

EC Consultation on the review of the European System of Financial Supervision - Comments by 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 has more than 120 members operating for their own account or for clients in different segments, particularly organised and over-the-counter markets for equities, fixed-income products and derivatives. Nearly one-third of its members are subsidiaries or branches of non-French institutions.

Considering its members' activities, AMAFI will focus its comments on aspects which relate to the European Supervisory Authorities, more particularly to ESMA and marginally to EBA.

1. The European Supervisory Authorities (ESAs)

1.1. Effectiveness and efficiency of the ESAs in accomplishing their tasks

1.1.a. How do you assess the impact of the creation of the ESAs on the financial system in general and on (i) financial stability, (ii) the functioning of the internal market, (iii) the quality and consistency of supervision, and (iv) consumer and investor protection in particular?

General assessment of the impact of the creation of the ESAs on the financial system. Although it has been a strong supportive of such an initiative, AMAFI thinks the creation of ESMA is still too recent to make a proper general assessment, especially in the field of financial stability.

Quality and consistency of supervision in particular. AMAFI would like to stress that this issue is crucial for its members as it is a key element for achieving a genuine level playing field between markets participants. Today, the rules are widely harmonised at European level but their implementation by each national competent authority reveals strong differences. At this stage, AMAFI thinks the impact of the creation of the ESMA is mitigated, if not disappointing. Indeed, it seems difficult for the national competent authorities to have common and harmonised supervisory practices in areas where first, their member states may have found difficult reaching a compromise at the earlier stage of the adoption and, secondly, where they have the possibility to declare themselves non compliant with all or part of a Guideline, which as such, poses a threat to uniform implementation. A recent example relates to ESMA's Guidelines on the market making exemption with respect to the short selling and CDS regulation. The UK FCA and authorities in other major jurisdictions declared they would not comply with some elements of the Guidelines, which are substantial to it, thus creating competitive distortions in the implementation of

the Regulation on short selling and CDS¹. Such a departure is important because the Guidelines provide a definition of market making that was not precisely set in the level 1 legislation. In this regard, AMAFI is worried that the European legislator is leaving critical concepts of level 1 legislation for further definition by ESAs at the level 3-stage.

Similar issues to the one related to market making could arise, for example, in relation to the 4th AML Directive and in MAR, both of which contain broad concepts insufficiently detailed at level 1. Indeed, in the 4th AML Directive, both enhanced and simplified due diligence measures are left to guidelines, and in MAR, the definition of inside information requires further detailed additions by ESMA.

1.1.b. Do the ESAs' mandates cover all necessary tasks and powers to contribute to the stability and effectiveness of the financial system? Are there elements which should be added or removed from the mandate? Please explain.

ESMA has a broad and ambitious mandate, which AMAFI supports. To accomplishing it, ESMA has a good set of powers and tools. Now, the real question is whether – and if so, how – ESMA will make use of all of them.

1.1.c. In your view, do the ESAs face any obstacles in meeting their mandates? If yes, what do you consider to be the main obstacles? Please explain.

To improve the effectiveness and efficiency of the ESAs, AMAFI thinks that a potential revision should focus not on the breadth of the mandate and powers but rather on political and material independence, such as an increase of funding and an increase in permanent staff.

1.1.1. Work towards achieving a single rulebook - regulatory activities

1.1.1.a. Do you consider that the technical standards and guidelines/recommendations developed by the ESAs have contributed to further harmonise a core set of standards in the area of supervision (the single rulebook)? If you have identified shortcomings, please specify how these could be addressed.

As regards regulatory activities, the level 1 legislation is, in some cases, the result of difficult political compromises which do not allow for clear outcomes, as recently illustrated by the Transparency Directive. In this context, it is a challenge for supervisory authorities to find consensual and efficient solutions at the ESA level. However, we think that more systematic use of ESMA's technical advice at level 1 would certainly help improve consistency between the different levels of legislation. For the time being, such opinions are only optional and do not seem to be regularly requested.

Guidelines and recommendations are undoubtedly aimed at contributing to further harmonisation of supervisory practices. Nevertheless, and although the experience is still quite limited, we observe that in some areas they do not fulfil this objective. In fact, the nature of the guidelines, which allow for flexibility in the way they will be applied within the different jurisdictions, is leading to divergences among jurisdictions over how EU legislation will be applied. Indeed, implementation arrangements within the different EU jurisdictions may range from very prescriptive ones (in France, for example, where ESMA's guidelines are incorporated in full as "positions", i.e. the only way to comply with the provisions) to a sole reference by the regulators to some part of the guidelines as examples of best practices. See also 1.1.a

¹ Besides, AMAFI is totally supportive of the position of the French authority (AMF) which underlined that it is not going to comply with ESMA's Guidelines as long as it is not implemented by all competent authorities.

1.1.1.b. What is your assessment of the work undertaken by the ESAs as regards providing opinions (e.g. technical advice) to the EU institutions?

There have been too few opinions in the relevant areas for AMAFI to have a view on this question.

1.1.2. Common supervisory culture/convergence of supervisory practices

1.1.2.a. In your view, did the ESAs contribute to promoting a supervisory culture and convergence of supervisory practices? If you have identified shortcomings how could these be addressed?

The creation of ESAs is indeed a very positive step in this direction, but as long as supervision remains at national level, it will necessarily be influenced by national approaches and cultures. See *question 1.1.a*

1.1.3. Consistent application of EU law

1.1.3.a. In your view, do the procedures on breaches of EU law (Article 17 ESAs Regulations) and binding mediation (Article 19 ESAs Regulations) ensure the consistent application of EU law? If you have identified shortcomings how could these be addressed?

In our opinion, these are useful and efficient tools for ensuring consistent application of EU law. Nevertheless, AMAFI is not aware that ESMA has used any of these tools.

1.1.4. Emergency situations

1.1.4.a. Do you consider the ESAs' role in emergency situations appropriate? Please explain.

AMAFI is not aware of the ESAs role in this area.

1.1.5. Coordination function (Art 31 ESAs Regulations)

1.1.5.a. Do you think that the coordination role of the ESAs is appropriate? If you have identified shortcomings, please specify how these could be addressed.

1.1.5.b. In your experience, to what extent have coordination activities carried out by the ESAs contributed to promoting a coordinated EU response to adverse market conditions? Please explain. (optional)

AMAFI is not aware of ESMA's conduct in the field of coordination activities.

1.1.6. Tasks related to consumer protection and financial activities

1.1.6.a. How do you assess the role and achievements by the ESAs in the field of consumer protection? Please specify the main achievements by each ESA.

AMAFI thinks that, from a general standpoint, ESMA's efforts to improve the harmonisation of national approaches is beneficial to consumer protection, as long as the level of protection is sufficiently ambitious.

1.1.6.b. Are you aware of the warnings that were issued by the ESAs so far? If yes, please specify which ones and whether they have contributed to improve consumer protection or any other objective of the ESAs.

AMAFI is aware of the warnings issued by ESMA, such as the one on "Contracts for Difference". As such, this action looks to be a positive one but AMAFI wonders to what extent such warnings are "visible" to consumers from different national jurisdictions.

1.1.6.c. What are 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? (optional)

To ensure that the targeted public is properly informed, AMAFI thinks that ESMA's actions should be passed along to the national level by the different competent authorities.

1.1.7. Direct supervisory powers

1.1.7.a. How do you assess ESMA's direct supervisory powers? If you have identified shortcomings, please specify how these could be addressed.

1.1.7.b. How do you assess ESMA's performance for the registration and supervision of credit rating agencies (CRAs)?

1.1.7.c. Do you consider that further responsibilities of direct supervision should be entrusted on one or more of the ESAs, particularly with regard to institutions or infrastructures of pan-European reach? Please explain.

On principle, AMAFI does support ESMA's developing further responsibilities of direct supervision with regard to institutions or infrastructures of pan-European reach. That said, this objective must be implemented with careful attention. Indeed, ESMA has a huge amount of work ahead, as well as scarce resources and a collegial way of functioning. In this context, giving it any further tasks, especially some requiring specific expertise, must be considered only progressively.

1.2. Governance of the ESAs

1.2.1. General governance issues

1.2.1.a. Are the governance requirements sufficient to ensure impartiality, objectivity and autonomy of the ESAs?

AMAFI is not aware of any problems in these fields.

1.2.2. Decision-making bodies and voting modalities

1.2.2.a. Does the current composition of the Board of Supervisors (BoS) ensure that it acts efficiently? If you have identified shortcomings, please specify how these could be addressed.

1.2.2.b. Does the composition of the Management Board ensure that the ESAs are run effectively and perform the tasks conferred on them? If you have identified shortcomings, please specify how these could be addressed.

1.2.2.c. Does the mandate of the Management Board ensure that the ESAs are run effectively and perform the tasks conferred on them? If you have identified shortcomings, please specify how these could be addressed. (optional)

The qualified-majority voting system is an important improvement compared with the former system based on consensus. Nevertheless, for such a voting system to be efficient, it is necessary that the regulators should have common technical objectives, which is not always the case at present, and also that they develop a common supervisory culture.

1.2.3. Financing and resources

1.2.3.a. How do you assess the arrangements on financing and resources? If you have identified shortcomings, please specify how these could be addressed. (optional)

ESMA's financing and resources currently depend for 40% on the European Commission budget and for 60 % on the national authorities. In this respect, we believe that efforts should be made to increase independent sources of revenues, from the European budget for example. This would notably enable the ESAs to recruit a larger number of permanent employees, which is crucial to develop their independence in the long run.

1.2.4. Involvement and role of relevant stakeholders

1.2.4.a. How would you assess the impact of the relevant stakeholder groups within the ESAs on the overall work and achievements of the ESAs?

As an introductory point, regarding the involvement and role of relevant stakeholders, AMAFI observes that the current formal framework of public consultations and working groups is too limited to ensure a proper contribution from all relevant stakeholders in the securities area. On the one hand, public consultations are too irregular and constrained in time to permit sufficient flexibility in the relationships with the Authority and to allow for early industry comment. On the other hand, we consider that the secrecy requirement imposed on ESMA's standing committees, working groups as well as its stakeholder group is detrimental to the gathering of all relevant information and opinions, and ultimately to ESMA's capacity to make fully informed decisions.

In addition, AMAFI would add that the disparity of the stakeholders' groups membership and the need for reaching a consensus is not conducive to the production of useful advice that would help the ESAs take informed decisions. Therefore, we would make two suggestions. First ESMA should consult the different stakeholders more frequently, for example by arranging regular meetings with national associations – at least the most important ones – especially because the securities industry in Europe is so diversified that it is not fully represented by European trade associations. Second, ESMA could put in place sectoral sub-groups alongside the current working groups in order to complement the existing broad-based groups.

1.2.4.b. Are you satisfied with the quality and timeliness of consultations carried out by the ESAs?

AMAFI is not at all satisfied. In fact, AMAFI urges the European Commission as well as the European co-legislators to take into consideration the necessity to set coherent and realistic implementation timeframes from the outset. These would give ESAs sufficient time to consult properly with market participants and produce high quality advice for delegated acts and proposals for technical standards. The quality of European legislation is at stake, and it is all the more important that the European economy needs to rely more heavily on markets for its financing.

1.2.4.c. Are you satisfied with the appointment procedures for the stakeholder groups?

AMAFI has no comments to make on this point.

1.2.4.d. In your experience, does the composition of stakeholder groups ensure a sufficiently balanced representation of stakeholders in the relevant sectors? If not, which areas appear to be insufficiently/overly represented?

AMAFI thinks that the securities markets stakeholder group could have a better balanced membership. Participants from market infrastructures currently seem to be over-represented compared with participants from the intermediation area.

Also, considering their broad-based composition, the stakeholders groups – especially the securities markets stakeholders group – have a political advisory role rather than a technical one. AMAFI does not question the importance for ESMA of having such input. Nevertheless, it is all the more important to ensure regular contacts between ESAs staff and bodies representing the different sectors of activity in order to get more specific and technical input. (*See also above 1.2.4*)

1.2.4.e. Is the work undertaken by the stakeholder groups sufficiently transparent? Do you see areas where the approach towards transparency needs to be revisited?

See 1.2.4

1.2.4.f. In your experience, are the ESAs, and in particular the ESAs stakeholder groups, sufficiently accessible for stakeholders not directly represented in these stakeholder groups?

See 1.2.4

1.2.5. Joint bodies of the ESAs

1.2.5.a. How do you assess the functioning of the Board of Appeal (BoA)? If you have identified shortcomings, please specify how these could be addressed.

As external participant, it is difficult to make a proper assessment of the functioning of the Board of Appeal.

1.2.5.b. What is your assessment of having one joined BoA for all ESAs as compared to a dedicated BoA for each ESA respectively?

1.2.5.c. How do you assess the functioning of the Joint Committee (JC)?
If you have identified shortcomings, please specify how these could be addressed.

As external participant, it is difficult to make a proper assessment of the functioning of the JC.

1.2.5.d. Does the JC ensure cross-sectoral cooperation and consistent approaches between the three ESAs? If you have identified shortcomings, please specify how these could be addressed.

