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**REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND  
THE COUNCIL**

**On the operation of the European Supervisory Authorities (ESAs)**

## 1. INTRODUCTION

The three European Supervisory Authorities (ESAs) – the European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority (EIOPA), and the European Securities and Markets Authority (ESMA) – were created in 2011 in response to the global financial crisis that unfolded in 2008. They were set up to help tackle the shortcomings in supervision revealed by the financial crisis and to restore full trust in EU financial markets.

More than 10 years after their creation, the ESAs now have a very convincing track-record in these areas. They are key actors in shaping the single market for capital and financial services by contributing to implementing EU legislation in this area and by coordinating the work of national supervisors. They have also successfully taken on new tasks in the recovery and resolution frameworks<sup>1</sup>. The recent COVID-19 crisis has proven that the European System of Financial Supervision is functioning well, and the work of the ESAs has been an important part of this achievement.

Also in the current geopolitical context, with Russia’s war against Ukraine, the ESAs play an important role, including in the implementation of sanctions by EU financial market operators. Moreover, the ESAs monitor the impact on EU financial institutions and follow financial market developments closely, notably with regard to energy, food commodity and commodity derivative markets.

During the past decade, the ESAs’ activities have focused on building the single rulebook for financial services and fostering supervisory convergence. Excellent progress has been achieved in these areas, but there is still a need for continued and appropriately targeted efforts to promote a genuine Capital Markets Union. A financial system with multiple centres across the EU increases the need for an improved single rulebook and greater supervisory convergence.

In this context, the Commission published its action plan for Capital Markets Union<sup>2</sup> on 24 September 2020. In this action plan, the Commission committed to: (i) work towards an improved single rulebook by assessing the need for further harmonisation of EU rules; and (ii) take stock of what has already been achieved in supervisory convergence.

In addition, Article 81 of the three ESA Regulations<sup>3</sup> requires the Commission to carry out a review of the Regulations. This review must be in the form of a published general report on the experience acquired from the operations of the ESAs and the procedures laid down in the ESA Regulations. In addition to the general requirement for a review of the performance of

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<sup>1</sup> [Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions](#); [Regulation \(EU\) 2021/23 of the European Parliament and of the Council of 16 December 2020 on a framework for the recovery and resolution of central counterparties](#).

<sup>2</sup> [Capital Markets Union 2020 Action Plan en](#)

<sup>3</sup> [Regulation \(EU\) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing the European Banking Authority](#); [Regulation \(EU\) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing the European Insurance and Occupational Pensions Authority](#); [Regulation \(EU\) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing the European Securities and Markets Authority](#).

the three ESAs, there are specific review clauses in the ESMA<sup>4</sup> and EBA<sup>5</sup> Regulations.

Amendments to the ESA Regulations entered into application on 1 January 2020<sup>6</sup> (hereinafter referred to as ‘2019 ESA review’). These amendments brought changes to existing convergence tools and governance provisions. The amendments also added new direct-supervision mandates for ESMA<sup>7</sup>. The first review following these amendments focuses particularly on whether – and to what extent – these amendments have benefited EU financial supervision.

To prepare this report, the Commission engaged in a broad consultation process. It carried out a targeted consultation that received 107 replies, and it also asked for feedback from the ESAs. It also organised a public event and held various stakeholder meetings. The Commission has published a feedback statement<sup>8</sup> providing a detailed summary of the responses received during this consultation. In broad terms, respondents to the consultation gave a positive assessment of the impact of the ESAs on: (i) financial stability; (ii) the functioning of the internal market; (iii) the quality and consistency of supervision; (iv) the strengthening of international supervisory coordination; (v) consumer and investor protection; (vi) sustainable finance; and (vii) digital finance.

Many respondents observed that it was still too soon to: (i) evaluate fully the changes that were agreed in 2019 and that had only entered into application in early 2020; and (ii) consider further changes given the short period of time since the implementation of the last amendments. In addition, respondents pointed to the extraordinary circumstances caused by COVID-19 that have occupied the attention of the ESAs – in particular during large parts of 2020. Despite these reservations, most respondents were still able to provide an assessment. By and large, the feedback was clearly positive about the changes introduced by the ESA review, even though a number of respondents considered that more changes were needed. The responses also revealed that the divergent opinions that surfaced in the 2019 ESA review are still present. The vast majority of respondents agree that the ESAs reacted appropriately in the COVID-19 crisis and that the current powers of the ESAs have proven to be largely sufficient. According to the feedback, the ESAs’ coordination seems to work satisfactorily. However, some stakeholders consider that the ESAs’ coordinating role has not been used to its full potential.

This report summarises the findings from the consultation and from other stakeholder contacts. It focuses on the main areas under review: (i) supervisory convergence; (ii) governance; (iii) direct supervision; and (iv) funding. It also includes a section on the single

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<sup>4</sup> Articles 81(2b) and 81(2c) of the ESMA Regulation ask the Commission to assess the potential supervision of non-EU trading venues and central securities depositories. The potential supervision of central securities depositories has been addressed as part of the ongoing review of the Central Securities Depository Regulation ([https://ec.europa.eu/info/publications/220316-central-securities-depositories-regulation-review\\_en](https://ec.europa.eu/info/publications/220316-central-securities-depositories-regulation-review_en)), while the potential supervision of non-EU trading venues will be assessed at a later stage.

<sup>5</sup> Article 81(2b) of the EBA Regulation asks the Commission to assess: (i) the new tasks in both anti-money laundering and countering the financing of terrorism (AML/CTF) that were conferred on the EBA; and (ii) the possibility of conferring specific tasks to an existing or a new dedicated EU-wide agency. This has been addressed in the AML/CTF legislative package ([https://ec.europa.eu/info/publications/210720-anti-money-laundering-counteracting-financing-terrorism\\_en](https://ec.europa.eu/info/publications/210720-anti-money-laundering-counteracting-financing-terrorism_en)).

<sup>6</sup> 2019 ESA review: [Regulation \(EU\) 2019/2175, which reviews the powers, governance and funding of the ESAs](#).

<sup>7</sup> The new direct-supervision mandates entered into application in January 2022.

<sup>8</sup> [https://ec.europa.eu/info/files/2021-esas-review-summary-of-responses\\_en](https://ec.europa.eu/info/files/2021-esas-review-summary-of-responses_en)

rulebook, as announced in the Commission's 2020 action plan on Capital Markets Union.

## **2. SUPERVISORY CONVERGENCE**

### Background and findings

The 2019 ESA review introduced a number of changes to strengthen supervisory convergence. In particular, the ESA review introduced: (i) a strengthened peer-review process; (ii) Union strategic supervisory priorities; and (iii) an EU supervisory handbook. It also introduced explicit rules to frame instruments already used by the ESAs, such as 'no-action' letters; coordination groups; and questions and answers (Q&A).

In the targeted consultation, respondents from both public authorities and the finance industry rated very positively the contribution of the ESAs to promoting a common supervisory culture and consistent supervisory practices. Most respondents expressed reasonably positive views about the recent changes<sup>9</sup>, but argued that it was still too early to assess the full effect of these changes on the convergence outcomes. They said that more time was needed to form a view on whether the amendments would be sufficient for achieving supervisory convergence.

The majority of respondents did not see the need to amend or add a tool to the ESAs' toolkit for achieving supervisory convergence. These respondents observed that the ESAs have not used their existing tools to their full potential. In addition, some respondents highlighted the effectiveness of informal supervisory convergence tools developed by the ESAs, such as ESMA's common supervisory actions<sup>10</sup>.

However, respondents also acknowledged that more efforts were needed to reach the goal of supervisory convergence. They considered the specificities of local markets and different legal environments (e.g. in civil, commercial and company law) to be the main obstacles to greater supervisory convergence. Sanctions were mentioned as the area where there is most room for improvement in convergence (e.g. National Competent Authorities should impose similar sanctions if there are similar breaches of EU legislation).

Many respondents observed that the new Q&A process has become slower and less efficient. Respondents cited two reasons for this problem. Firstly, they said it was difficult to distinguish which questions require an interpretation of Union law, and thus need to be answered by the Commission. Secondly, they said that the process was slowed down because the Commission needed to formally adopt a decision on this category of questions. Similarly, many respondents observed that the conditions for the new mechanism of no-action letters,

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<sup>9</sup> I.e. peer reviews, Union strategic supervisory priorities, new ESA tasks in fostering supervisory independence, breach of Union law, and mediation.

<sup>10</sup> For example, mentioned in this context were: ESMA's common supervisory action (e.g. on UCITS liquidity management); the Supervisory Coordination Network; the Senior Supervisors Forum; ESMA's risk-based approach towards supervisory convergence ('Heatmap'); discussion of real supervisory cases; EIOPA's promotion of bilateral and multilateral exchanges of information (e.g. the cross-border notification project); the EBA's annual plan and report on supervisory convergence; and the EBA's SREP guidelines.

introduced by the 2019 ESA review, made use of this mechanism very difficult<sup>11</sup>. They noted that due to the non-binding nature of no-action letters, market participants cannot rely on them, as there is no guarantee that National Competent Authorities will act on them in a harmonised way. Instead, some respondents said that the ESAs should be able to take a decision compelling competent authorities to disapply – or not enforce – a provision of Union law in some circumstances. Nevertheless, respondents recognised that, in instances where the conditions of no-action letters were not met, similar outcomes have been achieved with other tools such as deprioritisation statements<sup>12</sup>, which invite National Competent Authorities not to prioritise actions in relation to a given requirement.

### Assessment of the Commission

The ESAs have made an important contribution to improving supervisory convergence through the use of their toolkit. Guidelines, recommendations, and Q&As have proven particularly effective in spelling out the single set of rules for financial services and markets (‘single rulebook’) and thus achieving convergent supervisory outcomes. In recent times, the ESAs have rightly started to shift the focus of their work from developing the single rulebook to achieving convergence in its application and supervision. The Commission welcomes a greater focus by the ESAs on compliance with the rules. The risk-based approach towards supervisory convergence – whereby the ESAs choose the topics on which the convergence work should focus on in the next 1-2 years – is also welcome<sup>13</sup>.

Overall, the tools available to the ESAs, as improved by the 2019 ESA review, seem to be fit for purpose. Despite the recent nature of the changes that started to apply in 2020, it is already possible to see a certain positive impact in this area. For example, the new peer-review process proved to be an effective ad-hoc investigation tool during its first use in the Wirecard case<sup>14</sup>. However, the Commission considers that there may have been other instances apart from the above case where an ad-hoc peer review would have been warranted. Moreover, since peer reviews are resource intensive, the ESAs should carefully assess which topics most merit a peer review. For example, they could base their decision on an initial assessment of where the negative impact of supervisory divergence is the greatest.

The Commission agrees that informal tools<sup>15</sup>, which the ESAs have developed, can usefully foster convergence. An example of this can be seen in the common supervisory actions used

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<sup>11</sup> A practical example of a no-action letter is that adopted by ESMA on 29 April 2020 in connection with the entry into application of the new sustainability-related disclosures for benchmarks: <https://www.esma.europa.eu/press-news/esma-news/esma-issues-no-action-letter-new-esg-disclosure-requirements-under-benchmarks>.

<sup>12</sup> See some examples: [https://www.esma.europa.eu/sites/default/files/library/esma70-156-4714\\_statement\\_access\\_etds\\_2021.pdf](https://www.esma.europa.eu/sites/default/files/library/esma70-156-4714_statement_access_etds_2021.pdf); [https://www.esma.europa.eu/sites/default/files/library/esma35-43-2632\\_statement\\_suspension\\_rts\\_27.pdf](https://www.esma.europa.eu/sites/default/files/library/esma35-43-2632_statement_suspension_rts_27.pdf).

<sup>13</sup> See, for example, ESMA’s risk-based approach towards supervisory convergence (‘Heatmap’).

<sup>14</sup> ESMA conducted an ad-hoc peer review to assess the supervisory response in the financial-reporting area by BaFin and the Financial Reporting Enforcement Panel (FREP) to the events leading to the collapse of Wirecard AG. The peer review identified a number of shortcomings. These relate to: the independence of BaFin from issuers and government; the market monitoring by both BaFin and the FREP; examination procedures of the FREP; and the effectiveness of the supervisory system in the area of financial reporting. The peer review provided recommendations to address these shortcomings: [esma42-111-5349\\_fast\\_track\\_peer\\_review\\_report\\_-\\_wirecard.pdf \(europa.eu\)](https://www.esma.europa.eu/sites/default/files/library/esma42-111-5349_fast_track_peer_review_report_-_wirecard.pdf).

<sup>15</sup> These tools are cooperation practices to foster convergence that the ESAs have developed but that are not further specified in the founding regulations.

by ESMA<sup>16</sup>. These are useful for creating transparency and a common supervisory culture. They can also be effective for getting a holistic view of industry practices and the supervision of these practices across the EU. To the extent that shortcomings become apparent when those informal tools are used, such findings should ideally trigger national supervisors to intervene and take action.

However, there is also room for improvement. Firstly, some of the tools at hand might not be being used to their fullest to tackle supervisory discrepancies. For example, the procedure for breach of Union law has been very rarely used – as pointed out in two recent ECA audits<sup>17</sup>. Moreover, the tools should be used across the board. For example, and as flagged by stakeholders, more convergence would be desirable in enforcement in general and in sanctions more specifically<sup>18</sup>. Nevertheless, respondents to the consultation acknowledge that there are certain limits to what is achievable in this field due to: (i) limited harmonisation in the area of sanctions; and (ii) the different legal systems of Member States.

Taking into account the feedback from the consultation that more time is necessary to fully assess the impact of the recent changes, the Commission will not now propose changes to the ESA Regulations to strengthen supervisory convergence. Instead, the Commission continues to encourage the ESAs to make good use of the existing instruments.

In addition, the Commission will consider targeted improvements to foster supervisory convergence in sector legislation. This is to address specific shortcomings that the Commission has identified or may identify in certain areas of financial markets. To this end, the Commission has recently proposed targeted amendments, including:

- the Solvency II review proposal<sup>19</sup>, which proposes to increase the role of EIOPA in complex cross-border cases where the supervisory authorities involved fail to reach a common view in a collaboration platform<sup>20</sup>;
- the AIFMD review proposal<sup>21</sup>, which proposes that ESMA would be tasked with conducting peer reviews and analysing notifications of substantial delegation arrangements so that supervisors have a better overview of market practices;
- the supervisory data strategy<sup>22</sup>, which aims to improve the consistency and interoperability of the supervisory reporting system in the EU (this will also facilitate coordination between supervisors and contribute to supervisory convergence);

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<sup>16</sup> With this tool, NCAs agree to assess simultaneously whether market participants in their jurisdictions adhere to the rules in their day-to-day business, based on a common methodology developed together with ESMA.

<sup>17</sup> [Special Report 13/2021: EU efforts to fight money laundering in the banking sector are fragmented and implementation is insufficient](#); [Special report 04/2022: Investment funds EU actions have not yet created a true single market benefiting investors](#).

<sup>18</sup> See responses to the consultation and also ESMA's 2020 reports on the use of [sanctions for UCITS](#) and on [sanctions under AIFMD](#). A Commission report under Article 99(3) of the UCITS Directive is forthcoming.

<sup>19</sup> [https://ec.europa.eu/info/publications/210922-solvency-2-communication\\_en](https://ec.europa.eu/info/publications/210922-solvency-2-communication_en)

<sup>20</sup> According to Article 152b of Directive 2009/138/EC, where cross-border insurance activities are significant with respect to the market of the host Member State and require close collaboration between the supervisory authorities of the home Member State and the host Member State, especially where an insurer might risk being in financial difficulties to the detriment of policyholders and third parties, EIOPA should set up and coordinate collaboration platforms.

<sup>21</sup> [https://ec.europa.eu/info/publications/211125-capital-markets-union-package\\_en](https://ec.europa.eu/info/publications/211125-capital-markets-union-package_en)

- the CRD VI proposal<sup>23</sup>, which would harmonise sanctioning powers and introduce enforcement tools (e.g. periodic penalty payments) at the disposal of European supervisors.

To address specific problems, the Commission will also continue to propose targeted changes in upcoming reviews of sector legislation as necessary.

On the Q&A process, the power to issue (non-binding) interpretations of Union law lies with the Commission as the guardian of the Treaties rather than with the ESAs. However, the Commission notes the feedback from stakeholders, and will continue to try to streamline the Q&A process in practice, together with the ESAs. The Commission also notes that, although Q&As are often a useful tool to clarify aspects of legislation, they are sometimes used by stakeholders to obtain guidance for their own very specific situations, and are not necessarily in the general interest.

Although it is mindful of the concerns raised by stakeholders, the Commission considers that more time is needed to assess the effectiveness of the new provision on no-action letters (and the potential use cases of this provision) before considering whether any fine tuning is needed. That said, some stakeholders seem to wish for extensions to the scope and effect of this provision that would risk conflicting with general principles of Union law. In this context, the Commission has recently proposed ways to ensure that specific provisions of Union law do not apply under certain circumstances such as in the MIFIR proposal<sup>24</sup>, thus seeking to achieve on a case-by-case basis some of the flexibility of the framework sought by those stakeholders.

More generally, the Commission invites the ESAs to assess further improvements that can be implemented in the short term and that would not require any change to the legislative framework. To that end, stakeholders raised a number of ideas in the consultation. The Commission considers that the following suggestions in particular merit further reflection.

- Transparency on how rules are applied across the EU could be increased. For example, the ESAs could create a web-based tool that would make it possible for all stakeholders to report cases of supervisory inconsistencies.
- The focus on enforcement could be increased in supervisory convergence tools to foster the consistent application of enforcement measures, including sanctions. A similar goal could be achieved by ensuring that the ESAs collect comprehensive data on enforcement cases across the EU.
- The possibility of carrying out ad-hoc peer reviews of competent authorities in case of events with major supervisory implications could be used to a greater extent as an ex-post tool. In addition, greater focus on urgent or unforeseen supervisory issues could

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<sup>22</sup> [Strategy on supervisory data in EU financial services | European Commission \(europa.eu\)](#).

<sup>23</sup> [https://ec.europa.eu/info/publications/211027-banking-package\\_en](https://ec.europa.eu/info/publications/211027-banking-package_en)

<sup>24</sup> New Article 32a in [MIFIR proposal of 25-11-2021 \(COM/2021/727 final\) on stand-alone suspension of the trading obligation](#)



contribute to a more efficient use of peer reviews given that peer reviews require a lot of resources.

- Each of the ESAs has developed its own informal supervisory convergence tools in a different way to the other ESAs. This is due to the different regulatory frameworks in which the ESAs operate. The Commission agrees with stakeholders that these tools have proven very effective, and invites the ESAs to continue using these informal instruments. However, the ESAs could also explore to what extent informal tools developed by other ESAs might be usefully incorporated into their own supervisory convergence toolbox.
- Discussion of supervisory cases among National Competent Authorities in a more systematic way could be useful to promote convergent supervisory outcomes in comparable situations. The Commission invites the ESAs to draw up criteria on how to select supervisory cases relevant for such exchanges. The ESAs could enhance the value of these discussions by creating a collection of such cases available for consultation by National Competent Authorities.

### **3. GOVERNANCE, JOINT BODIES, STAKEHOLDERS' INVOLVEMENT AND SUPERVISORY INDEPENDENCE**

#### Background and findings

##### a) Governance of the ESAs

In the last ESA review, the Commission proposed far-reaching changes to the governance of the ESAs, aiming for them to be more independent from National Competent Authorities for certain tasks. The main argument for those proposals was that the use of some of the ESAs' tools could be increased by putting certain decisions into the hands of a body that had a degree of independence from the authorities to which those tools applied. This approach was subject to intense discussions in the legislative process. The text finally adopted by the co-legislators fell short of the Commission's initial ambition. Notwithstanding this, improvements were introduced in targeted areas (i.e. on breach of Union law<sup>25</sup>, conflicts of interest, and the role of chairpersons).

In the consultation, the vast majority of public authorities stressed that the ESAs are member-driven organisations, in which decisions are taken by national representatives in the Board of Supervisors as the ultimate decision-making body. Most industry respondents believed that the ESAs' current governance arrangements enabled the ESAs to ensure objectivity, independence and efficiency in their work/decision-making. However, a number of stakeholders (a few public authorities, some industry representatives, academics and NGOs) supported governance arrangements that are more independent from national supervisors. These stakeholders considered the limited amendments by the 2019 ESA review as insufficient to overcome situations where decisions are taken by representatives of the

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<sup>25</sup> Governance, in the context of the breach-of-Union law process, was strengthened by: (i) introducing independent panels; (ii) taking decisions through written non-objection procedures; and (iii) removing the voting right of the member who allegedly breached Union law.



National Competent Authorities, who might be driven more by national than by European interests.

Stakeholders were of the opinion that the latest changes in governance had improved the ESAs' decision-making processes<sup>26</sup>. Some respondents observed that the changes brought about by the 2019 ESA review: (i) made decision-making quicker; (ii) mitigated the risk of conflicts of interest; and (iii) brought additional impartiality and transparency.

On voting arrangements, there continue to be differing opinions. This is clearly illustrated by a public-sector voice from a smaller Member State asking for more decisions to be taken on the basis of 'one voting member, one vote', while another public-sector respondent from a Member State with a large financial market suggested strengthening the influence of Member States most affected by individual decisions of the ESA. A few respondents suggested further extending the right of an ESA chairperson to vote in all kinds of decisions (currently, the chairperson cannot vote in decisions taken by qualified majority).

Opinions were also split on whether the double-majority requirement for votes in the EBA (requiring simple majorities from National Competent Authorities participating and not participating in the Banking Union) should be kept unchanged. On the one hand, respondents considered that the double-majority requirement resulted in an unjustified overweighting of Member States not participating in the Single Supervisory Mechanism which would increase further with additional Member States joining the Banking Union. On the other hand, public authorities (and not only those from Member States not participating in the Banking Union): (i) stressed the importance of the double-majority requirement for European cohesion; and (ii) considered this requirement to be a guarantee of balanced and proportionate representation of Member States both within and outside the Banking Union.

Some respondents also reminded about the need for a targeted change to the governance of the EBA in order to ensure a more consistent separation of its resolution and prudential functions.

Several respondents also requested changes to governance at ESMA in cases of direct supervision. These respondents suggested that instead of submitting all issues to the Board of Supervisors for decisions, ESMA should: (i) entrust an independent Management Board or a committee similar to the Central Counterparty (CCP) Supervisory Committee with these decisions; or (ii) make more use of the delegation powers to relieve the Board of Supervisors of day-to-day supervisory decisions.

In addition to the consultation feedback, it can be useful to draw on other sources to assess the governance of the ESAs. One such source is the special report<sup>27</sup> by the European Court of Auditors (ECA) on the EU's efforts to fight money laundering. In this report, the ECA considered that, despite the revised EBA Regulation providing for some changes to the breach-of-Union law procedure, there remained key governance shortcomings in the EBA. Likewise, in its recent special report on investment funds, the ECA considers that ESMA

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<sup>26</sup> The allegations of a potential breach of Union law by the Danish Financial Services Authority in the context of the Danske Bank money-laundering case (the last case of an alleged breach of Union law) took place before the latest changes started to apply. It is not possible to conclude whether the outcome would have been different under the revised rules.

<sup>27</sup> See footnote 16 for references to both ECA reports.

faces challenges in using its tools effectively. These challenges include ESMA's own governance structure and its dependence on the cooperation of National Competent Authorities.

#### b) Joint bodies

All respondents saw the two joint bodies of the ESAs (namely the Board of Appeal and the Joint Committee) as effective mechanisms in general to ensure consistent views and cross-sectoral cooperation. However, some stakeholders observed that the Joint Committee is not used to the full extent possible in cases where the ESAs have a common mandate (e.g. the new ESA mandate to foster supervisory independence). A few respondents said that the decision-making of the Joint Committee was too cumbersome since decisions taken by the Joint Committee need to be endorsed by the boards of the three ESAs.

#### c) Stakeholder involvement

Stakeholders were also consulted on their involvement with the ESAs and on how the ESAs had been performing in ensuring stakeholder involvement. Most public authorities and a few industry respondents considered that the current framework works well and that stakeholders are sufficiently consulted. Most industry respondents stressed that the ESAs should intensify their interaction and dialogue with the industry and adopt a more open and pragmatic approach<sup>28</sup>. Finally, various industry representatives raised the issue of deadlines being too short to provide feedback when ESAs carry out consultations.

#### d) Supervisory independence

The 2019 ESA review introduced a new responsibility for the ESAs: to foster and monitor the independence of national supervisors. The ESAs have recently published their first individual reports on the supervisory independence of competent authorities in their sectors<sup>29</sup>.

In the consultation, most respondents were positive about this new responsibility for the ESAs to foster supervisory independence. Public authorities observed that this new responsibility makes possible an expert assessment by an entity that is knowledgeable about the functions carried out by National Competent Authorities. These public authorities also said that: (i) independence was a pre-condition for developing effective supervision; (ii) the new responsibility could improve harmonisation in the area of supervisory independence; and (iii) the ESAs could provide useful insights when comparing the state of supervisory independence across Europe.

Some respondents from the finance industry argued that the independence of national supervisors is critical for ensuring the legitimacy and credibility of the supervisory process. A research institute observed that the independence of national supervisory authorities should be regulated uniformly across Europe by introducing amendments to relevant financial legislation.

### Assessment of the Commission

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<sup>28</sup> For example, stakeholders observed that: (i) more meetings and direct dialogues with firms and not only with associations could be organised; (ii) consultations are sometimes too narrow and technical; and (iii) feedback could be provided on how stakeholders views were taken into account.

<sup>29</sup> [ESMA report](#); [EBA report](#); [EIOPA report](#).

The Commission agrees that the amendments set out in the 2019 ESA review are a step in the right direction and should have a positive overall impact on the governance of the ESAs. But despite these changes, the Commission continues to believe that the governance system of the ESAs, with decisions being taken by the 27 national supervisors, may still give too much prominence to national interests and occasionally produce sub-optimal results. In addition, this governance system sometimes makes it difficult for the ESAs to use the convergence tools at their disposal in the most appropriate way. This view is corroborated by the conclusions of the ECA and supported by responses in the consultation, particularly from academia, consumer groups, and a limited number of industry stakeholders and public authorities. That said, the Commission considers that not enough time has passed since the latest changes began to apply in practice to determine whether further amendments are warranted. The consultation feedback has clearly shown that stakeholders do not overall currently support further legislative changes. Therefore, the Commission will refrain from proposing further changes at this juncture. Nevertheless, the Commission will monitor closely this key area and consider further measures.

Based on suggestions from the consultation, the Commission will also consider the need for a targeted change to governance of the EBA in order to ensure a more consistent separation of its resolution and prudential functions. Furthermore, the Commission will consider introducing standards for independence in future reviews of sector legislation. In this spirit, the Commission has already proposed operational provisions on the principle of independence of competent authorities in the banking package adopted in October 2021<sup>30</sup>.

Additionally, some improvements suggested by stakeholders in the consultation can be implemented rather quickly by the ESAs. The Commission invites the ESAs to reflect on the following suggestions.

- The ESAs should improve transparency on the timing and content of decisions by the Board of Supervisors by publishing the part of their agendas which concern regulatory items. For regulatory matters, a tentative planning calendar could be published every 6 months, so that stakeholders can anticipate consultations.
- Where this is not already the case, the ESAs could further increase their interaction with stakeholders by engaging more in an ongoing dialogue with stakeholders, beyond what already happens with the stakeholder groups.
- In the interest of greater efficiency, ESMA is invited to consider whether there are further possibilities to delegate day-to day supervisory decisions for entities that are under its direct supervision to committees, or to the chairperson.

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<sup>30</sup> [https://ec.europa.eu/info/publications/211027-banking-package\\_en](https://ec.europa.eu/info/publications/211027-banking-package_en); Article 4 of the Capital Requirements Directive would be amended to clarify how Member States must ensure that the independence of competent authorities, including their staff and governance bodies, is preserved. Minimum requirements would be introduced to prevent conflicts of interest in the supervisory tasks of competent authorities, their staff and governance bodies. The EBA would also be mandated to develop guidelines in that regard, taking into account international best practices. These measures respond to problems that emerged in the Wirecard case in particular.

- There is an increasing number of cross-sectoral tasks and topics that must be dealt with by the ESAs. This has made the Joint Committee increasingly relevant. Given these developments, the ESAs are invited to reflect on desirable changes that could be made to the framework in the future to ensure sufficient resources and improve the decision-making process. The Commission invites the ESAs to provide this advice to the Commission by the end of 2023.
- The ESAs are encouraged to make further progress in their new task of monitoring and fostering supervisory independence by further developing the principles of independence (i.e. operational, financial and personal independence as well as accountability and transparency) and drawing up cross-sectoral criteria for supervisory independence in the EU. The ESAs could then assess the extent to which the criteria are met, thus going beyond the self-assessments of competent authorities that have been carried out so far.

#### **4. DIRECT SUPERVISION**

##### Background and findings

The 2019 ESA review entrusted ESMA with direct supervisory responsibilities in the areas of: (i) critical EU benchmarks and non-EU benchmark administrators; and (ii) providers of data-reporting services. These extended direct supervisory powers apply as of 1 January 2022. Since January 2020, ESMA has also been given a new range of supervisory responsibilities under the EMIR 2.2<sup>31</sup> framework with respect to non-EU CCPs.

In October 2020, the European Parliament called on the Commission to consider gradually granting ESMA more direct supervisory powers, including direct oversight over certain market segments, such as: (i) EU CCPs; (ii) central securities depositories; and (iii) the European Single Access Point<sup>32</sup>.

In the consultation, most respondents gave fairly positive assessments of ESMA's supervisory powers and ESMA's performance in supervising credit-rating agencies and trade repositories. However, respondents also pointed out that there was some room for improvement, mainly in communication and transparency. For example, the respondents suggested there was a need for: (i) closer interaction between ESMA, National Competent Authorities and trade repositories; and (ii) more regular bilateral meetings between the supervisor and the supervised entity.

On the future scope of direct supervisory powers, most respondents did not see the need for further centralisation of supervision powers in the ESAs, at least not at present. These

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<sup>31</sup> Regulation (EU) 2019/2099 of the European Parliament and of the Council of 23 October 2019 amending Regulation (EU) No 648/2012 as regards the procedures and authorities involved for the authorisation of CCPs and requirements for the recognition of third-country CCPs.

<sup>32</sup> European Parliament resolution of 8 October 2020 on further development of the CMU: improving access to capital market finance, in particular by SMEs, and further enabling retail investor participation ([https://www.europarl.europa.eu/doceo/document/TA-9-2020-0266\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2020-0266_EN.html)).

respondents argued that: (i) most capital-market operators should continue to be supervised by National Competent Authorities given their greater proximity and local knowledge; (ii) the ESAs have been set up as member-driven organisations with the objective of improving supervisory convergence among National Competent Authorities; and (iii) the principles of subsidiarity and proportionality mean it is not necessary to centralise powers further. Nevertheless, other respondents from both public authorities and industry thought that direct supervision should be considered in specific areas of capital markets where it would add value. These areas where direct supervision should be considered are, namely:

- environmental, social and governance (ESG) rating agencies, ESG data providers, and sustainability-related service providers;
- pan-European market infrastructures such as EU CCPs.

A number of public authorities were of the view that the decision to confer direct-supervision powers to the ESAs should be based on evidence and a set of clear criteria.

### Assessment of the Commission

In line with the action plan on Capital Markets Union, the Commission will consider proposing direct supervision by the ESAs should there be indications that the current supervisory set-up is not appropriate for the desired level of market integration. The Commission will assess this matter carefully when reviewing the relevant sectoral legislation.

In this spirit, the Commission has already included in three recent legislative proposals that are under negotiation (MICA<sup>33</sup>, DORA<sup>34</sup> and the proposal on EU green bonds<sup>35</sup>) mandates for direct supervision for the EBA and ESMA and oversight responsibilities for the three ESAs.

The Commission<sup>36</sup> is also looking at ways to address the financial-stability risk posed by overreliance on UK-based CCPs. It intends to come forward this year with measures to make EU-based CCPs more attractive, including by reviewing the EU supervisory system for CCPs. In this context, the Commission recently ran a targeted consultation on the review of the central clearing framework in the EU<sup>37</sup>.

Additionally, the Commission will consider the possibility of setting out different ‘modes’ of

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<sup>33</sup> Supervision of significant asset-referenced tokens and significant e-money tokens by the EBA is included in the Commission’s MiCA proposal (COM (2020) 593 final of 24.9.2020) ([https://eur-lex.europa.eu/resource.html?uri=cellar:f69f89bb-fe54-11ea-b44f-01aa75ed71a1.0001.02/DOC\\_1&format=PDF](https://eur-lex.europa.eu/resource.html?uri=cellar:f69f89bb-fe54-11ea-b44f-01aa75ed71a1.0001.02/DOC_1&format=PDF)).

<sup>34</sup> Oversight of critical ICT third-party services provided by the ESAs is included in the Commission’s DORA proposal (COM(2020) 595 final of 24.9.2020) (<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2020:595:FIN>).

<sup>35</sup> Supervision of external verifiers of EU green bonds by ESMA is included in the Commission’s proposal on European Green Bonds (COM(2021) 391 final of 6.7.2021) (<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021PC0391>).

<sup>36</sup> Commissioner McGuinness announces proposed way forward for central clearing ([https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT\\_21\\_5905](https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_21_5905)).

<sup>37</sup> Targeted consultation on the review of the central clearing framework in the EU ([https://ec.europa.eu/info/business-economy-euro/banking-and-finance/regulatory-process-financial-services/consultations-banking-and-finance/targeted-consultation-review-central-clearing-framework-eu\\_en](https://ec.europa.eu/info/business-economy-euro/banking-and-finance/regulatory-process-financial-services/consultations-banking-and-finance/targeted-consultation-review-central-clearing-framework-eu_en)).

direct supervision as a potential way forward in the area of direct supervision. One such mode could be the ‘hub-and-spoke’ model, in which National Competent Authorities continue to play a significant role and use their knowledge of national specificities of markets and legal systems to benefit a central supervisory authority. This is already the case in the model used by the Single Supervisory Mechanism or in the proposal for a Regulation establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism<sup>38</sup>.

## **5. THE SINGLE RULEBOOK AND THE OPERATION OF THE ESAs**

### Background and findings

An ‘enhanced single rulebook’ refers to more comprehensive and, where appropriate, more granular rules at different levels of EU legislation and guidance. On essential elements, this implies more EU rules set out in Level 1, namely Regulations and Directives. On non-essential elements, this implies more EU rules set out in delegated or implementing acts at Level 2. Further guidance and clarifications can then also be provided in guidelines or Q&As issued by the ESAs at Level 3. In addition, instead of directives, more harmonisation can be obtained through directly applicable Regulations at Level 1 for future sectoral legislation, or for existing legislation that comes up for review. Regulations might be a better choice than directives in this case, because directives generally leave Member States the choice of how to transpose the directive into national law. More harmonisation could also be applied through different degrees of harmonisation of either regulations or directives; or by allowing for fewer opt-outs from harmonised rules.

The trade-off between Level 1 and Level 2 is also linked to the broader question of how to achieve speed, adaptability and quality in legislation, which is particularly relevant for sectors undergoing fast transformation.

#### a) Enhancing harmonisation in legislative acts

The consultation did not reveal strong stakeholder support for future further-reaching harmonisation in Level 1 sectoral legislation, notwithstanding some support for greater harmonisation in rules on the cross-border provision of services.

#### b) Facilitating the application of harmonised law through delegated or implementing acts

In recent years, there have been instances in financial-services legislation where market participants and supervisors were required to start applying legislative acts at a moment when some of the relevant delegated and implementing acts<sup>39</sup>, including regulatory technical standards or implementing technical standards, had still not been adopted. Many stakeholders have pointed out that this might be a major concern in certain cases.

### Assessment of the Commission

#### a) Enhancing harmonisation in legislative acts

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<sup>38</sup> See footnote 4.

<sup>39</sup> For example, in the case of Taxonomy Regulation, the Commission issued a public statement explaining that compliance with certain disclosure obligations would be impossible as long as the relevant delegated act (in the example, relating to the technical screening criteria) was missing.

Stakeholders did not express support for greater harmonisation in the form of more EU rules or more granular EU rules at Level 1 or Level 2. The Commission therefore does not intend to review existing EU financial-services legislation solely with a view to introducing more granular rules at Level 1, or to removing provisions allowing national discretion. However, when reviewing or proposing legislation, the Commission will assess the impact of potentially introducing more granular rules and of limiting the degree of national discretion in the Level 1 sectoral legislation. For directives, this will also include assessing the impact of an option of converting a directive into a regulation.

Regarding the need to ensure that EU legislation remains future proof and can easily adapt to accelerating technological and market developments, it is important for the co-legislators, wherever possible and appropriate, to lay down general principles in level 1 and more detailed rules in level 2. This would allow to react more expeditiously to rapid market developments.

b) Easing the application of harmonised law through delegated or implementing acts

Level 1 legislative acts contain all essential elements of the legislation governing a certain area or sector, since only non-essential elements can be delegated to administrative rulemaking by the Commission. It is therefore, in principle, feasible to apply any legislative act even in the absence of the relevant Level 2 acts. However, mere compliance with the principles laid down in the legislative act does not necessarily produce all the results which the legislation was conceived to achieve. This is especially the case with reporting requirements where, in the absence of implementing acts providing templates, free-format reporting jeopardises coherence and comparability. In these situations, free-format reporting may also complicate the interpretation of the data by the supervisors and investors before the pertaining implementing acts are available.

This issue is a result of tension between the following two phenomena.

The first phenomenon is that Level 2 acts, by their very nature, take time to draw up. In some cases, it takes the ESAs considerable time to produce, for example, draft regulatory technical standards and implementing technical standards, given their complex and technical nature. The ESAs also consult stakeholders extensively and go through internal adoption processes. After that, the ESAs and the Commission have technical exchanges that may also take time before the adoption procedure is actually started. Finally, following the adoption by the Commission, certain Level 2 acts, such as Commission delegated acts and regulatory technical standards, are subject to scrutiny by the co-legislators that may last several months. However, the Commission cannot speed up the process by asking the ESAs to start working on Level 2 acts before the Level 1 legislation has been adopted, since the relevant empowerments are not yet finished at that point.

The second phenomenon is that, once the co-legislators reach agreement on the framework principles, they may be inclined to provide for a short entry into application of the Level 1 act. They do this in order to quickly deliver on the intended policy outcome, but this makes it very difficult to finalise the Level 2 acts by the same date.

The Commission and the ESAs are already mitigating the burden on market participants through a high degree of transparency when they draw up technical advice and technical standards. This transparency enables market participants to start their preparations on the



basis of drafts. Nevertheless, drafts have no legal value and it is possible for technical standards (or other Level 2 acts) to then be modified by the Commission, following demands by the co-legislators in the scrutiny process. When these modifications are of a material nature, the Commission is required to send draft technical standards back to the ESAs for further drafting. Therefore, there are limits to how much insight the stakeholders can draw from earlier published drafts of technical standards, where even small changes may require stakeholders to adapt.

The Commission acknowledges that certain provisions in legislative acts can be challenging to apply before delegated or implementing acts have been promulgated. It will work towards raising awareness of this problem, both with the co-legislators and with the ESAs. The Commission recalls that some of these difficulties had to be addressed in the past through changes to the main legislative acts in question to delay application. Furthermore, the Commission will continue to seek, where appropriate, informal prior guidance from the ESAs on the likely timing of planned Level 2 acts, with a view to feeding this information into the legislative process where beneficial.

## **6. FINANCING**

### Background and findings

The ESAs' budgets are based on a 60% contribution from the National Competent Authorities and a 40% contribution from the EU budget. For ESMA, this distribution is slightly different, as entities that are directly supervised by ESMA also pay supervisory fees to this agency. The Commission proposals in the 2019 ESA review to change the funding system were not supported by the co-legislators, and the funding rules remained unchanged.

In the consultation, the vast majority of respondents considered that the provisions on financing are appropriate and enable the ESAs to obtain sufficient resources to perform their tasks. Public authorities argued that the current 40/60 split in funding contributions is appropriate. They said that because the ESAs' work relates to a greater extent to a public function, it was fair and proper for funding to be mainly based on public contributions. Some public authorities, mainly from small countries, were of the view that the portion of financing from the EU budget could be increased.

Respondents from the finance industry observed that the current funding model is adequate since: (i) tasks of a regulatory nature should be funded by the EU budget; and (ii) supervisory convergence tasks should be funded by the National Competent Authorities since they directly benefit from the convergence work and supervision is the primary responsibility of the State. Finance-industry respondents further argued that the current funding model empowers the European Parliament to exercise budgetary control over the ESAs for the part of their budget financed from the general EU budget, and thus ensures that the ESAs can be held accountable.

Despite the overall positive assessment, some issues have been identified in the fees charged to supervised entities to cover the costs of ESMA's direct-supervision mandates. One public authority argued that an increase in the financing of direct supervisory mandates should come from the EU rather than from an increase in fees from supervised entities. In the consultation,

ESMA raised<sup>40</sup> the issue of the lack of flexibility in the fee system, which prevents it from reallocating resources on the basis of identified risks. In addition, for some direct supervisory tasks, the number of supervised entities is small or is likely to be small<sup>41</sup>. This may result in a high level of fees for small entities, since sector legislation requires that the fees cover all costs incurred for supervisory activities relating to those entities.

### Assessment of the Commission

In line with the feedback received, the Commission does not intend to propose legislative amendments to change the current legal framework for the funding of the ESAs.

To address the issue of supervisory fees and to ensure that fees remain reasonable in relation to the supervised entities' revenues, the Commission invites ESMA to explore the different options available within the current legal framework. Targeted amendments in sector legislation might be considered, if all possible non-legislative measures to tackle the issue prove insufficient.

## **7. CONSUMER PROTECTION**

### Background and findings

Enhancing customer and consumer protection is an important part of the ESAs' mandate. The 2019 ESA review increased the ESAs' tasks and improved their tools in this area. For example, the review entrusted ESMA with: (i) the coordination of mystery shopping; (ii) the development of retail risk indicators; (iii) collection, analysis and reporting on consumer trends; and (iv) the extension of inquiries under Article 22(4) of the ESA Regulations to potential threats to the protection of consumers or investors.

In the public consultation, most stakeholders considered that the ESAs made a positive contribution to safeguarding consumer and investor protection. Some stakeholders have outlined that consumer issues are often local. This means that good collaboration between National Competent Authorities and the ESAs is of key importance. In the view of most respondents, the ESAs provide added value by identifying consumer issues across the EU and sharing good practices among National Competent Authorities. In addition, most respondents pointed out that the ESAs play an important coordinating role within the internal market for the cross-border provision of services. In this regard, some public authorities requested more effective coordination powers for supervising cross-border services to reduce the risk of harm to consumers.

### Assessment of the Commission

The Commission considers that there is currently no case for legislative changes to the ESAs' founding regulations in the area of consumer protection. However, the Commission will carefully consider the current legal framework in the course of the ongoing reviews of sectoral legislation and suggest appropriate amendments to overcome identified shortcomings in consumer protection. In this spirit, the amendment on collaboration platforms in the

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<sup>40</sup> <https://www.esma.europa.eu/press-news/esma-news/esma-responds-european-commission-consultation-esas>

<sup>41</sup> Such as the supervision of providers of data-reporting services, securitisation repositories, and certain benchmark providers.

Solvency II review<sup>42</sup>, proposed on 22 September 2021, would: (i) enable EIOPA to play an enhanced role in dealing with prudential aspects in complex cross-border cases; and (ii) increase EIOPA's powers to reduce the risks to consumer protection when insurance products are offered across borders. The upcoming retail investment strategy<sup>43</sup> will be another opportunity for further legislative improvements in the interest of consumer protection.

The ESAs are also invited to continue to use all available tools to achieve their consumer- and investor-protection objectives. These tools include reports on consumer trends, supervisory heat-maps, peer reviews, and warnings/analyses of own-risk and solvency assessment reports in the insurance and pension sector.

## **8. SYSTEMIC RISK**

### Background and findings

In response to the global financial crisis, the ESAs, together with the European Systemic Risk Board (ESRB) were mandated to contribute to macro-prudential oversight of the EU financial system and to prevent and mitigate systemic risk, as the co-legislator considered it important that supervisory arrangements in the EU did not focus only on individual firms but also ensured the stability of the financial system as a whole.

Most respondents in the public consultation said that the current architecture of financial supervision by the ESAs and the ESRB had improved the cooperation and coordination of systemic-risk functions among competent authorities. In particular, stakeholders identified the collaboration between the ESAs and the ESRB on stress testing as an example of good practice. While the overall stress-test process is well coordinated by the ESAs, a number of respondents asked for the process to be further streamlined. They made this request because the level of detail in stress-test reporting is demanding for National Competent Authorities and supervised entities due to the quality-assurance process. Therefore, some stakeholders suggested a more risk-based approach to the quality assurance of stress tests. In addition, a few industry stakeholders also raised concerns about the publication of stress-test results, which entail some risks of market disruption if the wider public does not fully perceive all the nuances of the outcome of the exercise.

### Assessment of the Commission

The Commission sees no current need for legislative amendments in this area, but invites the ESAs and the ESRB to further streamline the stress-testing process. The Commission also notes the added value of ensuring a high degree of transparency on the stress-test results, including the publication of individual results in the insurance sector.

Furthermore, the ESAs, the ESRB, and competent authorities are all encouraged to: (i) continue to strengthen their cooperation on issues relating to systemic risk across all parts of the financial sector; and (ii) strengthen their efforts to develop common systemic-risk indicators, taking into account the interactions between the sectors they supervise.

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<sup>42</sup> See footnote 18.

<sup>43</sup> In its new [capital markets union action plan](#) of September 2020, the European Commission announced its intention to publish a strategy for retail investments in Europe in the first half of 2022.

## 9. CONCLUSION

Since the last ESA review in 2019, the ESAs have continued to perform their tasks efficiently and effectively, including during the recent challenging circumstances caused by the COVID-19 pandemic. The ESAs' actions during the COVID-19 pandemic showed their ability to coordinate the action of national authorities in an efficient way. The Commission takes this as a clear indication that the overall architecture of the European System of Financial Supervision – with its key role for the three ESAs – is largely adequate and works well.

The amendments introduced in the 2019 ESA review have started to produce some noticeable effects. For example, the new peer-review process has proven to be a quick and efficient convergence tool, as witnessed by its first use in the Wirecard case.

The feedback received from stakeholders on the changes introduced by the last ESA review in 2019 is positive overall. However, respondents to the consultation pointed to some remaining issues, in particular around the governance of the ESAs. The Commission remains mindful of the fact that the governance arrangements of the ESAs – with decisions being taken by 27 national supervisors – are not always conducive to ensuring that the convergence tools and other instruments at the disposal of the ESAs are used in the most effective way.

Since the changes to the ESA Regulations became applicable only in 2020<sup>44</sup>, the Commission considers that more time is needed to assess the full impact of the latest review before considering any new amendments to the ESA Regulations. Therefore, the Commission deems it premature to propose legislative changes to the ESA Regulations at this juncture. Nevertheless, where the Commission identifies a need for changes in supervision in response to new developments or shortcomings, the Commission may suggest targeted changes in sector legislation to improve supervisory convergence and supervision.

In addition, the review revealed some areas where improvements could be implemented with no need for legislative changes. As outlined in this report, the Commission will work together with the ESAs to assess whether and in which areas non-legislative measures are warranted. The aim of these non-legislative measures would be to promote supervisory convergence and consistent supervision, which is a key building block in creating a genuine Capital Markets Union. The Commission looks forward to continuing its engagement with the European Parliament, the Member States and all stakeholders in this matter and will work with the ESAs along the lines set out in this report.

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<sup>44</sup> Direct-supervision mandates for ESMA started to apply on 1 January 2022.