach or non-application of Union law and, following a specified procedure and under certain conditions, adopt an individual decision towards the market participant or financial institution requiring it to comply with EU law. How do you assess the role of each ESA under these articles of the founding Regulations?

1.10.2. Do you see room for improvement in the way each ESA could ensure that competent authorities enforce more effectively EU rules towards market participants/financial institutions? Please explain your answer.

YES

NO

1.10.3. In your view, are the powers of the ESAs to enforce EU rules towards market participants/financial institutions under Articles 17, 18 and 19 ESAs Regulations well balanced, adequate and effective? Please substantiate your answer.

YES

NO

1.10.4. Do you think the respective roles of the ESAs and of the Commission are clearly defined in Article 17, 18 and 19 ESAs Regulations? Please substantiate your answer.

YES

NO

1.10.5. Do you think the use of sanctions laid down in the EU acquis by competent authorities in case of non-compliance of market participants/financial institutions with EU rules is, in practice, sufficiently dissuasive or disproportionate? If not, what role could sectoral legislation and each ESA play in improving the situation? Please substantiate your answer and give examples.

Sufficiently dissuasive

Disproportionate

Other, please explain

## **2. Governance of the ESAs.**

### 2.1. General governance issues

2.1.1. Does the ESAs' governance allow them to ensure objectivity, independence and efficiency in their work/decision making? Please explain. If you consider that there should be differences in governance between different types of tasks, please indicate.

YES

NO

2.1.2. 2019 ESAs' review. In your view, has the new provision in Article 42 of the ESAs' Regulations according to which the Board of Supervisors members must abstain from participating in the discussion and voting in relation to any items of the agenda for which they have an interest that might be considered prejudicial to their independence, improved the decision making process? Please explain your answer.

YES

NO

2.1.3. 2019 ESAs' review. Do you think the requirements in Articles 3

and 43a of the ESAs' Regulations are sufficient to ensure accountability and transparency? If you identify areas for improvement, please explain.

YES

NO

2.1.4. 2019 ESAs' review. To what extent the recent enhancements in the role of Chairperson improve the decision making process? Please rate each change from 1 to 5, 1 standing for "less significant improvement" and 5 for "most significant improvement". Please explain your answer.

	1	2	3	4	5	No
						opinion
Request to the Board to establish internal committees for specific tasks						
Set the agenda to be adopted by the Board and table items for decision						
Call a vote at any time						
Propose the composition of independent panels for breach of Union law investigations and dispute settlements.						
Propose the composition of peer review committees for peer reviews						
Propose a decision to launch an inquiry and convene an independent panel for the purposes of Article 22 (4) ESAs Regulation						
Vote in the Board of Supervisors (except on matters that are decided on the basis of qualified majority voting)						
Other, please indicate						

2.1.5. Should the role of the Chairperson be strengthened in other areas?

If so, in which areas (please substantiate).

YES

NO

## 2.2. Decision-making bodies and preparatory bodies

2.2.1. Does the current composition of the Board of Supervisors (BoS) and of the Management Board (MB) ensure that decisions are taken efficiently and independently? If you identify areas for improvement, please explain.

YES

NO

2.2.2. Do the current voting modalities (e.g. simple majority, qualified majority...) of the BoS ensure efficient decision making? Please explain. If the answer is no please indicate how voting modalities could be streamlined.

YES

NO

[Only for EBA]. Does the current voting system that, for some decisions, requires additional simple majorities from competent authorities participating and not participating in the Banking Union ensure efficient and balanced decision making? Please explain.

YES

NO

2.2.3. Does the current allocation of tasks between the BoS and the MB ensure that the ESAs are run effectively and perform the tasks conferred on them? If you identify areas for improvement, please explain.

YES

NO

2.2.4. 2019 ESAs' review. To what extent the enhanced role of the Management Board has improved the decision making process. Please rate each change from 1 to 5, 1 standing for "less significant improvement" and 5 for "most significant improvement". Please explain your answer.



	1	2	3	4	5	No opinion
The MB can give opinions on all matters to be decided by the Board of Supervisors.						
The MB ensures the consistent use of a methodology for all peer reviews conducted						
The MB proposes a peer review work plan every two years.						
The MB can set up coordination groups on its own initiative						

2.2.5. Should the role of the Management Board be strengthened in other areas? If so, in which areas (please substantiate).

YES

NO

2.2.6. 2019 ESAs' review. Do you think the written non-objection procedure for core convergence tools (breaches of Union law, dispute settlements and peer reviews) is effective for achieving its objective? Please substantiate your answer. If your answer is yes, please indicate if there should be more decisions taken under this procedure and in which areas.

YES

NO

2.2.7. Do you think ad hoc committees composed of staff of the ESAs and members from the competent authorities (e.g. peer review committees) are effective tools to improve the decision making process? If your answer is yes, please indicate if there should be more decisions taken under this procedure and in which areas.

YES

NO

2.2.8. Do you think the functioning of preparatory/supporting bodies of the ESAs (e.g. technical working groups, standing committees, task forces etc.) is effective and efficient? If you identify any shortcomings please specify how these could be addressed.

YES

NO

2.2.9. Please assess the impact of the work undertaken by preparatory/supporting bodies of the ESAs (e.g. technical working groups, standing committees, task forces etc.) on the ESAs' overall work and achievements. Please rate the impact from 1 to 5, 1 standing for "less significant impact" and 5 for "most significant impact": If you identify any shortcomings please specify how these could be addressed.

	1	2	3	4	5	No opinion
Standing committees and other permanent committees						
Other preparatory bodies (e.g. technical working groups)						
Committee on consumer protection and financial innovation						
Proportionality Committee						

(only for ESMA) Should there be a different governance in case of direct supervisory decisions in ESMA (for example, similar to the new governance for CCPs)? If the answer is yes, please indicate your suggestions for improvements and the expected benefits.

YES

NO

### 2.3. Financing and resources.

2.3.1. Do you consider the provisions on financing and resources for the general activities of the ESAs appropriate to ensure sufficiently funded and well-staffed ESAs taking into account budgetary constraints at both EU level and the level of Member States? Please explain your answer. If the answer is no, please indicate what other sources of finance could be considered.

YES

NO

Before making any statement as to whether and how the ESAs resources could be increased – in particular ESMA – it is necessary to assess: a) how ESMA is fulfilling its duties with the current resources , and b) how changes in tasks and powers would affect ESMA's abilities to fulfil its duties and possibly trigger the need for additional resources.

In this respect, the Associations consider that the focus should be on enhancing certain processes before considering extending the powers of ESMA.

2.3.2. Do you think that the ESAs have sufficient resources to perform their tasks? Please explain.

YES

NO

In the context of the previous review of the ESAs framework, the Associations stated that, should a need for more resources for ESMA be identified, market participants might not oppose a system partly funded by the industry subject to strict conditions:

- a) the new resources would be justified by new powers and, logically, should lead to a decrease in the funding of the NCAs whose powers would partly be taken over by ESMA;
- b) the provision of financial services remains cost effective and the competitiveness of the EU market place is not affected;
- c) the collection mechanism is precisely designed and not disputable;
- d) fees should be fairly allocated across the regulated population, i.e. it would be inappropriate to carve-out specific categories of entities just because they are smaller in size than the largest financial institutions; proportionality should be at the heart of the allocation.

While we supported direct industry funding under certain conditions in the past, the Associations view the topic of direct industry funding with more scepticism today.

In particular, we note that ESMA's report on supervisory fees for benchmarks administrators did not agree with the industry proposal to achieve proportionality in scaling of costs based on the significance of benchmarks administered rather than a revenue number. We are of the view that the retained ESMA requirement for third country benchmark administrators to submit externally audited benchmark revenue figures annually is inherently disproportionate if it is an additional fixed cost only for firms with less in scope benchmark activity. The proportionality condition was not met in this respect.

2.3.3. Do you think there are enough checks and balances for how the ESAs spend their budget? Please explain.

YES

NO

## 2.4. Involvement and role of relevant stakeholders

2.4.1. In your view, are stakeholders sufficiently consulted or, on the contrary, are there too many consultations? Please explain your

answer.

YES

NO

Too many consultations

2.4.2. Please assess in a scale from 1 to 5 the quality, in your view, of the consultations launched by the ESAs (5 standing for the highest quality). Please explain your answer.

	1	2	3	4	5	No opinion
General consultations launched by the ESAs			X			
Specific consultations when developing data collection requirements			X			

The Associations particularly focus on ESMA in the response and would like to highlight three issues.

### Length of consultation periods

Following the ESAs review an obligation was formally introduced to allow reasonable time for stakeholders to respond and we have greatly welcomed ESMA decisions to extend the deadlines of specific consultations in light of the COVID-19 situation.

However, we note that in relation to many consultations launched from January 1<sup>st</sup> 2020 onwards, the length of the consultation period has been shorter than three months with not always providing an explanation for deviating from this standard.

The Associations' members are aware that the underlying reason for tight consultation deadlines is directly related to the broader "legislative supply chain" i.e. to Level 1 rules which prescribe mandatory review dates thereby determining, on their turn, the deadlines by which ESMA is required to produce its deliveries to the Commission. That said, we would like to underline that providing stakeholders with adequate time span is a critical factor to enable them to undertake comprehensive and thorough analysis of ESMA proposals and their potential implications as well as to provide constructive responses to consultation. This is important as consultations can be launched at different times of the year on subjects that are highly connected and the timeline of these consultation do not always allow market participants to assess the interconnection and what the combination of regulatory suggestions could mean in terms of business impact.

To achieve best outcomes, the Associations also recommend ESMA to take into account customary holiday periods as well as end of financial years and recommend not to publish consultation just before such periods. Markets participants noted a few examples of consultations published mid-December or in the first half of July. If there is no other possibility than publishing consultation during these timeframes, ESMA should then consider extended deadlines for response submissions.

### Inter-consultations consistency

The Associations consider it extremely important to adopt a holistic approach when addressing the same issue

in the context of different consultation papers and that the proposals put forward in each paper are mutually consistent. This is even more important in those cases where consultations are conducted in short intervals one from the other without following the same timeline.

By way of example, in 2020, markets participants noticed that in the Consultation Paper “MiFID II/ MiFIR review report on the transparency regime for non-equity instruments and the trading obligation for derivatives” issued on 10 March 2020, ESMA proposed to delete the size specific to the instrument (SSTI) waiver and to remove the SSTI-concept also for the SI-quoting obligation. This proposal (subsequently confirmed by ESMA in its Final Report published on 25 September 2020) was seemingly not fully consistent with the position adopted by ESMA in a previous Consultation Paper “MiFIR report on Systematic Internalisers in non-equity instruments” issued on 3 February 2020 (confirmed by ESMA in its Final Report published on 16 July 2020) according to which, in the absence of obvious issues linked to possible circumvention of the pre-trade transparency obligations via the SSTI threshold, no change to the legal framework was considered necessary by ESMA at that stage.

Generally, the fact that ESMA launched reviews by applying different timelines to highly connected consultations under MiFID 2/ MiFIR Review (transparency, data and reporting, SIs) has not supported a holistic and consistent approach to the review of this fundamental legislation.

### Output of consultations

The Associations welcomed that the ESAs Review formally introduced for ESMA to publish i) a summary of the input received from stakeholders and ii) an overview of how information and views gathered from the consultations were used in a draft regulatory technical standard and a draft implementing technical standard.

The Associations appreciated that in many Final Reports, ESMA has provided a summary of its proposals as well as details as to the specific legal measures to be adopted i.e. deletions and/or amendments of currently in force rules as well as introduction of new rules.

This approach should be applied more consistently as such information is not always included in all Final Reports.

It is important to include summaries of ESMA proposals and details of the specific legal measures to be adopted, as a rule, in every Final Report adopted by ESMA, as an outcome of consultation procedures in order to enable all stakeholders to follow the decision making process .

We also recommend ESMA to introduce as standard practice, public hearings/roundtables to present the proposals included in its Final Reports and discuss them with stakeholders and provide indications on next steps and timeline.

2.4.3. Are the ESAs sufficiently transparent and accessible for stakeholders to ensure effective and efficient interaction? Please explain your answer.

YES

NO

The Associations believe that consulting with market participants, professional users of markets and consumers is the bedrock of effective rulemaking.

The Associations reiterate their response to the consultation conducted in 2017 on the 1<sup>st</sup> review of the ESAs: while the consultative working groups/ stakeholder groups are an important component in ensuring a formal consultation process, consultation should not be restricted to the individuals who are members of these groups. With capital markets rulemaking in particular, it is vital that there is an ongoing process of engagement with

interested parties to enable ESMA to fully understand sometimes nuanced and complex issues. Such an approach would be more aligned with the Commission’s Better Regulation philosophy. Moreover, active ongoing engagement with market participants would assist ESMA in identifying potential issues at an early stage.

It would be optimal to introduce a culture of ‘soft’ consultation at the ESAs that is not limited to formal published consultation and stakeholder groups, but which would consist of and include broader ongoing informal dialogue with the industry.

The Associations would like to make a few suggestions that may facilitate a more effective interaction between ESMA and stakeholders:

#### **Early engagement with stakeholders:**

- The “Public Statement of Consultation Practices” outlines that ESMA may organise informal discussions at an early stage with those stakeholders most likely to be directly affected. We recommend to utilize this option more frequently and introduce as common practice.
- Before finalizing the drafting of its consultation papers and the proposals included therein, ESMA could : a) test proposals in advance and before formally “lock-in” policy proposals in consultation papers; b) engage in an exchange of evidence and quantitative data and validate methodologies and assumptions.

#### **Dialogue with stakeholders during consultation procedures**

The Associations reiterate the point made in response to question in section A.II and believe that keeping the dialogue with stakeholders open during consultation processes after consultation papers have been issued could assist market participants i) to grasp better the underlying rationale and the ultimate goals of ESMA ii) to lay comments on more solid and reliable interpretive basis and, in the final analysis iii) increase the effectiveness of the whole process to the benefit of both ESMA and the respondents.

#### **Transparent approach to consultation pipelines**

The Associations recommend ESMA to provide market participants, in due advance, with a comprehensive overview of the workplan/pipeline of the consultation activities scheduled to be undertaken by the ESAs over the next twelve months.

Market participants greatly appreciated ESMA’s publication of the “Timeline of upcoming MiFID II Review Reports” by ESMA on 16 July 2020. Based on that, we deem extremely important that periodic overviews of the status of the process, next steps and expected outcomes of the consultation processes are published by ESMA on a regular basis.

More generally, the Associations support ESMA to publish comprehensive annual consultation work programs where the activities scheduled to be undertaken by ESMA during the next twelve months are presented including main objectives, planned outputs and related timeline and deadlines differentiated by policy area. Mutatis mutandis, the ESMA Supervisory Convergence Work Programme which, inter alia, contains a list of the new guidelines to be elaborated in the year could be a good starting point in this respect.

**Flexibility in case of unforeseeable market conditions.** The Associations consider important to provide the ESAs with greater leeway so as to propose a re-scheduling of the timetable for delivering their mandated reports in the face of unforeseeable market conditions. Market participants greatly appreciated ESMA’s proposal in 2019 to postpone various reports foreseen under MiFID II/R with the intention to allow the Authority i) to base its analysis on a sufficient amount of feedback on the application of the MiFIR transparency regime and, hence, ii) to achieve more efficient results to collect data for a longer period of time leading to more accurate analyses and recommendations and to better be able to take into account the decision by the UK to leave the EU. We also welcomed ESMA’s decision in 2019 not to perform the first annual assessment of the operation of the thresholds for the liquidity determination recognizing that, should this assessment be conducted before the impact of Brexit on liquidity in bond and liquidity market has materialized, its value would have been limited.

#### **Post-consultation process**

The Associations reiterate the point made in response to question AT section A.II and welcomed the “Public Statement of Consultation Practices” that specifically indicates that ESMA will consult, if possible, for a second time if the response to the first consultation reveals significant problems, or where revised proposals are radically different from the original proposals on which consultation was based.

However, we note that some Final Reports adopted as an outcome of consultation procedures, ESMA has expressed its willingness to carry out some actions as a follow-up to a consultation exercise e.g. the willingness to continue to monitor, to assess and/or to further reflect on some issues without providing sufficient indication of how and when these follow-up actions are due to materialize.

2.4.4. Please rate in a scale from 1 to 5 the impact of stakeholders groups within the ESAs on the overall work and achievements of the ESAs (1 standing for "less significant impact" and 5 for "very significant impact"). Please explain your answer.

	1	2	3	4	5	No opinion
EIOPA Insurance & Reinsurance Stakeholder Group						
EIOPA Occupational Pensions Stakeholder Group						
ESMA Securities and Markets Stakeholder Group			X			
EBA Banking Stakeholder Group						

2.4.5. 2019 ESAs' review. Please assess the significance of the recent changes in the composition, selection, term of office and advice of

the stakeholders groups (Article 37 ESAs Regulations)? Please rate each change from 1 to 5, 1 standing for "less significant" and 5 for "most significant". Please explain your answer.

	1	2	3	4	5	No opinion
Composition of stakeholders groups						X
Selection of members						X
Term of office						X
A third of its members can issue a separate advice						X

2.4.6. Does the composition of stakeholders groups ensure a sufficiently balanced representation of stakeholders in the relevant sectors? Please explain your answer.

YES

NO

2.4.7. In your experience, are the ESAs' stakeholders groups sufficiently accessible and transparent in their work? If the answer is no, please indicate the areas where the transparency could be improved.

YES

NO

## 2.5. Joint bodies of the ESAs – Propose not to respond

2.5.1. Please assess the aspects described below regarding the Board of Appeal (BoA) of the ESAs. Please rate the effectiveness of each aspect from 1 to 5 (1 least effective, 5 most effective). If you identify areas for improvement, please explain.

	1	2	3	4	5	No opinion
Organisation						
Functioning and time limits						



One joint Board of Appeal for the 3 ESAs						
The composition of the BoA						

2.5.2. Please assess the aspects described below regarding the Joint Committee of the ESAs. Please rate the effectiveness of each aspect from 1 to 5 (1 least effective, 5 most effective). If you identify areas for improvement, please explain.

	1	2	3	4	5	No opinion
Functioning						
Working methods						
Ensuring cross-sectoral cooperation						
Ensuring consistent approaches						
Decision making process						
The legal structure (no legal personality)						

The Associations are not in a position to assess how the Joint Committee of the ESAs operates. However, where the Level 1 gives mandate to the three ESAs to produce joint level 2 legislation, the process can be delayed and not achieve the desired results in good time.

By way of example, a joint draft RTS on IM Model validation (i.e. when and how counterparties subject to initial margin rules have to get formal validation from NCAs for the use of initial margin models) under EMIR Refit that was mandated by the Level 1 legislation is still outstanding. As a result, many firms concerned by phases V or VI of implementation initial margin for non-cleared derivatives have expressed concerns that the rules might be available only shortly before the application dates of phases V or VI with the potential to create challenging implementation issues.

Therefore, we strongly recommend the ESAs to prioritise and publish a long-expected and time-sensitive draft level 2 legislation of significant importance in good time.

2.5.3. Please assess the work of the Joint Committee of the ESAs in the areas below. Please rate each area from 1 to 5 (1 least significant contribution, 5 most significant contribution). If you identify areas for improvement, please explain.

	1	2	3	4	5	No opinion

Consumer Protection and Financial Innovation						
Coordination and cooperation for bi-annual Joint Risk Reports, published in spring and autumn						
Financial Conglomerates						
Securitisation						
European Forum of Financial Innovators						

### 3. Direct supervisory powers.

3.1. How do you assess ESMA's direct supervisory powers in the field of:

- Credit Rating Agencies
- Trade Repositories under EMIR
- Trade Repositories under SFTR
- Securitisation Repositories (STS)

3.2. Please assess ESMA's performance as a direct supervisor of the entities referred to in question 3.1 in a scale of 1 to 5 (1 lowest rate, 5 highest rate). If you identify areas for improvement please explain.

	1	2	3	4	5	No opinion
Credit Rating Agencies						X
Trade Repositories under EMIR						X
Trade Repositories under SFTR						X
Securitisation Repositories						X

3.3. How do you envisage the future scope of direct supervisory powers of ESMA or any other ESA? What principles should govern the decision to grant direct supervision to the ESAs? If you see room for improvement, please provide evidence where you see weaknesses of the current set-up.

3.4. Have you identified any areas where supervision at EU level should be considered? If your answer is yes, please explain.

YES

NO

#### 4. The role of the ESAs as regards systemic risk.

4.1. Please assess the aspects described below regarding the role of each ESA as regards systemic risk in a scale of 1 to 5 (1 lowest rate, 5 highest rate). If you identify room for improvement, please specify how this could be addressed.

	1	2	3	4	5	No opinion
The quality of the analysis of market developments			X			
The quality of the stress test and transparency exercises that were initiated and coordinated by the ESAs						X
The interaction between the ESRB and ESAs on the development of a common set of quantitative and qualitative indicators to identify and measure systemic risk						X
The cooperation within the European System of Financial Supervision (ESFS) to monitor the interconnectedness of the various subsectors of the financial system they are overseeing						X
The broader cooperation between the ESRB and the ESAs within the ESFS						X
The contribution of the ESAs to facilitating the dialogue between micro- and macro-supervisors						X

## B. QUESTIONS ON THE SINGLE RULEBOOK

### 5. The ESAs work towards achieving a rulebook

5.1. Do you consider that the technical standards and guidelines/recommendations developed by each ESA have contributed sufficiently to further harmonise a core set of standards (the single rulebook)?

- YES If you have identified areas for improvement, please explain
- NO Please give reasons.
- Other

5.2. Do you assess the procedure for the development of draft technical standards as foreseen in the ESAs Regulations effective and efficient in view of the objective to ensure high quality and timely deliverables? Please explain your answer. If you identify areas for improvement, please indicate.

- YES
- NO
- Other

As observed in response to question 2.5.2, the Associations note that where the Level 1 legislation gives mandate to the three ESAs to deliver a joint level 2 legislation, the process can be delayed and not achieve the desired results in good time.

By way of example, a joint draft RTS on IM Model validation (i.e. when and how counterparties subject to initial margin rules have to get formal validation from NCAs for the use of initial margin models) under EMIR Refit that was mandated by the Level 1 legislation is still outstanding. As a result, many firms concerned by phases V or VI of implementation initial margin for non-cleared derivatives have expressed concerns that the rules might be available only shortly before the application dates of phases V or VI with the potential to create challenging implementation issues.

Therefore, we strongly recommend the ESAs to prioritise and publish a long-expected and time-sensitive draft Level 2 legislation that is of significant importance in good time.

5.3. When several ESAs need to amend joint technical standards (e.g. PRIIPs RTS) and there is a blocking minority at the Board of Supervisors of one of the ESAs, what would you propose as solution to ensure that the amendment process runs smoothly?

5.4. In particular, are stakeholders sufficiently consulted and any potential impacts sufficiently assessed? Please explain your answer. If you identify areas for improvement, please indicate.

- YES

NO

Other

5.5. Can you provide examples where guidelines and recommendations issued by the ESAs have particularly contributed to the establishment of consistent, converging, efficient and effective supervisory practices and to ensuring the common, uniform and consistent application of Union law?

5.6. Would you consider it useful if the ESAs could adopt guidelines in areas that do not fall under the scope of legislation listed in Article 1 (2) of the ESAs founding Regulations and are not necessary to ensure the effective and consistent application of that legislation?

YES Please specify which ones

NO Please give reasons.

[exclusively for ESMA] If you think of the Wirecard case as an example, how could supervision be improved in the field of auditing and financial reporting?

Including Regulation (EC) No 1606/2002 [IAS Regulation] and Directive 2013/34/EU [Accounting Directive] in Article 1(2) of the ESMA Regulation

Other, please explain

No improvements are needed.

5.7. Do you think that the role of ESMA with regard to Directive 2004/109/EC (Transparency Directive) could be strengthened? For example, by including a mandate for ESMA to draft RTS in order to further harmonize enforcement of financial (and non-financial) information.

YES Please explain and specify how.

NO Please give reasons.

5.8. Do you think that Directive 2004/109/EC (Transparency Directive) should require ESMA to annually report on the supervision and enforcement of financial and non-financial information in the EU on the basis of data provided by the national competent authorities regarding their supervisory and enforcement activities? Please explain your answer.

YES

NO

5.9. Do you think that ESMA could have a role with regard to Directive 2006/43/EC (Audit Directive) and Regulation 537/2014/EU (Audit Regulation)?

YES Please explain and specify how.

NO Please give reasons.

5.10. What is your assessment of the work undertaken by each ESA regarding opinions and technical advice?

## 6. General questions on the single rulebook

6.1. Which are the areas where you would consider maximum harmonisation desirable or a higher degree of harmonisation than presently (rather than minimum harmonisation)?

The Associations represent the derivatives markets ecosystem, including dealers, buy-side firms, corporates, trading venue operators. The Associations members have always been keen to have fully harmonised rules applied to derivatives to avoid fragmentation of market that are global by nature. Of course, the process of harmonising any rules at an EU level where national rules apply currently should be subject to normal due process and suitable consultation with market participants to ensure the harmonised approach is appropriately calibrated, respecting the principle of subsidiarity.

The Associations have always engaged with international bodies as well as regional and national policy makers and regulators to assist with the implementation of G20 commitments (reporting of derivatives, central clearing, margin rules, capital rules, trading rules) is as consistent as possible across jurisdictions.

Unlike legislation that are affecting retail investor markets (e.g. PRIIPs) where national dynamics can justify national nuances in the application of EU legislation, derivatives markets are wholesale by nature and all market participants strongly support maximum harmonisation.

Safe and efficient derivatives markets depend upon harmonisation of rules in all above-mentioned areas.

Please give your reasons for each

National rules on notifications of major shareholdings under the Transparency Directive vary significantly across the EU. In particular, there are differing thresholds, differing deadlines for disclosure, differing methods of calculating levels of investment and no centralised reporting channel for notifying issuers. The creation of a European Single Access Point for financial and non-financial information could certainly accelerate the harmonisation of EU shareholder disclosure requirements as well as the move towards the use of a EU Regulation in that regard.

6.2. Which are the areas where you consider that national rules going beyond the minimum requirements of a Directive (known as “gold-plating”) are particularly detrimental to a Single Market? Please identify the relevant sectoral legislation, examples of gold plating and give reasons for each.

Sector:	Specific piece of legislation	Example of gold-plating	Please explain
Banking			

Insurance			
Asset management			
Market infrastructure (CCPs, CSDs)			
Market organisation (MiFID, MIFIR, MAR)			
Other			

6.3. Do you consider that the single rulebook needs to be further enhanced to reach the uniform application of Union law or rules implementing Union law and efficient convergent supervisory outcomes? Please explain your choice. Where appropriate, please support your response with examples.

YES

NO

6.4. Questions regarding the appropriate level of regulation.

6.4.1. In your view, are there circumstances in existing EU legislation where level 1 is too granular, or for other reasons, would rather be preferable to have a mandate for level 2, or guidance at level 3? Please specify the area (and if possible, specific piece of legislation) and explain why (e.g. in order to have appropriate flexibility to adapt the specifics of the regulation in case of change of circumstances)?

YES

NO

6.4.2. On the other hand, in your view, could **reducing divergences in rules** at level 1 (legislation agreed by the co-legislators), as well as rules regarding delegated acts (regulatory technical standards) or implementation at level 2, (implementing acts and implementing technical standards) and/or level 3 ('comply or explain guidance' by ESAs) further enhance the single rulebook?

YES



NO

6.4.3. Which of the three levels and/or a combination thereof are more effective in building the single rulebook? (multiple choices allowed)

6.5. Generally speaking, which level of regulation should be enhanced/tightened in order to ensure **uniform application** of the single rulebook? (multiple choices allowed). Please explain and substantiate with examples, where possible.

Level 1 (legislation agreed by the co-legislators)

Level 2 (e.g. delegated acts and technical standards)

Level 3 ('comply or explain guidance' by ESAs)

6.6. In your view, what, if anything and considering legal limitations, should be improved in terms of determining application dates and sequencing of level 1, level 2 and level 3?

Please explain

Beyond the example of the revision of the EMIR margin RTS, which took longer than expected, the Associations would like to raise two examples where timelines present challenges:

### **CSDR**

The timeline of the CSDR process raises two concerns:

Firstly, with few months left before the Commission adopts its proposal for Level 1 CSDR review, the Commission has not provided clear and final information about i) which issues will be covered in the above-mentioned proposal and, in particular, ii) whether settlement discipline regime will be included in the scope of the review. This means that it is not certain, as of now, whether the above-mentioned Level 1 CSDR Review will affect or not the Level 2 rules on settlement discipline which will be applicable on 1 January 2022. The risk exists that an 'outdated' Level 2 regulatory framework (Delegated Regulation 2018/1229 on settlement discipline regime) starts being implemented in January 2022 when a legislative process for amending Level 1 rules has already started at that time/will be due to start within a short timeframe. Secondly, members are concerned about the flaws relating to the mandatory buy-in regime and the need to amend the regime before the 1<sup>st</sup> of January 2022 deadline.

Based on the CSDR case study, we recommend two possible improvements:

- The announcements of plans to review Level 1 rules, i) should be made by the Commission in advance of the adoption of the relevant legislative proposals for review and ii) should be made with sufficient degree of clarity specifying, among other things, whether and how the proposed review are due to affect already adopted Level 2 rules and which market participants, at the time of the above-mentioned announcements, are in the process of implementing so as to meet already prescribed impending regulatory deadlines.
- In relation to rules which have been highlighted as problematic by market participants (such as, the rules on mandatory buy-in rules), it would be preferable that one single round of regulatory amendments is finalised before these rules enter into force rather than adopting a gradual approach with multiplicity of rounds scattered over time.

### **EMIR FRANDT**

The timeline of the EMIR FRANDT process raises the following concerns:

- With slightly more than one month left before 18 June 2021 i.e. the date when the Level 1 EMIR requirement start and the requirement to apply FRANDT terms on 18 June 2021 without the relevant Delegated Act having been adopted yet.
- As a consequence of the delay in the publication of the Draft Delegated Act, a three-months implementation period after the Delegated Act has come into effect like the one proposed by the Commission will not be sufficient.

Based on the EMIR FRANDT case study, we would suggest two possible improvements for consideration:

- Level 2 rules, which specify the details for Level 1 requirements should be adopted in advance of Level 1 application dates. Moreover, any delay in the process of publication of Delegated Acts should automatically trigger longer implementation periods.
- The time lag between the publication dates of ESMA Technical Advice and the publication of Commission Draft Delegated Act should be minimized.

6.7. Please indicate whether the following factors should be considered when deciding on the need for further harmonisation in rules (attribute 1 to 5 to each factor, 1 being the least important and 5 being the most important):

	1	2	3	4	5	No opinion
Strong interlinkages with areas of law which remain non-harmonised (e.g. CRIM-MAD and national criminal law)						
Broad discretion left to national authorities and frequent use of that discretion by these national authorities						
High level of gold plating by national rules						
High degree to which supervision of the same type of actors and/or activities render divergent outcomes across Member States						
All of the above						
None of the above						
Other aspects, if so which ones: Please provide concrete examples						

6.8. As part of the Commission's work on enhancing the single rulebook under the Capital Markets Union project, do you consider that certain EU legislative acts (level 1) should, in the course of a review, become more detailed and contain a higher degree of harmonisation? Would any of those legal frameworks currently contained in Directives, or any part therein, benefit from being directly applicable in Member States instead of requiring national transposition?

YES Please specify which one

Sector:	Specific piece of legislation	Example	Please explain
Banking			
Insurance			
Asset management			
Market infrastructure (CCPs, CSDs)			
Market organisation (MiFID, MIFIR, MAR)			
Other			

NO Please specify which Directives you have in mind and explain your answers

Sector:	Specific piece of legislation	Example	Please explain
Banking			
Insurance			
Asset management			
Market infrastructure (CCPs, CSDs)			
Market organisation (MiFID, MIFIR, MAR)			
Other			

6.9. Do you consider that on the basis of existing mandates, additional/more detailed rules at level 2 should be introduced to provide the supervised entities and their supervisors with more detailed and clearer guidance?

YES Please specify legislation and what these rules at level 2 should regulate

NO

6.10. Against the objective of establishing the single rulebook for financial services, how would you increase the degree of harmonisation of EU financial legislation?

Across the board (e.g., via an Omnibus act which amends multiple sectoral acts at the same time)

Sector:	Specific piece of legislation	Legislative approach (omnibus vs targeted reviews)	Please explain
Banking			
Insurance			
Asset management			
Market infrastructure (CCPs, CSDs)			
Market organisation (MiFID, MIFIR, MAR)			
Other			

In a targeted manner through individual sectoral reviews

### About FIA

FIA is the leading global trade organization for the futures, options and centrally cleared derivatives markets, with offices in Brussels, London, Singapore and Washington, D.C. FIA's membership includes clearing firms, exchanges, clearinghouses, trading firms and commodities specialists from about 50 countries as well as technology vendors, law firms and other professional service providers.

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#### **About ISDA**

Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 950 member institutions from 76 countries. These members comprise a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearing houses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association's website: [www.isda.org](http://www.isda.org). Follow us on [Twitter](#), [LinkedIn](#), [Facebook](#) and [YouTube](#).

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