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# The Future of the European Supervisory Authorities

AFME's response to the consultation on the operations of the European Supervisory Authorities

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**www.afme.eu**

## Introduction

The European Supervisory Authorities (ESAs) play an important role in the European regulatory landscape and have broadly been successful in fulfilling challenging mandates since their establishment in 2011. Being faced with a regulatory reform programme which was unprecedented in scale and complexity, the ESAs should be commended for the work that they have delivered while being faced with considerable resource constraints. While the institutional framework has been largely fit-for-purpose, we believe that a number of reforms should now be implemented to ensure that the ESAs will continue to function well in a changing political and market environment. This consultation is therefore very timely and AFME welcomes the opportunity to respond to it. In our response, we have mainly focused on the functioning of the European Banking Authority (EBA) and the European Securities and Markets Authority (ESMA).

The UK's decision to leave the EU, and thereby the institutional framework of the ESAs, changes the dynamics of the EU's regulatory architecture considerably. This response to the consultation is based on the experience with the ESAs so far in an EU28 context, but will also address some points of relevance for the future EU27 context. Although it is appropriate to consult on the functioning of the ESAs at this time, we believe it is important to further reflect on the conclusions of this review at the time when the details of the future EU-UK relationship are known. Any arrangements for supervisory and regulatory cooperation between the EU and the UK, which should involve the ESAs, can then be decided upon.

Overall, we believe that the ESAs should take a more strategic role and be given greater autonomy by defining and pursuing a common EU approach. Enhancing regulatory coherence and consistency to avoid market fragmentation should be a top priority. In order to be able to deliver on an ambitious agenda, the resources of the ESAs should be increased appropriately. The governance of the ESAs should be strengthened. Without reforming the current governance arrangements, increasing the powers of the ESAs, as we suggest in this response, would be less effective. We would also urge the Commission and the ESAs to consider the opportunities for increasing the transparency and accountability of the ESAs, in particular in areas where the powers of the ESAs might be increased. Accountable ESAs are an important cornerstone of the supervisory architecture in the EU.

This response sets out our suggestions for reforms in more detail but we have identified the following eight key priorities for the ESAs:

1. **supervisory convergence** contributes to the reduction of fragmentation of the Single Market and to realising the EU's potential for growth and competitiveness. Supervisory convergence should therefore remain a key priority for the ESAs as it enables firms to operate cross-border more easily. Supervisory convergence can be enhanced by discouraging goldplating by the National Competent Authorities (NCAs), conducting and publicising more peer reviews and getting involved earlier in case of cross-border conflicts. The ESAs have a key role to play in ensuring a level playing field across the EU;
2. **improve the involvement of stakeholders** by creating more opportunities for contributions from market participants in the Level 2 and Level 3 processes, improving the transparency of how the ESAs deal with input from stakeholders and strengthening the role of the stakeholder groups. The ESAs should follow better regulation principles when engaging with stakeholders and in particular the transparency of the Questions and Answers (Q&A) process should be improved;
3. **work with realistic implementation deadlines** ensuring that sufficient time is given between the finalisation of Level 2 texts and their implementation. It should be considered whether dynamic implementation dates can be used that would be subject to the timing of finalising Level 2 measures and their implementation;
4. **reform the governance** of the ESAs enabling them to pursue a more common European approach by giving the Chairs and Executive Directors voting rights and introducing independent members on the Boards of Supervisors. The Management Boards should be transformed into Executive Boards focusing more on policy content and should be given more decision-making powers;

5. **increase ESMA's powers** in certain areas of cross-border activity for example by introducing joint supervision of critical benchmarks and Markets in Financial Instruments Directive (MiFID) regulated data providers and beginning to build the capacity and expertise to participate in the supervision of Central Counterparties (CCPs) and Central Securities Depositories (CSDs) while leaving the supervisory responsibilities for these institutions with the NCAs for now. ESMA should also be provided with "Emergency Relief" type of powers to temporarily suspend the application of regulatory requirements in certain circumstances and within a reasonable timeframe;
6. **give the ESAs a more prominent role in the equivalence assessment process** following an outcome-based approach supporting open capital markets. In particular, they could strengthen their valuable role in providing more resource and technical advice in the context of equivalence assessments and ongoing monitoring of equivalence. The ESAs should be tasked more consistently with timely and effectively monitoring the regulatory, supervisory and market developments in third countries while leaving the ultimate decision on the third country equivalence status with the European Commission;
7. **increase the resources of the ESAs** appropriately given the current workload and the proposed additional tasks. We would expect the ESAs to optimise their efficiency in a way to minimise the need for additional funding;
8. **accept a funding system which would be partly funded by the industry but subject to certain conditions and further detailed consultation with the industry**. For example, in cases where activities currently performed by NCAs are transferred to the ESAs, then so should relevant funding arrangements to avoid double charging.

***We have focused on a selected number of questions in the consultation and have left out the questions we have not provided an answer to.***

## I Tasks and powers of the ESAs

### A. Optimising existing tasks and powers

#### 1 Supervisory convergence

1. **In general, how do you assess the work carried out by the ESAs so far in promoting a common supervisory culture and fostering supervisory convergence, and how could any weaknesses be addressed? Please elaborate on your response and provide examples.**

   *Answer:*

   A consistent implementation and application of legislation is crucial for creating a level playing field and promoting the development of cross border capital markets: a key objective of the CMU initiative. The ESAs play an important role in ensuring that the NCAs take a converging approach to the application of rules for market players. In recent years, the ESAs have tried to give greater priority to supervisory convergence, for example through ESMA's second Supervisory Convergence Work Programme.

   However, in many cases the ESAs have been mainly focused on rule-making. As the significant regulatory reform agenda of past years begins to settle down, it is paramount that supervisory convergence becomes the ESAs' top priority. Goldplating should be discouraged. There have been instances where the ESAs – for example due to a lack of resources, strong positions taken by certain NCAs or particular Level 1 provisions – have not been able to promote supervisory convergence sufficiently. Where tools and powers are lacking for the ESAs to take effective action to promote supervisory convergence, these should be developed with a view to achieving the objective of having a level playing field in the area of supervision.

   **We believe that the ESAs should take a stronger stance with regard to supervisory convergence and we urge NCAs to respect decisions taken by the ESAs and more strongly address issues that have been encountered. We would encourage more emphasis to be placed on the single supervisory handbook (in addition to the single rulebook) going forward.** It is therefore essential that this function is appropriately resourced and that work programmes are drafted to avoid supervisory convergence being of secondary importance to the regulatory function.

   However, in certain cases, convergence is restricted by legislation itself either at Level 1 or at Level 2. It is right that in limited cases EU legislation should allow different requirements to be applied in different Member States through minimum harmonisation and – where strictly necessary to reflect local specificities – additional local requirements. But in areas where arbitrage issues may arise, maximum harmonisation is appropriate and therefore national regulators' discretion should be limited. An example of this is the role allocated to NCAs in the transparency requirements of 'Level 1' MIFID II[1]. We believe that the NCAs' regulatory implementation and supervisory practices under key areas of financial services legislation should be subject to peer reviews and be explicitly required in all Level 1 texts going forward. Outcomes should be publicised and reported on.

[1] For example, the post-trade transparency requirements allow competent authorities to authorise deferred publication but do not oblige them to do so. This means that different NCAs are likely to end up with different levels of post-trade reporting requirements

Supervisory convergence should at the same time respect the diversity in business models of banks across the EU. Given that a number of NCAs have experience with only a limited number of business models, the ESAs should be careful that convergence of supervisory practices caters for, and is appropriate for, all existing business models.

Monitoring and analysing supervisory practices and outcomes are necessary ongoing activities in light of their continuous development and the potential impact on the Single Market. **Additional mechanisms and formal interaction channels among NCAs should be considered to promote alignment of supervisory practices. The ESAs should develop more detailed annual reports with specific conclusions about divergences** and steps to be taken may help in the convergence process. Also, coordination in supervision between the ESAs and the SRB should be promoted.

With respect to the EBA and prudential supervision, greater harmonisation will be particularly important in the areas of approaches to stress testing and the Supervisory Review and Evaluation Process (SREP). The publication of the EBA guidelines on common procedures and methodologies for the SREP— even though these came into force only in 2016 — had a positive impact on a common understanding of the SREP elements and resulting Pillar 2 requirements and their communication in 2015.

However, as identified by the EBA in their last report on convergence of supervisory practices, there are identified areas of the SREP where authorities still face challenges to converge, particularly with regard to the setting of institution-specific capital requirements and common scoring of risks and viability. In our view, the more relevant are:

- divergences in supervisory approaches towards the nature and level of capital requirements. More specifically, the differences in the quality of capital required to meet the additional own funds (pillar 2R and G) set by supervisory authorities;
- the different application of automatic restrictions on distributable amounts;
- a lot of emphasis has been put on converging on the definition of capital, and we would also encourage a continued focus on the promotion of common supervisory practices for the approval and ongoing supervision of internal models as supervisory divergence is an important driver of undue RWA variability. The EBA's IRB Repair programme tries to achieve this, but possibly places to great an emphasis on detailed rules for institutions, rather convergence between competent authorities;
- a better articulation of the objectives of P2G, which should only be applied to the extent that stressed losses exceed the combined buffers to avoid double counting risk.

Greater harmonisation is also needed where the exercise of discretion allowed in the Level 1 text is in the hands of competent authorities. For instance, AFME members operate across borders and are affected by the different supervisory approaches taken to the treatment of intragroup exposures in the prudential framework. This is a good example of an area where the EBA should support a consistent approach so that entities operating in the EU can truly benefit from the advantages of the Single Market.

It is important that the EBA's supervisory convergence work has enough weight to ensure that there is a consistent approach between ECB supervision and that of NCAs within and outside the Eurozone.

Finally, in terms of promoting a common supervisory culture, the amended Transparency Directive was an effort to harmonise the major shareholder reporting rules across the EU jurisdictions but due to differences in the way Member States transposed the rules into their own laws, the landscape remains disjointed, which is not in the best interests of transparency. The European Commission

acknowledged this in a paper[2] published last year, and the weakness could potentially be addressed with **a more prescriptive set of rules that are less open to interpretation and change by the NCA**.

2. **With respect to each of the following tools and powers at the disposal of the ESAs:**

   - peer reviews (Article 30 of the ESA Regulations);
   - binding mediation and more broadly the settlement of disagreements between competent authorities in cross-border situations or cross-sectorial situations (Articles 19 and 20 of the ESA Regulations)
   - supervisory colleges (Article 21 of the ESA Regulations);

   **To what extent:**

   **a) have these tools and powers been effective for the ESAs to foster supervisory convergence and supervisory cooperation across borders and achieve the objective of having a level playing field in the area of supervision;**

   *Answer:*

   We believe that peer reviews are a helpful tool in principle, however tangible results of the work carried out by the ESAs are not always visible from the outside. **Increased transparency on the outcome of these exercises and enhanced supervisory disclosure would help overcome this perception**. For example, updates and a more user-friendly presentation of the current supervisory disclosure section of the EBA's website could contribute to achieving this.

   Going forward, this could be complemented by **sharing the outcomes of peer reviews relating to the application of guidelines on supervisory practice**. This would be particularly beneficial in areas such as, in the case of the EBA, internal model approval where variability in RWA outcomes is also due to supervisory divergence but where this has been more difficult to measure to date.

   For mediation, the ESAs are reliant on the involvement of the NCAs. **The NCAs should be encouraged to involve the ESAs at an earlier stage in the process when there are cross-border conflicts**. We agree with ESMA that the NCAs' obligations to respond to requests for information made by the ESAs should be clarified.

   Besides supervisory convergence between NCAs, the ESAs themselves should also be well coordinated. **It should be considered how the Joint ESA Committee can be strengthened, resulting in a better exchange of best practices across the ESAs and a better coordination of the respective work programmes**. For example, the ESAs need to cooperate well and coherently in the context of the Securities (STS) Regulation and Solvency II revisions to make a success of the framework.

   The Joint ESA Committee could also play a leading role in assessing potential conflicting or cumulating rules from a markets and prudential perspective to avoid unintended impacts on growth and market liquidity. The Joint ESA Committee should pay due regard to the intersection of prudential and markets regulation to ensure that these are pulling in the same direction towards agreed objectives and not in the opposite direction.

   Also, there are some ESA guidelines that overlap or are very much related. The Joint ESA Committee could play a coordinating role in this respect by providing clarity on responsibilities and increasing coherence and consistency.

   Finally, we also refer to some suggestions made in response to question 1 of this consultation.

[2] Section 2.3 http://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/COM-2016-855-F1-EN-MAIN.PDF

b) **to what extent has a potential lack of an EU interest orientation in the decision making process in the Boards of Supervisors impacted on the ESAs use of these tools and powers?**

**Please elaborate on questions (a) and (b) and, importantly, explain how any weaknesses could be addressed.**

*Answer:*

The tools, including peer reviews, which are available to the ESAs to promote supervisory convergence are of limited use as national interests prevail. To address this potential issue, **we suggest making some changes to the Boards of Supervisors** (see Section II on the governance of the ESAs).

**We would also suggest the Boards of Supervisors to dedicate a part of their agenda each month to supervisory convergence topics** in order to ensure this does not become secondary compared to rule-making.

## 2 Non-binding measures: guidelines and recommendations

5. **To what extent are the ESAs tasks and powers in relation to guidelines and recommendations sufficiently well formulated to ensure their proper application? If there are weaknesses, how could those be addressed? Please elaborate and provide examples.**

*Answer:*

With a significant part of the single rulebook now being established or finalised soon, focus should shift towards implementation and the convergence of supervisory practices. Guidelines, recommendations and Q&As are important tools for the ESAs in this process. Level 3 instruments can provide important clarifications on implementation matters. However, there are areas where Level 3 instruments (including Q&A) are being used to deal with issues that are clearly matters of policy (and not the implementation or technical application of rules) and/or that may have significant impacts such that they imply substantive policy change. It is important that the scope and content of Level 3 measures always reflects what has been agreed and required under Level 1 legislation. We therefore urge that robust processes are in place to ensure an appropriate interpretation of Level 1 texts and full adherence to the political mandates.

An example of this includes the EBA's Shadow Banking Guidelines, where the EBA took a stance on an issue that should have been dealt with by the co-legislators. Also, the Q&A guidance on the application of Potential Future Exposure (PFE) add-ons for written options under the Mark-to-Market Method was inconsistent with the Level 1 text and represented a significant change in policy.

Additionally, EBA guidelines must bear consideration not only the extent to which the intended guidelines are consistent with the legal framework, but also how they may entail a competitive disadvantage vis a vis other sectors or companies not subject to similar constrains.

There have also been instances where Level 3 measures were being developed while relevant Level 2 measures had yet to be adopted. We believe that where possible questions should be addressed in Level 2.

Q&As are considered to be tools to address issues of a more technical nature or a way to clarify certain issues arising from Level 1 or Level 2. Q&As are theoretically non-binding guidance but the interpretations and clarifications provided by the ESAs in Q&As have a significant impact across the marketplace with supervised entities being encouraged to follow the guidance in the same way as they follow the actual rules. In practice, Level 3 instruments, including guidelines are extremely impactful because, unless firms receive an indication otherwise from their NCAs, these instruments

have to be complied with, and often with immediate effect. They cannot be considered therefore "soft" instruments in their entirety and their legal status should thus be clarified.

At the same time though, Q&As are not presently subject to consultations with stakeholders. We therefore warmly welcome the recent launch by ESMA of its Q&A webpage tool (similar to that of the EBA's existing tool), which allows stakeholders to consult existing Q&As and submit new questions. **We do believe however that the ESAs should follow a more inclusive approach when writing Q&As and provide stakeholders with the opportunity to give input to their development and potential impact before they are being finalised**. The Commission's Better Regulation agenda should also be rolled out to the ESAs and applied to all of their pronouncements.

We have in the past urged the **ESAs to explore potential mechanisms that would enhance the transparency of the Q&A process** and allow for some form of industry engagement, for example through a public consultation, before answers are published, particularly when these may be especially impactful. Consultation of Stakeholder Groups (in lieu of public consultation), although welcome, appears to have been relatively limited and Stakeholder Group members may not necessarily always have the precise area of expertise relevant for all technical matters.

It is precisely because Q&As tend to be highly technical and detailed in nature we feel that they would benefit from early dialogue between policy experts at NCAs and supervised firms in order to properly assess impacts. It would be important for firms to know what issues are under consideration for the Q&As and be able to see proposed drafting. This would for example have been helpful in the context of the recent Q&A on MiFID investor protection issues where opaque drafting means that law firms are giving conflicting advice as to their meaning.

Given the role of NCA policy experts in the formulation of Q&A responses, we believe that they have a duty to raise and discuss potentially impactful Q&As with firms at an early stage. This would help to ensure that answers are understood, avoid surprises and unintended effects, and help firms in their forward planning. It would also help in making sure that the Q&As are as precise and clear as possible.

Therefore, we believe that the **ESAs should consult on Q&As – at least the ones where they could expect their response to diverge significantly from the industry's expected answer and where the impact of such divergences would be potentially very meaningful.** These most technical consultations could be conducted on a shorter timeframe but would increase the transparency of the type of questions the ESAs are considering and would improve the quality and usefulness of the Q&As. We believe that the ESAs should also think about better ways to prioritise the Q&As.

Moreover, we believe that whenever Q&As deal with policy matters, they should be subject to the same cost/benefit assessment of other ESA products. **In particular, given the increase in responsibilities that we suggest throughout our consultation response, we believe that the ESAs should further strengthen their capability in the area of economic/impact analysis and develop their impact assessment capabilities to evaluate the implementation costs of secondary legislation and undertake necessary cost benefit analyses. This can be implemented without changing the legal framework. The ESAs should consider a pooled research approach to ensure efficiencies.**

Q&As, while not dealing with policy matters, can have significant impacts, and when this is the case, they should be subject to the same cost/benefit assessment of other ESA products.

Finally, in certain cases the ESAs develop own initiative guidelines. We would welcome that clarity is provided on the legal status of these guidelines.

## 3 Consumer and investor protection

6. **What is your assessment of the current tasks and powers relating to consumer and investor protection provided for in the ESA Regulations and the role played by the ESAs and their Joint Committee in the area of consumer and investor protection? If you have identified shortcomings, please specify with concrete examples how they could be addressed.**

   *Answer:*

   The ESAs' tasks related to consumer protection and financial activities are set out in Article 9 of the ESA Regulation ("'*…promoting transparency, simplicity and fairness in the market for consumer financial products or services […] financial literacy and education initiatives*"). However, the ESAs have so far not significantly contributed to financial education. We would recommend the ESAs to assess whether and how they can play a useful role in this area. Many regulators are developing financial education programmes involving firms they regulate. It may be helpful having a homogenous approach within the EU which is centrally coordinated by the ESAs. **The ESAs could issue an Opinion setting out recommendations for how financial literacy could be improved**.

## 4 Enforcement powers – breach of EU law investigations

8. **Is there a need to adjust the tasks and powers of the ESAs in order to facilitate their actions as regards breach of Union law by individual entities? For example, changes to the governance structure? Please elaborate and provide specific examples.**

   *Answer:*

   We understand that the breach of EU law procedure has only rarely been used but is thought to be an effective deterrent to non-compliance. If NCAs do not take the necessary action in the case of a breach of EU law, the ESA Regulations give powers to the ESAs to take action directly towards market participants. **As part of the ESAs' focus on supervisory convergence, we recommend that the ESAs makes a further assessment of the benefits of and possible improvements to this instrument where available**.

   ESMA has expressed the view, in their response to the Commission's CMU Mid-Term Review, that it should be clarified that the breach of Union law powers are available to the ESAs not only in cases where acts are directly applicable to market participants (through Regulations) but that these powers also relate to those provisions of Directives. We believe that this proposal should be further considered and it should be specified how these powers would be exercised in those circumstances before deciding to give them to the ESAs.

## 5 International aspects of the ESAs' work

9. **Should the ESA's role in monitoring and implementation work following an equivalence decision by the Commission be strengthened and if so, how? For example, should the ESAs be empowered to monitor regulatory, supervisory and market developments in third countries and/or to monitor supervisory co-operation involving EU NCAs and third country counterparts? Please elaborate and provide examples.**

   *Answer:*

   A sensible equivalence framework is key to maintaining and developing open capital markets that are able to provide access to global capital pools and funding opportunities. The EU has played a leading

role in developing a global regulatory framework supporting cross border financial services which is an important underpinning of an equivalence framework.

**We believe that the ESAs should play a more prominent role in the equivalence framework given their expertise, with the ultimate decision on third country equivalence status remaining with the European Commission.**

The current process for deciding on the third country equivalence status should be improved. The equivalence assessment process has been burdensome and slow at times with too few final assessment being made. Resourcing seems to have been a major issue for both the Commission and the ESAs, with national expertise not being made sufficiently available. For example, currently not even all countries which were deemed to have equivalent prudential regimes to the Capital Requirements Directive (CRD) in the past, have been re-assessed. This creates issues for EU headquartered firms with subsidiaries in these third countries, for instance in terms of the recognition of certain capital instruments at consolidated level.

Moreover, the methodology currently used to assess equivalence is too rigid and narrow. For example, again in the area of prudential regulation, too often equivalence is determined on an almost article by article comparison of different country's regimes. **Equivalence decisions should be outcome-based favouring regulatory dialogue and international supervisory cooperation**. Such decisions should take into account other factors such as the overall quality of the regulation and supervisory bodies, the degree of development of local financial markets, as well as the health of the local financial system.

Moreover, a country that has been rejected in the past should be reassessed as soon as the country has formally adopted the relevant provisions according to its constitutional arrangements in order to maintain the right incentives and to avoid that the process takes too long.

It is of essence to accelerate the process of third country equivalence to issue decisions in a more timely and predictable manner, especially for those jurisdictions that were previously assessed as being equivalent by the European Commission. **It is therefore essential that more resources be dedicated to these activities.**

We note the recent publication of a Commission staff working document on EU equivalence decisions in financial services policy. **We believe that the ESAs should play a more prominent role in the equivalence assessment process by**:

- assisting the Commission in streamlining the equivalence assessment process where it is available;
- assisting the Commission in analysing deviation from rules on business or risk taking;
- monitoring regulatory, supervisory and market developments in third countries conducting periodic reviews of equivalence decisions and regularly report any potential changes to regulatory equivalence to the Commission;
- being more actively involved in international fora (this applies not only to the ESAs, but also to the Single Supervisory Mechanism (SSM));
- spending more resources on establishing strong dialogues and continuous engagement with third country regulators. This should be prioritised and could be strengthened by establishing Memoranda of Understanding that could formalise basic bilateral relations such as exchanges of information. A similar comment applies to the SSM.

**The ESAs should clearly and publicly define any specific criteria they are monitoring** in order to assess equivalence on an ongoing basis so the market and third country regimes have full clarity on where potential changes may trigger reassessments of equivalence.

The UK's decision to leave the EU is adding a new dimension to the debate about the EU's third countries' equivalence framework given the significant degree of integration that the EU and UK capital markets have achieved. Given that the UK will remain a close and major international financial centre, the case is even stronger for improving the current third country equivalence framework.

## 6 Access to data

**11. Are there areas where the ESAs should be granted additional powers to require information from market participants? Please elaborate on what areas could usefully benefit from such new powers and explain what would be the advantages and disadvantages.**

*Answer:*

We recognise the importance of the ESAs having access to the right information for being able to perform their tasks, particular in the case of cross-border activities or in the context of supervisory convergence practices. **To avoid any undue burden on market participants however, we believe that the ESAs should make use of the extensive amount of information which is already available to the NCAs.** The NCAs should commit to providing the information they might have swiftly. If any data gaps are identified, we believe that the ESAs and NCAs should work together to address these gaps instead of sending new, separate data requests to market participants.

**We are not convinced of the need to give the ESAs additional powers to request information from market participants directly**. We believe that the ESAs already have access to the data they need through the NCAs.

Where the necessary data is not available, a careful assessment would need to be made to the benefits of collecting the data and this should be discussed with market participants. If it is however decided that the ESAs should be given powers to directly request information from market participants, we believe that the following principles should be applied:

- information requests should always be targeted and well justified. We would urge against sending general information requests which could cost market participants a significant amount of resources to collect;
- it would also be good practice to discuss potential information requests with market participants so that they may be framed appropriately and that sufficient time is given to market participants to respond.

As a general point, we would recommend that the ESAs spend more time engaging actively with market participants to keep on top of market developments. This should assist them in identifying potential issues at an early stage. This could be done particularly by **organising more industry roundtable discussions**.

## 7 Powers in relation to reporting: Streamlining requirements and improving the framework for reporting requirements

**12. To what extent would entrusting the ESAs with a coordination role on reporting, including periodic reviews of reporting requirements, lead to reducing and streamlining of reporting requirements? Please elaborate your response and provide examples.**

*Answer:*

The recently introduced regulatory framework has greatly increased the reporting requirements for market participants, improving market transparency and contributing to financial stability. It has

however also created duplicative and redundant reporting. It is important that more focus by all authorities is given on streamlining the different reporting obligations and better coordinate the different reports that firms are required to provide. We welcome ESMA's recent offer to contributing to the design of a common EU financial data strategy and believe that the ESAs, and ESMA in particular, have an important role to play in this field. Such approach should be focused on reducing compliance costs for reporting firms while making the reports of greater use to the supervisory authorities.

**We would welcome ESMA being tasked with taking a leading role in developing a common EU financial data strategy.** This strategy should identify as a priority what data is needed and explain what it is being used for. **We also believe that the ESAs should be tasked with periodically reviewing reporting requirements and making recommendations at EU level and to NCAs on how reporting requirements could be streamlined.**

These reviews of reporting requirements should focus in particular on:

- multiple reports being required under different regulations for the same trade with the timing, format and content of those reporting obligations differing;
- the requirements applying to different entities/persons;
- the requirements applying to different financial instruments and cases where NCAs take different approaches on which instruments are in scope.

Besides having reporting requirements in the EU, globally operating institutions also have reporting obligations in other jurisdictions. **The ESAs should play a leading in role in comparing data reporting requirements in the EU with other key jurisdictions** (for example the US) and pro-actively suggest further streamlining of these obligations. An EU financial data strategy should be compatible with a global financial data strategy.

**13. In which particular areas of reporting, benchmarking and disclosure, would there be useful scope for limiting implementing acts to main lines and to cover smaller details by guidelines and recommendations? Please elaborate and provide concrete examples.**

*Answer:*

The current process of developing templates for reporting, disclosure or benchmarking requirements (for instance of RWAs under hypothetical portfolios) via Implementing Technical Standards (ITS) which have to be adopted by the Commission, sometimes on an annual basis in light of necessary updates is highly inefficient (for industry, the ESAs and the Commission Services) and leads to a high degree of legal uncertainty. As things stand, even simple errors need to be formally addressed through the Q&A and ITS adoption process, which is practicably not manageable. **We therefore suggest moving away from the use of ITSs to develop specifications for reporting, and instead allow the ESAs to issue 'implementing technical decisions' as called for by the EBA in a recent opinion,** strictly within the framework of the mandate given by the co-legislators. We recommend that the ESAs be given direct powers to amend and adopt such templates for reporting, benchmarks and disclosures.

Separately, we propose to involve ESMA in the harmonisation of good governance guidelines or recommendations not only for the financial sector but also for the listed companies in general. Currently ESMA is working with EBA on guidelines on suitability for financial institution, however ESMA could enlarge its framework on this matter to other listed companies which are not financial institutions. It may allow comparability through companies from different sectors in Member States and favour Capital Markets Union generating a better understanding of them for investors and the public in general.

## 8 Financial reporting

**14. What improvements to the current organisation and operation of the various bodies do you see would contribute to enhance enforcement and supervisory convergence in the financial reporting area? How can synergies between the enforcement of accounting and audit standards be strengthened? Please elaborate.**

*Answer:*

We support the improvement of communication between enforcement bodies at EU level and clearer communication between the different European and national institutions with responsibilities in this area. We believe however that ESMA's current role of coordinating enforcers at EU level (through the European Enforcers Coordination Sessions) is an appropriate way of promoting common supervisory approaches and practices relating to enforcement activities in the financial reporting area across Member States. This role could be improved by providing greater transparency on its activity on supervisory convergence in financial reporting, which would also help to avoid different application in Member States and would assist preparers. We note that Recommendation 10 from the 2013 Maystadt Report, calling for "maintaining the current quarterly meetings between EFRAG and representatives of all national standard setters (including Norway and Switzerland)", provides a useful tool which could be used by the European supervisor to share information between standard setters (including on enforcement measures). We therefore believe that ESMA should also be invited to attend these meetings in the future.

ESMA's enforcement activities in the financial reporting area should continue to be separated from involvement in the standard setting process. We acknowledge the contribution ESMA already has in feeding interpretation questions through to the IFRS Interpretations Committee and providing valuable input into the development of new standards, and believe this should continue. We believe however that the IASB should continue to be the ultimate authority in interpreting existing accounting standards.

**15. How can the current endorsement process be made more effective and efficient? To what extent should ESMA's role be strengthened? Please elaborate.**

*Answer:*

We believe that the current endorsement process is sufficiently effective and efficient in meeting its objectives. We would also encourage EFRAG to continue analysing, in their endorsement advice, the commercial and practical consequences for the EU of adopting new accounting standards.

ESMA should continue using its expertise to provide input to the endorsement process through its comments on draft endorsement advice in its current role as an observer in EFRAG Board meetings. We would however discourage any EU action which could lead to a fragmentation of accounting standards (through, for example, allowing for changes made to a standard issued by the IASB except in specific, narrow and exceptional circumstances). We would also welcome more focus on completing the endorsement process in a timely manner in order to reduce uncertainty and assist preparers in proceeding with the implementation of new standards.

## C. Direct supervisory powers in certain segments of capital markets

**19. In what areas of financial services should an extension of ESMA's direct supervisory powers be considered in order to reap the full benefits of a CMU?**

*Answer:*

ESMA's direct supervisory powers are currently limited to credit rating agencies and trade repositories. Promoting supervisory convergence should be a key objective of the ESAs. To achieve this goal and promote the integration of Europe's capital markets, we would support giving ESMA (joint) supervisory authority in some areas. **We believe that ESMA should be granted joint supervisory authority in respect of critical benchmarks and MiFID regulated data providers**. Initially this could be done through joint supervisory teams which are composed of the ESAs and NCAs (similar to the model used by the SSM). Overtime the direct supervisory powers could be transferred completely to ESMA.

It has also been suggested to give ESMA direct supervisory authority over post trade market infrastructures. Given the timing of this response, it should be clarified that in these comments we are commenting on ESMA's responsibilities with regard to CCPs and CSDs in the EU27. We would not be supportive of a sudden change in supervisory responsibilities vis-à-vis these post trade market infrastructures and we believe that further analysis on the implications of changes to the supervisory responsibilities in this area is needed, in consultation with the industry.

**However, we would be supportive of ESMA beginning to *build the capacity and expertise* to participate in the supervision of CCPs and CSDs**. We think that in the near-term future, the direct supervisory responsibility of these entities should remain with the NCAs gradually increasing the involvement of ESMA in the supervisory process.

As already mentioned above, the exact consequences of any changes to the supervisory arrangements would have to be carefully considered further and we would encourage the Commission to separately consult on any such proposal. As part of such consultation, the resolution authority for CCPs should be discussed in particular whether that responsibility would remain with the NCAs or should be moved to a pan-EU level as well.

As also suggested in the Five Presidents' Report, the idea of creating a European supervisor for capital markets merits further reflection in the not too distant future.

## II. Governance of the ESAs

### A. Assessing the effectiveness of the ESAs governance

**22. To what extent do you consider that the current governance set-up in terms of composition of the Board of Supervisors and the Management Board, and the role of the Chairperson have allowed the ESAs to effectively fulfil their mandates? If you have identified shortcomings in specific areas please elaborate and specify how these could be mitigated.**

*Answer:*

We believe that the **ESAs should take a more strategic role and be given greater autonomy by defining and pursuing a common EU approach**. The current composition of the Boards of Supervisors hinders this as a lot of focus is being placed on safeguarding specific national interests.

The role of the Management Boards should thus be strengthened – see our response to question 23.

Also the role of the Chairs should be reinforced – see our response to question 25 in this respect.

Independent, permanent members should be added to the Boards of Supervisors – see our response to question 24.

The process of making changes to the governance set-up could benefit from establishing some form of an "Expert Committee on Governance" to develop more detailed proposals and think through their consequences carefully before taking decisions on institutional reform.

We also believe that some changes to the governance set-up of the ESAs should be made with regard to their relationship with third country NCAs. At the moment, NCAs from the EEA countries are allowed to attend meetings of the Boards of Supervisors in an observer capacity for Level 2 and Level 3 discussions. Given the enhanced role we are suggesting for the ESAs in the equivalence assessment framework, **we would support a reinforced information exchange and an enhanced cooperation framework with other third country NCAs as well**. Further consultation on the exact design of this is needed.

Furthermore, we would support the **creation of an Advisory Board comprising delegates of third country NCAs** with a limited number of members giving advice to the Management Boards and the Supervisory Boards of the ESAs. Its advice would not be binding. The current status of the EEA countries in the work of the ESAs should however not be eroded by this Advisory Board.

**23. To what extent do you think the current tasks and powers of the Management Board are appropriate and sufficient? What improvements could be made to ensure that the ESAs operate more effectively? Please elaborate.**

*Answer:*

The Management Boards of the ESAs currently operate more as administrative bodies within the ESAs. We believe that the role of the Management Boards should be strengthened by involving them more in policy and supervisory issues. This could partly be achieved by **delegating more responsibilities from the Boards of Supervisors to the Management Boards**. **We believe that the Management Boards should be transformed into Executive Boards.**

Certain decisions could be taken by the Executive Boards without having to be approved by the Boards of Supervisors as well. The Executive Boards could be given more independent powers by enabling them to adopt final decisions on supervisory convergence, peer reviews and mediation.

**The Executive Boards should be extended by adding independent members and giving them voting rights**. This would create more balance with the representation from the NCAs and strengthen their European perspective. These independent members should be added on the basis of their merits and competences. The right balance should be found between independent members and representatives from the NCAs. Also the budgetary implications of adding independent members should be further considered.

The influence of ESA's staff on the Executive Boards should be strengthened by **giving the Executive Directors of the ESAs voting rights in the Executive Boards, alongside the Chair and the newly to be appointed independent members**.

Besides improvements to the Executive Boards, we believe it should also be considered to allow **ESA staff to chair the Standing Committees** rather than only allow the NCAs to take on these roles.

In addition to improvements to the governance of the current Management Boards (to be Executive Boards), we believe that the ESAs (at the proposal of the Executive Board and decided upon by the Board of Supervisors) **should be given "Emergency Relief" type of powers to temporarily suspend the application of regulatory requirements.** It would be important to enable the ESAs to offer regulatory forbearance as with Regulations and Directives the NCAs currently have no latitude to offer flexibility, even in situations where, due to the delayed publication of rules, firms have no

realistic possibility of complying by the deadline set in legislation. A recent example of where Emergency Relief would have been helpful was with regard to the 1st March 2017 deadline for the variation margin requirements under the European Market Infrastructure Regulation (EMIR). In the absence of the ESAs being able to centrally provide comfort to market participants, the NCAs expressed their views in different ways resulting in uncertainty among market participants. At the same time these Emergency Relief powers should not preclude the NCAs from applying their own discretion in the context of domestic market specificities.

We take note of the Meroni doctrine in this context but believe there should be a way of providing these powers to the ESAs particularly given recent ECJ jurisprudence on this issue. The ESAs Regulation should be updated to reflect the most recent ECJ doctrine on the exercise of limited discretionary powers by EU Agencies (i.e. Agencies created by EU legislation). The ESAs should therefore be granted the possibility to exercise some discretion circumscribed by various conditions and criteria which limit those powers, including requirements that:

- those measures address a threat to the orderly functioning and integrity of financial markets or to the stability of the whole or part of the financial system in the EU and there are cross-border implications;
- those measures are subject to the condition that either no NCA has taken measures to address the threat or one or more of those authorities have taken measures which have proven not to address the threat adequately;
- those measures do not create a risk of regulatory arbitrage and do not have a detrimental effect on the efficiency of financial markets, including by reducing liquidity in those markets or creating uncertainty for market participants, which is disproportionate to the benefits of the measure;
- those measures are confined within article 9 (5) of the ESA Regulations;
- before adopting those measures, the ESAs consult other EU institutions as relevant, including the European Systemic Risk Board (ESRB), and notify the NCAs concerned of the measure they propose to take, including the details of the proposed measure and the evidence supporting the reasons why it must be adopted;
- that the ESAs review the measure at appropriate intervals, at least every 3 months.

Although these Emergency Relief powers are envisaged to be used in situations where quick supervisory decisions need to be taken, we believe they should be subject to a review process by the co-legislators (i.e the Council and the European Parliament), which should be conducted within a short timeframe to allow for swift action. Concurrently, the review process should provide the co-legislators with a veto right similar to the one they have under the RTS adoption procedure where they can object to an act, and if not, it is deemed adopted.

**24. To what extent would the introduction of permanent members to the ESAs' Boards further improve the work of the Boards? What would be the advantages or disadvantages of introducing such a change to the current governance set-up? Please elaborate.**

*Answer:*

To strengthen the development of an EU common approach by the ESAs, **we are supportive of adding permanent independent members to the Boards of Supervisors**. This would help bring a wider perspective to the table and help to deliver decisions in the best interest of the Union. The practicalities of the ECB Governing Council model should here be considered.

We would be **supportive of making the members of the Executive Boards, including the newly to be added independent ones and the Executive Directors, full members of the Boards of Supervisors** and giving them voting rights for those cases that require a "one person, one vote" decision.

Further consideration should be given to the role of the Chair, Executive Director and independent members when decisions are currently taken by qualified majority voting (QMV).

25. **To what extent do you think would there be merit in strengthening the role and mandate of the Chairperson? Please explain in what areas and how the role of the Chairperson would have to evolve to enable them to work more effectively? For example, should the Chairperson be delegated powers to make certain decisions without having them subsequently approved by the Board of Supervisors in the context of work carried out in the ESAs Joint Committee? Or should the nomination procedure change? What would be the advantages or disadvantages? Please elaborate.**

*Answer:*

The Chairs of the ESAs are important figures giving the ESAs a clear (external) profile. The role and mandate of the Chairs should be strengthened to enable them to pursue an EU common approach. To achieve this, **we support providing the Chairs with voting rights in the Boards of Supervisors.**

Given the importance of supervisory convergence, we would also suggest **giving the Chairs the power to request NCAs to provide the ESAs with timely information on supervisory convergence issues**.

## B. Stakeholder groups

26. **To what extent are the provisions in the ESA Regulations appropriate for stakeholder groups to be effective? How could the current practices and provisions be improved to address any weaknesses? Please elaborate and provide concrete examples.**

*Answer:*

The stakeholder groups of the ESAs provide a very important forum for input from market participants. AFME strongly supports the continued existence of the four ESA stakeholder groups (ESMA, EBA, EIOPA IRSG and EIOPA OPSG). These senior level groups, which do not have any special legal status but serve as a structured and regular dialogue between senior ESA staff and boards and a diverse group of stakeholders, are useful mediums for dialogue. The deliberate diversity of the groups, which are comprised of a mix of consumer, academic, industry, market infrastructure, and others is recognised as both a strength and a weakness. Membership of the groups are as individuals, not as industry representatives. Since many of the participants are individuals with no institutional backing, they inevitably will not have the data research resources frequently possessed by trade associations. Since many stakeholder group views on technical consultations require specialist knowledge, in some cases this means that individuals without technical knowledge are asked to provide views on matters on which they do not have expertise.

However, the independence of these individuals is a valued institutional counterweight from a governance standpoint, since they have an equal vote as industry groups who arguably can represent the interests of their industry. From a transparency perspective, agendas and minutes of all of the stakeholder meetings are readily available on each of the four websites.

Nevertheless, we believe that certain improvements to the stakeholder groups could be made. **The ESAs should make greater use of them and strengthen their role as a key source of input during the process of preparing the technical standards and Q&As**. At the moment, the perception exists that the stakeholders only have limited impact on the work of the ESAs. To improve the functioning of the stakeholder groups, the governance and structure of them should be changed. **We would suggest the following changes**:

- announce meetings and publish agendas and working papers well in advance to allow participants more time to prepare;
- reflect on the appointment process and improve the representation on the stakeholder groups of those who are subject of the ESAs' rules. This could be done by allowing trade associations to be members of stakeholder groups;
- the ESAs to provide regular reports to the stakeholder groups on how their opinion has been taken into account and explain when and why this was not the case;
- organise for all the stakeholder groups to meet with the ESA executive and board leadership at least once per year;
- allow the stakeholders group to mandate the creation of technical groups composed of financial market participants to advise them in the formulation of opinions on issues of a technical nature.

We believe that the **ESAs should organise more frequent roundtable discussions** so they can benefit more often from hearing about the latest market developments. A good example of this are the roundtables organised on the Market Abuse Regulation (MAR) last year[3].

We also believe that the coordination between the four ESA stakeholder groups should be improved. Although the existing stakeholder groups serve an important function by providing specialised advice to their respective ESAs, and their recommendations are public, further benefits could be achieved through enforced dialogue across industries, particularly regarding how various regulatory positions impact economic growth. We also highlight that the various consultative working groups are useful for the ESAs to be provided with industry feedbacks. We note however that certain improvements could be made in order for these consultative working groups to be able to feed the ESAs ahead of the publication of each relevant technical standard and Q&As.

## III. Adapting the supervisory architecture to challenges in the market place

**27. To what extent has the current model of sector supervision and separate seats for each of the ESAs been efficient and effective? Please elaborate and provide examples.**

*Answer:*

**We have been broadly satisfied with the sectorial structure of the ESAs. In particular, we believe that ESMA should be maintained as a standalone markets authority**. ESMA's current supervisory mandates (for example for Credit Rating Agencies or Trade Repositories) are working well and we believe that ESMA can play a role in working toward consistent supervision in other areas as well (e.g. critical benchmarks and MiFID regulated data providers) in the short to medium term.

[3] ESMA overview of roundtables https://www.esma.europa.eu/press-news/hearings

## IV. Funding of the ESAs

**29. The current ESAs funding arrangement is based on public contributions:**

**a) should they be changed to a system fully funded by the industry;**

**b) should they be changed to a system partly funded by industry?**

**Please elaborate on each of (a) and (b) and indicate the advantages and disadvantages of each option.**

*Answer:*

As advocated before, and becomes clear from our responses to the other questions in the consultation, we believe that **the resources of the ESAs will need to be appropriately increased** to optimise the quality of the current work and deliver on the additional tasks we are suggesting that the ESAs should take on. This increase in resources should also contribute to better managed consultations, more transparency and more timely Q&As. At the same time we would expect the ESAs to optimise their efficiency in a way to minimise the need for additional funding. The development of an EU financial data strategy has the potential of creating significant cost savings by NCAs and the ESAs too.

An increase in resources would allow the ESAs to attract more staff with more market and varied experience. Special attention should be given to the profiles of future recruits, with a particular focus on their seniority and expertise in the technical areas to be regulated and/or supervised.

The UK's departure from the EU will demand a consideration of the future resourcing arrangements of the ESAs, including personnel and budgetary needs. **AFME recognises that given the significant workload and the additional resources needed, the importance of 'getting it right' for the industry and the importance of independent ESAs, a system which would be partly funded by the industry is realistic and acceptable but subject to certain conditions:**

- existing resources from public funds should be maintained to ensure an overall increase in resources for the ESAs. We believe that the funding coming from public sources should better reflect the size of the financial industry subject to the rules in the respective Member States;
- where activities (e.g. supervisory activities) are being moved from NCAs to the ESAs, their related budgets should move to the ESAs as well and should not lead to an overall increase of charges to the industry. We note that a significant part of the ESAs budget is already (indirectly) funded by the industry as the industry pays for the budgets of many NCAs that take part in the ESAs;
- in cases where the ESAs get new direct supervisory powers, these should be funded from those who are being supervised;

**Any partial industry funding proposals should be designed in close consultation with the industry**. We are not able to provide further detailed comments on the exact design of a future funding system at this stage, other than the above, but would welcome to contribute to this discussion further.

If EU agencies continue to not be allowed to build up reserves, the consequences of charging market participants a fixed amount should be considered when designing a partly industry funded model. The resourcing of the ESAs will need to be adjusted annually given changing priorities and workload. Charging fixed amounts to market participants which do not have much flexibility in following changes in workload and priorities while at the same not being able to keep (limited) reserves from years when contributions exceeded expenditure could complicate this.

**30. In your view, in case the funding would be at least partly shifted to industry contributions, what would be the most efficient system for allocating the costs of the ESA's activities:**

**a) a contribution which reflects the size of each Member State's financial industry (i.e., a "Member State key"); or**

**b) a contribution that is based on the size/importance of each sector and of the entities operating within each sector (i.e., an "entity-based key")?**

**Please elaborate on (a) and (b) and specify the advantages and disadvantages involved with each option, indicating also what would be the relevant parameters under each option (e.g., total market capitalisation, market share in a given sector, total assets, gross income from transactions etc.) to establish the importance/size of the contribution.**

*Answer:*

For a system partly funded by the industry, we believe that the ESAs should structure the industry contributions by using a mixed method of:

i) the size of a Member State's financial services industry, and;

ii) the size of each sector and entities within each Member State.

**The exact details of the calculations should be subject to further consultation**. This should also take into account to what extent a distinction should be made between those institutions operating on a pan-European basis and those whose activities are mostly concentrated at national level. The impact of Brexit should also be considered in this context.

**32. You are invited to make additional comments on the ESAs Regulation if you consider that some areas have not been covered above. Please include examples and evidence where possible.**

*Answer:*

***International fora***

A number of financial products, such as foreign exchange (FX), are truly global products. **We believe that the ESAs could play a more prominent role in international fora, including IOSCO,** to promote a global harmonisation of rules impacting these products such as transparency, clearing and trading mandates, noting that harmonisation is required at all levels, down to the explicit data attribute level, including with regard to definitions.

The involvement of the ESAs in all level of international fora should be more structured. The coordination among members of the Boards of Supervisors in this respect should be improved. This could for example be achieved by **organising a meeting of the Boards of Supervisors before key meetings of international bodies** to shape a common EU position that can be carried by the NCAs as well as the ESAs represented in these international fora.

***ESAs and the Level 1 process***

In recent years, through the implementation of the regulatory reform agenda, it has become apparent that there can be situations where the ESAs are being tasked with taking decisions which are rather political than technical and should have been decided in the Level 1 negotiations. There are also situations where the ESAs introduce Level 2 and Level 3 measures which are not in line with what

was intended by the co-legislators under Level 1. A greater involvement of the ESAs in the Level 1 negotiations could address this issue.

**We therefore support giving the ESAs observer status for Level 1 negotiations, at least at the stage of trilogues,** for legislation where the ESAs will be expected to prepare Level 2 and Level 3 measures. As an observer, the ESAs could highlight issues which should be decided upon during the political process or seek clarification on the exact intention of certain rules or required time for producing Level 2 measures. This would require additional resources for the ESAs.

Examples of where this would have helped in recent years include the requirement in the Capital Requirements Regulation (CRR) Art 181 para 1 for all observed defaults to be used in the Loss Given Default (LGD) estimation, whereas this means there is a risk that not all these data will be representative contradicting the EBA's PD/LGD/Defaulted Assets (draft) Guidelines and resulting in firms having to 'automatically' apply a margin of conservatism.

Also, in order to avoid maintaining multiple unnecessary systems, provisioning models used under IFRS 9 should be allowed to be used for the purposes of estimating the expected loss (ELBE). This would require a change to the Level 1 CRR text, otherwise firms will have to build new ELBE models/recalibrate exiting LGD models for ELBE, all for little benefit in terms of reducing RWA variance. Involving the ESAs in the Level 1 negotiations could have prevented these situations from occurring.

Another example of where involving the ESAs in the Level 1 negotiations would have helped is in the context of MiFID II and the provisions on research and inducements. In this area, ESMA Level 2 measures introduced substantive obligations which should have been decided upon at the political level under Level 1.

***Realistic implementation timetables***

The implementation of the significant regulatory reform agenda has made clear that there must be sufficient time between the finalisation of Level 2 texts and the implementation of new regulation, for both regulators and the industry to make the appropriate resourcing, structural and systems changes.

Moreover, the delegation of tasks to the ESAs, and their time and resources for them, should be considered once the final legislative package is agreed, rather than on a delegation by delegation basis. This should give a better idea of whether the total package is achievable on the timelines suggested in the Level 1 text. **We therefore suggest the following changes to be made** as part of a Better Regulation approach:

- allow adequate time of at least 12 months for the ESAs to deliver well-designed Technical Standards (TSs). The ESAs should be consulted during the Level 1 process on the timetable of the TSs foreseen;
- The Level 1 measures should allow enough time for the requirements to be implemented. Therefore, it should be considered whether, legally, the date of application of Level 1 measures can be made dependant on the finalisation of the Level 2 rules i.e. requirements set out in a Regulation/Directive should only become applicable at least 12 months after publication of the Level 2 measures in the Official Journal. Relevant stakeholders should be given ample time to consider the implications of Level 2 measures and feed their input into the ESAs various consultations.

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