

REFORMING ESMA A TRUE PAN-EUROPEAN SUPERVISOR FOR EU FINANCIAL MARKETS IS KEY TO CMU'S SUCCESS

The sanitary crisis and Brexit have underlined the necessity for the Union to develop and strengthen its open strategic autonomy globally, especially in the financial area. In this context, the relaunching and the deepening of the CMU project has a central role to play to increase the attractiveness of the Union's financial markets regulatory framework and the competitiveness of their actors in a new post-Brexit ecosystem¹.

The overarching objective is to enable EU markets to further contribute (i) to the economic recovery at national and European levels and (ii) to the financing challenges the Union is facing, as a result of climate change mitigation, of the ageing of the population and of the need to support the development of EU champions in strategic fields such as the digital and de-carbonation economy.

To meet these funding challenges, the successful integration of EU financial markets is essential. But this success is largely conditional on the establishment of a pan-European supervisor able to ensure genuine supervisory convergence while fully applying the concept of "open strategic autonomy". And, as AMAFI recently stressed², this presupposes that the mandate of this European supervisor does not ignore the challenge of ensuring the competitiveness of EU players.

In this context, while AMAFI welcomes the [European Commission's \(EC\) consultation on the Supervisory Convergence and the Single Rule Book](#), it considers that it deals with too many issues which are not of equal importance in light of ESMA's necessary reforms.

Therefore, beyond its response to the consultation³, AMAFI is keen to highlight in this paper the reforms it believes are instrumental for ESMA to become a true pan-European supervisor for EU-27 financial markets. Even though we understand that no comprehensive legislative proposal should be expected in the near future as more time is needed to properly assess the impact of the [2019 ESAs review](#), we call on the European Commission (EC) to quickly carry out some necessary targeted reforms.

ESMA new supervisory regulatory framework should be designed around four critical objectives: financial stability, financial markets' integrity, investor protection and EU actors' competitiveness. The challenge is that, while working to enable the homogeneous implementation of the EU regulatory framework to achieve the supervisory convergence that an efficient integrated market requires, ESMA should apply a "do not significantly harm" principle regarding these four objectives. Similarly to the principle developed in the field of sustainable finance, it implies that each reform undertaken by ESMA and aiming at strengthening one objective should not negatively impact the others.

More precisely, we call for targeted reforms which should aim at:

- (i) Including the competitiveness of EU's financial market actors in ESMA's mandate;**
- (ii) Improving the efficiency of ESMA's supervisory convergence tools;**
- (iii) Reforming ESMA's governance;**
- (iv) Developing ESMA's pragmatism.**

¹ For further details please see [AMAFI-CEPS report on Completing Capital Markets Union](#).

² For further details on the necessity to consider the issue of competitiveness when reforming the EU regulatory and supervisory frameworks please see ([AMAFI / 21-38](#)).

³ For further details please see ([AMAFI / 21 - 32](#)).

I. Including the competitiveness of EU's financial market actors in ESMA's mandate

The Commission's action plan related to "[A Capital Markets Union for people and businesses](#)" rightly insists on the need to ensure the global competitiveness of the EU economy globally, and of EU financial markets specifically. This appears all the more critical as Brexit has permanently changed the competitive landscape for financial markets in Europe.

With this in mind, we believe that the objectives set for ESMA by the article 1.5 of Regulation 1095/2010 should be modified: alongside the contribution to "ensuring the integrity, transparency, efficiency and orderly functioning of financial markets" and to "enhancing customer and investor protection", ESMA's mandate should include "ensuring the attractiveness of the Union's financial markets and the competitiveness of their players". It should be noted that such inclusion would simply mirror the objectives assigned to the FCA in the UK and to the CFTC in the US.

II. Improving the efficiency of ESMA's supervisory convergence tools

Even though a lot of efforts have been made since the creation of ESMA in 2011 to increase supervisory convergence, results so far remain insufficient.

Considering the main objectives of CMU, it appears critical to make the distinction between:

- **The interdealer market** at international level which does not require strong harmonisation action from ESMA;
- **The wholesale market** for which further integration at EU level is of the utmost importance; and
- **Local/regional markets**, the specificities of which need to be preserved and for which supervisory convergence at the level of the Union is less relevant, whenever they effectively fulfil their role in financing companies and allocating savings.

To further integrate the wholesale market, we call on the EC to review two specific tools as a matter of priority.

Q&As – Although they are legally non-binding, Q&As play a critical role in the convergence of supervisory practices across the Union and have been increasingly used by ESMA. In light of their importance, we consider their elaboration should be reviewed to be made more inclusive. Clarifying the regulatory framework is only useful when you are sure that you are rightly answering the questions of the players and that everyone exactly understands its scope.

Indeed, the current process does not ensure that Q&As are based on a sufficient dialogue between the supervisor and the entity supervised. Typically, we believe that such an important Q&A like [the recent one on inducement under MiFID 2](#) should have been discussed between ESMA and stakeholders.

With this in mind, we consider that Q&As should systematically be subject to a public consultation even though it would de facto reduce the speed and flexibility of their elaboration which could be improved by making the EC's contribution not mandatory⁴. Generally speaking, further independence between ESMA and the EC is essential as highlighted in section III of this paper.

No action letter – Currently, ESMA is extremely far from having similar prerogatives to the SEC or the CFTC. ESMA's power should tend towards those of its US peers under the condition that the decision of issuing a no action letter is taken in close collaboration with the industry and NCAs.

Another issue revolves with the fact that, under the current mechanism, no action letters are not fully reliable for the financial industry, as they do not guarantee that NCAs will act in a harmonized way and that market participants will be relieved from their obligations. We hence consider that no action letters should come

⁴ This issue was highlighted in ESMA's answer to the European Commission's consultation on the supervisory convergence and the Single Rule Book, [link](#)

with an assumed agreement by NCAs to de-prioritise their enforcement actions related to the targeted rule unless they explicitly and officially express their refusal to do so.

III. Reforming ESMA's governance

We believe ESMA's governance needs in-depth reforms (i) to better reflect the importance of financial markets across the Union as well as (ii) to strengthen the independence of ESMA.

Board of Supervisors (BoS) decision making process – In the decisions taken by the BoS, its members are particularly faced with two challenges: on the one hand, being able to grasp an often highly technical dimension; on the other, ensuring that Member States' own interests do not interfere. Moreover, even if simple majority voting may appear to be the most "democratic" approach, it does not reflect the reality of financial markets across Member States which, in terms of size and complexity, vary greatly within the Union. For this reason, while qualified majority voting would be a better alternative, AMAFI believes that new voting arrangements should be considered to reflect the heterogeneous weight of the financial services industry in the Union and the different degrees of expertise associated with each national market authority. We also consider that, as it is the case for simple majority voting, abstention should never count as approval or as objection for all types of votes at the BoS level.

Creation of a new Executive Board – It would be composed of independent members and would have greater responsibilities than the existing Management Board which mainly revolve around the development and implementation of a multi-annual Work Programme together with budget and staff matters. The main objective is to increase the independence of ESMA vis-à-vis the EC and Member States which we consider is of paramount importance not only for the efficiency of the decisions taken by the Authority but also for its credibility at EU and international levels. Additionally, it would aim at bringing pan-European expertise and at limiting national bias.

IV. Developing ESMA's pragmatism

It is critical to ensure that ESMA's work is deeply rooted into the industry's operational issues and that it takes into account National Competent Authority's (NCAs) expertise. Otherwise, it will continue to feed into the distrust in providing the Authority with further direct supervisory powers.

We consider two areas where targeted reforms would contribute to strengthen ESMA's pragmatism.

Standing committees and stakeholder groups representativeness – While the Securities and Markets Stakeholders Group (SMSG) is rather well structured and useful in light of the reports it produces, we are more sceptical with regards to the impact of the discussions taking place in Standing Committees. We consider these groups have an important role to play in providing the necessary expertise to ensure industry's core concerns are properly assessed and taken into consideration. They should therefore be better organised that is to say they should meet on a more frequent basis and produce written and public contributions including reports on topical issues for which the industry's expertise would be valued and complete ESMA's staff knowledge.

Recruitment of ESMA's staff – In order to increase ESMA's knowledge of industry concerns and enable a better understanding of how markets operate, dedicated recruitment schemes should be elaborated to facilitate not only the secondment / transfer of staff from NCAs to ESMA but also to establish a certain turn-over between ESMA and the industry while maintaining compliance with high standards in terms of management of conflicts of interests, like is the case for instance in the US and the UK.

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The achievement of a large, efficient and competitive integrated market depends on supervision by a single European authority. While this objective can only be progressive and therefore long term, its collective acceptability is directly linked to various improvements in the day-to-day functioning of ESMA, the most essential of which in the short to medium term are those described in this document.

An essential step will be to gradually increase the scope of ESMA's supervision, starting by extending it to entities with pan-European activities, such as CCPs, TVIs and CSDs, while avoiding the bias induced by national supervision. This is all the more important since, as a direct consequence of Brexit, the European financial market ecosystem is now multipolar and the specialisation of certain centres on certain activities must not lead to harmful competition between NCAs. This gradual extension will also facilitate the gradual development of ESMA's expertise.

**About AMAFI**

Association française des marchés financiers (AMAFI) is the trade organisation working at national, European and international levels to represent financial market participants in France. It acts on behalf of credit institutions, investment firms and trading and post-trade infrastructures, regardless of where they operate or where their clients or counterparties are located. AMAFI's members operate for their own account or for clients in different segments, particularly organised and over-the-counter markets for equities, fixed-income products and derivatives, including commodities. Nearly one-third of members are subsidiaries or branches of non-French institutions.