Consultation response

European Commission targeted consultation on supervisory convergence and the single rulebook

21 May 2021

The Association for Financial Markets in Europe (AFME) welcomes the opportunity to comment on the **TARGETED CONSULTATION ON SUPERVISORY CONVERGENCE AND THE SINGLE RULEBOOK** published by the European Commission. AFME represents a broad array of European and global participants in the wholesale financial markets. Its members comprise pan-EU and global banks as well as key regional banks, brokers, law firms, investors and other financial market participants. We advocate stable, competitive, sustainable European financial markets that support economic growth and benefit society.

AFME is the European member of the Global Financial Markets Association (GFMA) a global alliance with the Securities Industry and Financial Markets Association (SIFMA) in the US, and the Asia Securities Industry and Financial Markets Association (ASIFMA) in Asia.

AFME is listed on the EU Register of Interest Representatives, registration number 65110063986-76.

Executive Summary

Since the establishment of the European Supervisory Authorities (ESAs) there have been significant advances in supervisory convergence and the development of a single rulebook. While it is premature to provide a full assessment of the impact of the changes, developments in the past year have provided practical experience on the effectiveness of the enhanced arrangements, including areas for reflection and potential improvement.

Targeted efforts should continue towards promoting an inclusive and transparent approach to supervisory convergence. Reinforcing certain aspects of the toolkit of the ESAs and strengthening mechanisms for the assessment of outputs and consultation with market participants is particularly important to ensure that supervisory objectives are achieved and outcomes are conducive to stronger EU financial markets.

Focusing on issues relevant to ESMA and EBA, AFME's submission focuses on the following themes and recommendations.

- **The performance of the ESAs during the Covid-19 pandemic**

  The Covid-19 emergency showed that the ESAs have the capacity to successfully respond to major challenges in financial markets in a timely and effective manner. While lessons can be learned, actions by ESMA and EBA in AFME's areas of focus were largely appropriate and effective.

- **EU competitiveness as a core mandate of the ESAs**

There is a strong case for embedding the following objectives in the formal mandates of ESMA and the other ESAs, alongside their existing core mandates: (1) promoting competitive and efficient EU financial markets; (2) advancing the Capital Markets Union (CMU).

- **The limitations of the no-action letter mechanism**

  While we welcome the efforts of EU legislators to introduce the no-action procedure in the 2019 ESAs review, we question the effectiveness of this tool as currently available. AFME concurs with ESMA's response that the no-action letters experience during the COVID-19 crisis illustrated the limitations of this mechanism under the existing legal framework. From the perspective of regulated financial institutions, there is little to differentiate a no-action letter issued by an ESA from the "deprioritisation of enforcement" statements under the coordination procedure that were issued by the ESAs prior to the 2019 review and which continue to be issued. In particular, because of the non-binding nature of the no-action letter procedure, there is no guarantee that national regulators will act in a harmonised manner; meanwhile, market participants still face the need to potentially liaise with several competent authorities on whether they intend to follow the recommendations of ESAs. Further reflection is therefore needed on the design of a more effective tool.

- **The need for the ESAs to undertake cost-benefit analyses of major proposals**

  It is essential that technical standards, guidelines and other outputs by ESAs do not impose burdens that are disproportionate to the policy goals being pursued. In particular, cost-benefit analyses should assess regulations' impact not only on consumers, but also on markets and financial stability. As a result, we believe the ESAs should regularly consider and undertake cost-benefit analyses of high impact proposals, technical standards and recommendations they put forward. We support that the ESAs are given the resources and the more specific regulatory mandates to conduct impact assessments.

- **Improving consultation processes and dialogue with the industry**

  Targeted efforts should continue towards promoting an inclusive and transparent approach to supervisory convergence. Reinforcing certain aspects of the ESAs' toolkit and strengthening mechanisms for the assessment of outputs and consultation with market participants is particularly important to ensure that supervisory objectives are met and outcomes are conducive to stronger EU financial markets. Therefore, we encourage the ESAs to pursue consultation with stakeholders on high impact proposals at different stages of the policy formulation process, including dialogue beyond formal written consultations.

  There remains room for improvement in relation to the Q&As process. While Q&As constitute in principle non-binding guidance, the interpretations and clarifications provided have a substantial impact across the marketplace. The ESAs should take an inclusive approach when developing Q&As and allow stakeholders to give input to their development and potential impact before they are finalised. High impact Q&As would benefit from early dialogue between policy experts at NCAs and supervised firms in order to properly assess impacts. AFME members would also welcome greater visibility around the status of questions under consideration.

- **Direct EU-level supervision of ESG data and ratings providers**

In the rapidly evolving sustainable finance agenda, the increased demand for reliable and comparable ESG data and ratings should lead to reflections on extending ESMA's direct supervisory powers to cover providers of such services.

Consultation response:

ESA(s) you want to focus on

Please select the ESA that you know best. You can select one, two or the three ESAs.

- European Banking Authority (EBA)
- European Securities and Markets Authority(ESMA)
- European Insurance and OccupationalPensions Authority (EIOPA)

General questions

Question II.
EBA: In your view, does EBA's mandate cover all necessary tasks and powers to contribute to the stability and to the well-functioning of the financial system? If you think that there are elements which should be added or removed from EBA's mandate, please provide a substantiated answer.

- Yes
- No
- Don't know / no opinion / not relevant

Question II.
ESMA: In your view, does ESMA's mandate cover all necessary tasks and powers to contribute to the stability and to the well-functioning of the financial system? If you think that there are elements which should be added or removed from ESMA's mandate, please provide a substantiated answer.

- Yes
- No
- Don't know / no opinion / not relevant

We believe the work of ESMA and the other ESAs should take into account the following objectives, which could be added to the formal mandates of the ESAs: (1) promoting competitive and efficient EU financial markets; (2) advancing the Capital Markets Union.

In relation to the first objective on the theme of competitiveness, we believe there are internal and external dimensions to take into consideration. Internally, it is important to support competition and choice within the single market in the interest of end-users. By way of example, ESMA's outputs in the area of securities trading (including MiFID/R-related mandates) should be aligned with the objective of promoting diverse, competitive and well-regulated capital markets, with a range of trading mechanisms and not being reliant upon one category of trading venue, as this better supports the needs of investors and consumers' pensions and savings. ESMA and relevant EU and national authorities should also seek to tackle situations where limited competition can lead to sub-optimal outcomes for end-users – this is the case with the persistent problems regarding the high cost of market data, a significant market failure harming investors, consumers, and investment firms in the single market.

Externally, in today's global financial markets landscape, European supervisors should increasingly take into consideration the overall competitiveness and attractiveness of EU financial markets. The promotion of competitiveness and market efficiency features in the mandates of some of ESMA's peers in other jurisdictions. For example:

- The mission of the US SEC is to protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation.

- The mission of the UK Financial Conduct Authority includes the promotion of competition in the interest of consumers.

- The statutory objectives of the Hong Kong Securities and Futures Commission includes the promotion of a fair, efficient, competitive, transparent and orderly securities and futures industry.

The importance of promoting competitive and efficient EU financial markets is manifested in a number of areas. For example, we firmly believe that a competitive securities trading ecosystem is vital to support capital markets, the growth of EU financial centres and better outcomes for investors.

ESMA's mandates could formally also reflect the core objective of EU financial markets policy to advance the CMU project. AFME believes that the largest and most competitive global financial centres are characterised by their openness, access to global pools of capital, scale of the financial ecosystem and quality of legal frameworks. Regulatory frameworks should be designed not only to preserve financial stability and strong levels of investor and consumer protection, but also to make market-based mechanisms across Europe understandable and economically attractive to households, enterprises, and market participants. New regulation must contribute to the overarching objectives of encouraging investor participation and growing the capacity of the EU's capital markets.

Question III.
EBA: In your view, does EBA face any obstacles in delivering on their mandates? Please explain what you consider to be the main obstacles for EBA

- Yes
- No
- Don't know / no opinion / not relevant

We observe cases where the EBA has delivered mandates on time but then an RTS spends a long time with the Commission and is delivered a long time after it is due – for example, the RTS on IRB risk assessment methodology and specialised lending slotting approach. There should be more careful consideration around timing and delivery of standards for banks to better manage implementation.

Another ongoing challenge in EU legislative processes remains the need for realistic implementation timelines and 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. These challenges are relevant to the three ESAs.

Question III.
ESMA: In your view, does ESMA face any obstacles in delivering on their mandates? Please explain what you consider to be the main obstacles for ESMA.

- Yes

- No
- Don't know / no opinion / not relevant

It is essential that ESMA's work across a range of areas takes into greater consideration the impact that ESMA's proposals and outputs will have on market participants, supervised entities and the broader marketplace. This includes placing a stronger emphasis on economic and cost-benefit analysis of ESMA's proposals and recommendations. We believe this is an area where there is a need for significant improvement.

It is important that technical standards, guidelines and other outputs by ESMA are assessed to ensure they do not create burdens disproportionate to the policy goals being pursued. In particular, cost-benefit analyses should assess regulations' impact not only on consumers, but also on markets (including their efficiency and liquidity) and on financial stability. This is with respect to quantifying both burdens and benefits.

We believe ESMA should regularly consider and undertake cost-benefit analysis of high impact proposals, technical standards and recommendations it puts forward. This involves also strengthening its capabilities to undertake such analysis.

ESMA's work on securitisation disclosure requirements provides examples where we believe burdens and costs placed on market participants were disproportionate and far exceeded any benefits to the European securitisation market. Please see our response to question 5.4 where we refer to ESMA's technical standards on disclosure requirements under the Securitisation Regulation.

Another area where cost-benefit analysis would be beneficial is MiFID/R. ESMA noted in its final MiFIR review report on the obligations to report transactions and reference data that: "respondents recurrently expressed the need for a full Cost-Benefit Analysis to be produced before they could express an opinion on or support a proposal made in the Consultation Paper. However, ESMA would like to clarify that the provision of Cost-Benefit Analyses does not appear at this stage of the regulatory revision process (i.e. during the consultation and recommendation phase). Indeed, the Consultation Paper and the following Final Report contain ESMA's recommendations to the European Commission and its suggestions of amendments that should be made to Level 1 legislation. It is if the European Commission were to move forward with the recommendations made by ESMA, that a full Cost-Benefit Analysis will be done on the proposals recommending to amend the relevant provisions of MiFIR. While ESMA's role is not to produce Cost-Benefit Analyses at this stage of the regulatory revision process, ESMA does stand ready to provide further advice and clarifications on the proposals included in this Final Report[1]".

AFME would like to stress that ESMA's recommendations carry significant weight and play an important role in the formulation of Commission proposals and subsequent work by the co-legislators. While we acknowledge that a full impact analysis of a legislative review is the Commission's responsibility, we believe that ESMA should conduct a thorough impact analysis of key proposals it puts forward as an advice to EU institutions that could have a high impact on a given market segment. We support that ESMA is given the resources and the more specific regulatory mandates to undertake impact assessments.

1.1 The supervisory convergence tasks of the ESAs

Common supervisory culture/supervisory convergence

[1] *https://www.esma.europa.eu/sites/default/files/library/esma74-362-1013_final_report_mifir_review_-_data_reporting.pdf*

Question 1.1.1
EBA: To what extent does EBA contribute to promoting a common supervisory culture and consistent supervisory practices?

- 1 - the less significant contribution
- 2
- 3
- 4
- 5 - the most significant contribution
- Don't know / no opinion / not relevant

Question 1.1.1
ESMA: To what extent does ESMA contribute to promoting a common supervisory culture and consistent supervisory practices?

- 1 - the less significant contribution
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- 3
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- 5 - the most significant contribution
- Don't know / no opinion / not relevant

In the framework of the 2019 ESAs review:

Question 1.1.4
How do you assess the new process for questions and answers (Article 16b)?

There remains significant room for improvement in relation to the Q&As process. Our perception is that challenges in this area continue despite improvements following the ESAs review.

We welcome that ESMA has started publishing a list of questions received through its Q&A process which provides some visibility of questions outstanding. However, AFME members would welcome greater visibility around the status of questions under consideration by ESMA, with indicative timelines of when they may be reviewed and addressed, or indeed if they have been rejected or passed on to the Commission or other authority. Greater visibility on prioritisation would also be welcomed (acknowledging that ESMA provides general guidance on its website on the prioritisation criteria).

By way of example, AFME submitted important questions in relation to the implementation of the CSDR settlement discipline regime which remain unanswered more than 18 months following their submission.

Q&As are key tools to address issues of a more technical nature or a way to clarify certain interpretation questions arising from Level 1 or Level 2. While Q&As constitute in principle non-binding guidance, the interpretations and clarifications provided 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.

We believe the ESAs should follow an inclusive approach when writing Q&As and provide stakeholders with the opportunity to give input to their development and potential impact before they are finalised. We question whether the mechanism set out on Article 16b/4 on consultation on Q&As upon request of three members of the Board of Supervisors is an effective way to ensure that important questions are consulted on and addressed in a timely manner.

High impact Q&As would benefit from early dialogue between policy experts at NCAs and supervised firms in order to properly assess impacts. It would be beneficial for firms to know the issues that are under consideration for the Q&As and be able to comment on proposed drafting. The stakeholder groups and consultative working groups should be given a prominent role in this process; however, we note that stakeholder group discussions should not be a substitute for direct dialogue with the participants affected by issues in need of clarification via Q&As.

Therefore, we believe that the ESAs should improve their consultation process around Q&As, allowing the most concerned parties to provide feedback. Also, impactful Q&As should be accompanied by reasonable implementation timelines to allow for sufficient time for the industry to comply with new guidelines.

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

- Yes
- No
- Don't know / no opinion / not relevant

Please refer to our response to question 1.1.4.

1.2 No action letters

In the framework of the 2019 ESAs review:

Question 1.2.1
In your view, is the new mechanism of no action letters (Article 9a of the ESMA/EIOPA Regulations and Article 9c EBA Regulation) fit for its intended purpose?

- Yes
- No
- Don't know / no opinion / not relevant

We welcome the fact that the new mechanism was introduced and that EU legislators recognised the importance of the ESAs having a no-action letter type instrument in their toolkit. However, we are not convinced that the mechanism has in practice delivered more clarity to market participants and been a stronger instrument compared to mechanisms that were already available. AFME reiterates its support for no-action letters but urges EU authorities to improve the mechanism to make it an effective tool.

Please refer to our comments under 1.2.2 and 1.2.3.

Question 1.2.2
How does the new mechanism, in your view, compare with "no action letters" in other jurisdictions?

The tools currently available to the ESAs differ from those available to authorities in other jurisdictions. While we welcome the efforts of EU legislators to introduce the no-action procedure, we question the effectiveness of this tool as currently available.

The no-action letter tool introduced in the ESAs review has been used in a limited manner as a non-binding ESMA statement for national authorities to not prioritise certain supervisory actions. ESMA has continued to issue "deprioritisation of enforcement" statements in accordance with

Article 31 of Regulation(EU) 1095/20102 which refers to Coordination of NCAs action and not to the no-action procedure.

From the perspective of regulated financial institutions, there is little to differentiate a no-action letter issued by an ESA from the traditional forbearance statements under the coordination procedure that were issued by the ESAs prior to the amendment of the ESAs' founding regulations and which continue to be issued. In particular, because of the non-binding nature of a no-action letter, there is no guarantee that NCAs will act in a harmonised way; NCAs are not relieved of their obligation to enforce EU law and market participants are not relieved of their obligation to comply with directly applicable EU law. Market participants still face the need to potentially liaise with 27 competent authorities to ask whether they intend to follow the ESAs's recommendations. Provided it is legally and operationally feasible, and subject to further consultation, one possibility to explore could be the use of an "assumed compliance" principle whereby NCAs could be asked to explicitly indicate, by a specific deadline, whether they intend to diverge from the ESA proposed approach not to prioritise supervisory or enforce actions in relation to specific requirements; in the absence of an explicit indication in this respect, market participants would assume that NCAs intend to follow the ESAs's proposed approach.

Regulatory forbearance powers are standard tools at the disposal of regulators in other jurisdictions, most notably the US and the no-action powers of federal financial markets regulators. These letters are a commitment on the part of the regulator not to enforce market participant non-compliance with the provisions of US federal law, SEC rules, regulations or orders. These letters may be issued by the regulator on the application of one or more market participants where market participants are unable to comply with relevant law, rules, regulations or orders for specific reasons. The letters are addressed to subject market participants and time-limited.

Question 1.2.3
ESMA: Could you provide examples where the use of no action letters would have been useful or could be useful in the future?

No-action letters should be considered an essential tool to provide comfort to market participants in instances where it is not possible to meet certain application dates for legitimate reasons. They could also offer assurance that they would not be held liable if they are unable to implement particularly problematic provisions despite their best efforts.

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

According to the minutes of ESMA's Board of Supervisors of 29 April 2020, the European Commission expressed opposition to the proposed use of the no action letter tool, referring to the lack of justification and legal proposal as requested for in article 9a of the amended ESMA

Regulation. Indeed, the provision in question stipulates that *"in the cases referred to in points (a) and (b) of paragraph 1, the Authority shall provide the Commission with an opinion on any action it considers appropriate, in the form of a new legislative proposal or a proposal for a new delegated or implementing act, and on the urgency that, in the Authority's judgment, is attached to the issue."*

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

Question 1.4.3
EBA: Do you think there is the need to amend or add a tool to the toolkit of the ESAs for achieving supervisory convergence?

- Yes
- No
- Don't know / no opinion / not relevant

As noted under section 1.2, we believe the no-action letter mechanism, while helpful in principle, has in practice not delivered material benefits to market participants compared to tools that were already available.

Question 1.4.3
ESMA: Do you think there is the need to amend or add a tool to the toolkit of the ESAs for achieving supervisory convergence?

- Yes
- No
- Don't know / no opinion / not relevant

As noted under section 1.2, we believe the no action letter mechanism, while helpful in principle, has in practice not delivered material benefits to market participants compared to tools that were already available.

Question 1.4.9
In your view, is there the need to add any tools or tasks in order to enhance supervisory convergence towards digital finance?

- Yes
- No
- Don't know / no opinion / not relevant

AFME does not see a need to add any tools or tasks; however, we believe that supervisory convergence must be a more precise objective throughout the European Commission digital finance strategy. This objective is needed to support the transformation of financial services across Europe and address fragmentation, preventing a truly Digital Single Market.

The Commission 2020 digital finance strategy is a welcomed and significant step towards greater supervisory convergence, such as the proposals for standard rules on crypto-assets (MiCA and DLT pilot regime) and digital operational resilience (DORA). The successful implementation of EU-wide oversight frameworks, such as MiCA and DORA, require that the ESAs have the appropriate mandate to ensure that supervisory convergence can be achieved. For

example, enhanced ESA cooperation within the DORA framework will drive a more effective oversight of critical third-party providers and consistency across NCAs on their follow up to the Lead Overseer's recommendations to these critical third parties.

Future proposals in the digital finance strategy, such as the potential for certification of solutions to support regulatory compliance (RegTech), will also benefit firms and supervisors where the ESAs have a clear mandate to drive supervisory convergence for the adoption of new technologies and ways of working.

However, there is a risk that as further digital finance proposals are progressed, such as DORA, the convergence needed across NCAs is not achieved, and firms remain subject to fragmented rules for the adoption of new technologies. This fragmentation at the early stages of the digital finance agenda will severely limit the long-term objectives of facilitating greater innovation, and competition, from being realised.

Therefore, we believe that the role of the ESAs to drive supervisory convergence must be a more central objective in current and future proposals on digital finance as part of the Commissions five-year strategy.

1.6 Emergency situations and response to COVID-19 crisis

Question 1.6.1
EBA: Please rate the impact of EBA's response in the context of the COVID-19 crisis:

- 1 - the less significant contribution
- 2
- 3
- 4
- 5 - the most significant contribution
- Don't know / no opinion / not relevant

Overall we think EBA acted effectively in the context of the COVID-19 crisis. We welcome the operational relief provided by the EBA to financial institutions by postponing the 2020 stress test, and recommending authorities to use the flexibility embedded in regulation.

An area where the EBA could have provided stronger support towards promoting uniformity across the EU was the distribution of dividends. While the SSM exempted intragroup dividend distributions from its recommendation to restrict dividend distribution, AFME members report that several countries (e.g. in the CEE region) recommended to the subsidiaries under their jurisdiction not to distribute dividends to their parent companies.

Question 1.6.1
ESMA: Please rate the impact of ESMA's response in the context of the COVID-19 crisis:

- 1 - the less significant contribution
- 2
- 3
- 4
- 5 - the most significant contribution
- Don't know / no opinion / not relevant

ESMA took important steps to respond to the period of volatility in Q1/Q2 2020 by making use of the tools at its disposal to grant flexibility to market participants in different areas, helping to ensure that resources in the financial system were available where they were needed.

We commend ESMA's timely actions in response to various compliance and implementation challenges. We fully support the rationale for the regulatory flexibility granted: implementing major regulatory requirements or technology systems changes across multiple infrastructures at a time of heightened market volatility would have introduced unnecessary stability and operational risk.

We particularly welcome the regulatory flexibility announced in the following areas.

- First reporting obligations under the Securities Financing Transactions Regulation (SFTR);
- Changes to the tick size regime due for implementation by 26 March;
- Best execution reporting deadlines for execution venues and investment firms;
- Deferral of final implementation phases of the margin requirements for non-centrally cleared derivatives (by the three ESAs following BCBS and IOSCO announcements);
- Postponement of publication dates for annual non-equity transparency calculations and quarterly SI data
- Postponement of applicate date of the CSDR settlement discipline regime

We also welcome the guidance by ESMA on the record of telephone communications, as well as pronouncements by ESMA's leadership pledging to ensure open and functioning markets.

We also valued the extensions of consultation deadlines as announced by ESMA and the Commission but note that market participants still faced with a significant volume of highly technical and impactful consultations to address at a time when firms were still dealing with the response to Covid-19 as well as finalising preparations for Brexit. Please refer to our comments under Question 2.4.2 on the quality of ESMA consultations.

We note, however, that the ESAs and the Commission could have provided stronger support to firms by postponing non-time sensitive (or non-Covid related) policy development work throughout 2020. The Commission and ESMA continued to issue a significant number of reports and consultations through the year, at a time when firms were highly stretched dealing with both Covid-19 and final Brexit preparations. We appreciate that some of this work emanated from ESMA's obligations to meet different timelines.

Question 1.6.3
ESMA: Do you think the coordinating activities carried out by ESMA successfully contributed to address the challenges posed by the COVID-19 crisis?

- Yes
- No
- Don't know / no opinion / not relevant

Please explain your answer to question 1.6.3 for ESMA. Please give examples of situations where the coordinating activities carried out by ESMA did not successfully contribute to address the COVID-19 challenges.

Generally we believe that ESMA's actions contributed to ensuring that European capital markets continued to operate well and serve their function of intermediating market liquidity and facilitating risk management during the period of unprecedented stress in 2020.

Question 1.6.4
EBA: Do you think that EBA has always acted effectively, where needed, in the context of the COVID-19 crisis?

- Yes
- No
- Don't know / no opinion / not relevant

Please give concrete examples where you consider that EBA should have taken relevant action:

Generally yes, we believe EBA's actions were effective in AFME's areas of focus.

Question 1.6.4
ESMA: Do you think that ESMA has always acted effectively, where needed, in the context of the COVID-19 crisis?

- Yes
- No
- Don't know / no opinion / not relevant

Please give concrete examples where you consider that ESMA should have taken relevant action:

Generally yes, we believe ESMA's actions were effective in AFME's areas of focus.

1.7 Coordination function (Art 31 ESAs' Regulations)

Question 1.7.2
ESMA: Do you see a need for greater coordination between ESMA and/or with other EU and national authorities as regards developing data requirements, data collection and data sharing?

- Yes
- No
- Don't know / no opinion / not relevant

If you do see a need for greater coordination for ESMA, please explain your answer to question 1.7.2 and indicate what changes you propose:

We support the creation of a "golden source" of data listing all instruments which are in scope for transaction reporting and post-trade transparency under MiFID/R. In relation to the CSDR, AFME believes that the establishment of a central database of in-scope securities subject to the settlement discipline regime (and the relevant reference price, penalty rate and extension period) maintained by ESMA is essential to providing clarity for all market actors and reducing the likelihood of disputes. Please see our comments under Question 6.8.

Coordination among EU and national authorities will be needed in relation to the establishment of the European Single Access Point (ESAP), which AFME supports. We believe the ESAP should be populated with listed and non-listed (strictly voluntary) company financial and non-financial data through the existing mechanisms via the relevant EU national company registers, NCAs and OAMs. AFME concurs with the High-Level Forum on the CMU Final Report which invites the Commission to "Ensure that companies (listed and non-listed) are required to submit all the public information only once through a single reporting channel, which may necessitate

streamlining existing multiple reporting channels (considering for instance Officially Appointed Mechanisms, National Competent Authorities, European Authorities)." AFME agrees with this recommendation and advocates that no incremental cost, duplication and administrative burdens should be introduced for listed companies, which would not be conducive to the objective of creating a vibrant and competitive business environment in European capital markets.

Question 1.7.4
In the framework of 2019 ESAs' review, do you think the new coordination groups (Article 45b of the ESAs Regulations) are effective tools to coordinate competent authorities regarding specific market developments? Please provide examples where the new coordination groups could be useful:

- Yes
- No
- Don't know / no opinion / not relevant

We would provide a positive assessment of the new coordination groups to the extent that they played a role as part of the ESAs responses during the Covid-19 crisis which were generally effective. However, more evidence may be needed to provide a longer-term assessment.

Question 1.8.2
ESMA: Please assess the impact of ESMA's work on analysis of consumer trends, reviewing market conduct, developing indicators, contributing to level playing field, financial literacy and follow up to work in this area:

	1	2	3	4	5	Don't know
Reviewing market conduct			X			
Developing indicators			X			
Contributingto a level playing field			X			

Please explain your answer to question 1.8.2 for ESMA:

We would like to provide comments in relation to ESMA's work on the monitoring of EU secondary market liquidity and specifically ESMA's first report on the overview and structure of EU securities markets, published in November 2020.

AFME is concerned that ESMA's analysis in this report misrepresented the available addressable liquidity in European markets. In the EU, trading on SIs and OTC represented 13% and 6% of total trading respectively at end 2020, with 81% of all trading taking place on venue.

This is not borne out in ESMA data because data collection templates mandated by MiFIR are not granular enough to identify different trading modalities. The reporting system in the EU also suffers from a complex data flow prone to inaccuracies with trade dating passing from reporting entities to Approved Publication Arrangements to National Competent Authorities and then only to ESMA for aggregation. Particularly given the relatively small share of SI and OTC trading in the EU, we suggest prioritising accurate and granular data collection in the MiFIR review over other changes which could lead to a less diverse trading landscape.

It is vital that analysis of secondary equity and debt markets and their liquidity and efficiency is driven by robust data analysis and performed via the appropriate metrics. In particular, we wish to stress the following considerations in providing a robust picture of the strength of the European liquidity landscape:

- To fully understand market liquidity, the different types of financial instruments, trading categories and execution protocols which exist in the market ecosystem need, from the outset, to be identified with respect to the functions they serve. To achieve this, trade reporting, which is collected via NCAs and aggregated by ESMA, would need to be adapted at source, with improvements made to data definitions and appropriate trade category identifications.
- Further to these adaptations to source data, the measurement of secondary market liquidity requires ESMA and relevant authorities to regularly conduct a detailed factual analysis of actual trading activity across all segments of the market. For example, so called non-addressable liquidity, i.e. liquidity that does not contribute to the price formation process, needs to be filtered out of any indicators attempting to measure market liquidity[2]. We acknowledge that many steps have been made with a view to improving data quality since the date of application of MiFID II/R. However, we are concerned that recent statistical reports and publications sourced by the available supervisory data, including ESMA's analysis noted above, currently misrepresent the available addressable liquidity in European markets.
- Secondary market liquidity monitoring should reflect the CMU's overarching objectives for a more efficient and integrated market for the benefit of investors and other end-users of capital markets. This could include for example tracking the implied costs of trading for different categories of investors (for instance measured by the bid/ask spread and immediacy of trading at different order sizes); the extent of a "home bias" for equity and fixed income investments and trading; and, more generally, overall costs of cross-border trading as an advanced indicator of liquidity across the EU.

We note ESMA's report on EMIR and SFTR data quality of April 2021, and we commend ESMA for publicly acknowledging the shortcoming and the need for improving the quality of the existing data. We anticipate that similar drawbacks and flaws will be recognised in the short term on other key regulatory frameworks, particularly on MIFID/R. We would therefore urge ESMA to carefully review the existing MiFID/R data sets and to urgently propose adjustments to the collection of data, where it is warranted.

1.9 International relations

Question 1.9.1
EBA: How do you assess the role and competences of EBA in the field of international relations? Are there additional international fora in which EBA should be active?

Please refer to our response under 1.9.1 in relation to ESMA. Our views are relevant to both EBA and ESMA.

Question 1.9.1
ESMA: How do you assess the role and competences of ESMA in the field of international relations? Are there additional international fora in which ESMA should be active?

[2] AFME published a report to set out our understanding of the liquidity landscape in the European equity markets. This aimed at contributing to an evidence-based analysis of today's equity markets. The report can be found here.

We believe it is important for ESMA and the other ESAs to be proactively involved in the work of international standard setters in their areas of responsibility with a view to closely considering international guidelines and standards in their outputs at European level.

The ESAs should also ensure that strong relationships are developed with authorities in key jurisdictions with a view to maintaining a close dialogue in high impact regulatory areas with an international or regional dimension. This includes being involved as appropriate in the work of the envisaged Joint EU-UK Financial Regulatory Forum, as well as other fora for structured dialogue.

We support ESMA's new tasks as regards equivalence assessments of third-country regulatory and supervisory frameworks following the ESAs review, which include (i) assisting the Commission in the preparation of equivalence decisions, (ii) monitoring and informing the European Parliament, Council and Commission on regulatory and supervisory developments in third countries regarding which an equivalence decision has been adopted, and (iii) contributing to united, common, consistent and effective representation of the Union's interest in international fora (IOSCO, FSB).

We believe that over the coming years, close regulatory and supervisory cooperation between EU and non-EU regulators will continue to be vital, not least following the UK's departure from the EU. The ESAs will have an important role to play in this by fostering relationships with third country NCAs. They should also maximise coordination and cooperation with third country supervisory and resolution authorities through existing international fora such as Crisis Management Groups, bilateral arrangements through Memoranda of Understanding, participation in colleges and related arrangements.

Question 1.9.2
EBA: In the framework of 2019 ESAs' review, how do you assess the new EBA's role in monitoring the regulatory and supervisory developments, enforcement practices and market developments in third countries for which equivalence decisions have been adopted by the Commission?

Please refer to our response to Question 1.9.2 in relation to ESMA.

Question 1.9.2
ESMA: In the framework of 2019 ESAs' review, how do you assess the new ESMA's role in monitoring the regulatory and supervisory developments, enforcement practices and market developments in third countries for which equivalence decisions have been adopted by the Commission?

The roles of ESMA and the EBA in monitoring developments in third countries for which equivalence decisions are important to support the making of equivalence decisions and facilitating effective regulatory dialogue and supervisory cooperation with third countries. In particular it will be very important to establish an effective forum for cooperation and dialogue with the UK on regulatory developments following the agreement of the MoU establishing a Joint EU-UK Financial Regulatory Forum.

2.4 Involvement and role of relevant stakeholders

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

- Yes

- No
- Too many consultations
- Don't know / no opinion / not relevant

We believe stakeholders are not sufficiently consulted in relation to the Q&A process. Please see our comments under question 1.1.4.

Please also see our comments under Question 2.4.2 on the quality of ESMA's consultations.

Question 2.4.2
EBA: Please assess the quality, in your view, of the consultations launched by EBA:

	1 (lowest quality	2	3	4	5 (highest quality)	Don't know
General consultations launched by EBA			x			
Specific consultations when developing data collection requirements			x			

Generally, the quality of EBA consultations is good and their objectives are clear. We would note, however, the tendency for impact analysis to take a 'top of the firm' view rather than considering impacts on specific activities, customers, markets and financial stability.

Specific consultations when developing data collection requirements are usually logical and clearly set-out and we appreciate the high levels of detailed work that go into these papers. Owing to the highly technical nature of such consultations, industry will usually have detailed points which may not have been initially considered by the EBA which is to be expected and highlights the usefulness of the process.

As with our comments in relation to ESMA, it would be a welcomed practice to minimise or avoid the issuance of consultations over summer or year-end holiday periods. Consultations that fall under such holiday periods should have significantly longer consultation periods.

Question 2.4.2
ESMA: Please assess the quality, in your view, of the consultations launched by ESMA:

	1 (lowest quality	2	3	4	5 (highest quality)	Don't know
General consultation slaunched by ESMA			X			

Generally the quality of most ESMA consultations is good. However, there are examples of major issues arising in important consultation processes. Please refer to our comments under Question 5.4 on ESMA's Technical standards on disclosure requirements under the Securitisation Regulation.

As a general observation, we stress that market participants require sufficient time to comprehensively review what are often very lengthy and complex consultation proposals. Often, proposals will span multiple business lines within a single firm, as well as global activity. Analysing proposals and formulating insightful and constructive responses, supplemented with relevant data can take significant time and resource. Further, for many proposals impacting global or pan-European markets, our members find it vital to discuss and form consensus views in order to provide the most appropriate input. All of this requires sufficient time.

We note that the root cause for pressing deadlines and tight consultation processes often lies in Level 1 legislation, whereby scheduled review dates are mandated in the legal text, in turn setting deadlines for the ESAs to produce outputs. These timelines cannot account for unexpected developments such as the COVID pandemic or the accumulation of workstreams across dossiers. We recommend that greater flexibility is provided to the ESAs to defer delivery of reports where market circumstances indicate that this is necessary to ensure broad and deep engagement.

It would also be a welcomed practice to minimise or avoid the issuance of consultations over summer or year-end holiday periods. Consultations that fall under such holiday periods should have significantly longer consultation periods.

We also encourage the availability of a forward-looking and transparent approach to the consultation pipeline as much as possible. For example, we valued the application of a timeline of upcoming MiFID 2/R review reports in July 2020. The publication of an annual consultation work programme (similar to the annual supervisory convergence work programme) would be very useful for the purposes of planning and resource allocation.

Question 2.4.3
EBA: Is EBA sufficiently transparent and accessible for stakeholders to ensure effective and efficient interaction?

- Yes
- No
- Don't know / no opinion / not relevant

We welcome the roundtable and bilateral engagement that the EBA is prepared to undertake with stakeholders. In our view, it is important that this form of 'soft engagement' continues and is developed to allow an effective exchange of information and the on-going development of leading practices.

Question 2.4.3
ESMA: Is ESMA sufficiently transparent and accessible for stakeholders to ensure effective and efficient interaction?

- Yes
- No
- Don't know / no opinion / not relevant

We feel that there is a need to instil a culture of 'soft' consultation at ESMA that is not limited to formal published consultation and stakeholder groups, but which would consist of and include broader ongoing informal dialogue with the industry and consumers alike. We believe that ESMA should be required to organise on a periodic basis roundtable discussions in order to benefit from discussions with the industry on latest market practices and latest market developments. We do see progress in this area following the ESAs Review but believe there is room for further improvement.

We also stress that while the consultative working groups/ stakeholder groups are an important component in ensuring a formal consultation process, consultation should not be restricted to the individuals who are members of these groups. With capital markets rulemaking in particular, it is vital that there is an ongoing process of engagement with interested parties to enable ESMA to fully understand sometimes nuanced and complex issues. Such an approach would be more aligned with the Commission's Better Regulation philosophy. Moreover, active ongoing engagement with market participants would assist ESMA in identifying potential issues at an early stage.

We would encourage ESMA to pursue consultations and dialogue with stakeholders on high impact proposals at different stages of the policy formulation process. Early stage (pre-consultation) interaction with stakeholders could improve the effectiveness of consultations by allowing ESMA to test proposals before they are more formally "locked-in" as part of public written consultations and also allow ESMA and stakeholders to achieve a better understanding of their respective views on the problems, objectives, options and the impacts of different measures. In relation to some consultation processes (see, for example, "ESMA Final Report on MiFIR review report on the obligations to report transactions and reference data" published on 30 March 2021) ESMA noted that some respondents appear to have misunderstood or misinterpreted certain questions. Dialogue with stakeholders during the preparation of submissions and after written contributions have been submitted would allow participants to explain their written comments and to provide additional clarifications and address questions.

In relation to the roundtable discussions that ESMA organises, we stress the importance of ensuring fair and proportionate representation of the main perspectives relevant to a particular discussion. We underline the need for key affected parties – we emphasise investment firms and asset managers active in wholesale markets – to not be underrepresented in important discussions and would welcome greater visibility and feedback from ESMA on the criteria and selection process used to select the participants invited to the roundtables.

We would also welcome some enhancements to the way answers to consultations are analysed, considered and communicated by ESMA and the other ESAs in formulating their final recommendations on a subject. We recommend that:

- a quantitative analysis is systematically provided, together with a qualitative assessment of answers to major questions. This should include feedback on the number of respondents to a specific question per category of respondent and the proportion of answers supporting / opposing a proposal by the ESAs;
- the alternatives to the ESA's proposal provided by the respondents are listed and precisely described.

Question 2.4.6
Does the composition of stakeholders groups ensure a sufficiently balanced representation of stakeholders in the relevant sectors?

- Yes
- No
- Don't know / no opinion / not relevant

It is very important that the membership of the stakeholder groups is balanced and represents all the key constituencies concerned – the latter is, in our view, just as important as ensuring geographical and gender balance in the composition of stakeholder groups. AFME wishes to stress this aspect with reference to ESMA's work on wholesale markets which is our area of focus. It is important that ESMA's work on areas such as securities trading (which includes many non-retail

activities) and securitisation, to give two examples, reflects the perspectives of the key players in these markets. Key perspectives from wholesale participants – including wholesale investment firms active in the EU as brokers and liquidity providers, as well as asset managers – should not be underrepresented.

The stakeholder groups for all the ESAs need to balance representation with a requirement for technical knowledge covering all the areas of work of the respective ESA. Stakeholder groups could also consider seeking expert advise on a given issue to ensure their outputs provide robust technical commentary on a given area.

Question 2.4.7
In your experience, are the ESAs' stakeholders groups sufficiently accessible and transparent in their work?

- Yes
- No
- Don't know / no opinion / not relevant

Please indicate the areas where the transparency could be improved:

Generally AFME believes there is limited visibility in relation to the work of the stakeholder groups and the outputs they produce.

2.5 Joint bodies of the ESAs

Question 2.5.3
Please assess the work of the Joint Committee of the ESAs in the areas below:

	1 (less significan timpact)	2	3	4	5	Don't know
Consumer Protection and Financial Innovation						
Coordination and cooperation for bi-annual Joint Risk Reports, published in spring and autumn						
Financial Conglomerates						
Securitisation			X			
European Forum of Financial Innovators						

If you identify areas for improvement, please explain:

The Joint Committee of ESAs performs an important role in interpreting and clarifying various ambiguities that have arisen in the implementation of the Securitisation Regulation.

Possible areas for improvement include:

- Policy coordination among EU authorities and the need to ensure that experts in

securitisation feed into the policymaking process is key.

- The securitisation regulatory and supervisory framework features numerous interdependencies under the responsibility of different EU bodies. They include not just the ESAs but also several DG FISMA units, the ECB and the wider network of supervisors, the European Parliament and Council.
- Coordination of policy outcomes and decision-making across the various technical and supervisory work areas is vital. It must be consistent with the aim of supporting well-functioning securitisation as a building block of the CMU.
- It is also important that decision-making is driven by experts with sufficient understanding of the operation of securitisation. Some frameworks have caused significant challenges as unhelpful and overly conservative legal interpretations from non-experts have led to results which have been very unhelpful and not designed for the specificities of the securitisation market – for example the application of templated disclosure to private transactions under the transparency and disclosures regime.

3. Direct supervisory powers

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

Given the diverse nature of capital markets and products, the principal supervisors in most capital market areas should continue to be the NCAs. ESMA's role as a direct supervisor makes sense when there are a small number of large entities which operate in the whole or large part of the EU (for example, trade repositories or credit rating agencies).

Incremental steps to expand ESMA's mandates and powers could be considered following a longer period of application of the existing tools and powers as expanded following the 2019 ESAs review and following a careful assessment of supervisory needs.

In the field of Anti-Money Laundering, AFME supports harmonisation of the EU-level AML/ CFT supervision but notes that a clear scope and mandate for an EU AML/ CFT supervisory authority will need to be defined at the outset. We believe that key in reviewing the EU AML/ CFT supervision framework will be to ensure that:

- The EU authority has very clear powers to oversee and instruct national authorities to carry out different AML/CFT related tasks;
- The EU authority ensures the promotion and enforcement of fully harmonised standards.
- The EU authority be equipped with sufficient resources and qualified staff.

Question 3.4
Have you identified any areas where supervision at EU level should be considered?

- Yes
- No
- Don't know / no opinion / not relevant

Aside from our comments below on ESG service providers, we believe the existing direct supervision mandates of ESMA remain sufficient and appropriate.

We are supportive of the expansion of ESMA's direct supervision mandates – which will start in January 2022 – in respect of (1) EU critical benchmarks and their administrators and (2) data providers (APAs, ARMs and consolidated tape providers) as a result of the 2019 ESAs review.

ESMA's mandates in respect of data providers will be particularly important in the context of the CMU Action Plan objectives regarding the consolidation of core market data. AFME believes that an appropriately constructed consolidated tape for equities and bonds can help to build deeper and more open capital markets in the EU.

ESG service providers

Considering the increased regulatory demand for ESG data, AFME supports consideration of an extension of ESMA's direct supervisory powers to cover ESG service providers (data and ratings), together with a future EU regulatory regime in this area. The comparability, quality and reliability of ESG data from ESG providers currently available in the market could be increased by improving the level of transparency of rating methodologies and data processing. EU level supervision of ESG service providers would ensure that a pan-European, single and consistent supervisory approach is implemented. It would also ensure that the various disclosure requirements for financial and non-financial companies can build on reliable and comparable data.

5. The ESAs work towards achieving a rulebook

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

- Yes
- No
- Other
- Don't know / no opinion / not relevant

The technical standards and guidelines/recommendations developed by the EBA are consistently of a good quality in relation to liquidity and reporting matters and we continue to appreciate the collaborative approach that is taken with industry. Owing to the complexities of these topics there are, however, invariably many areas for interpretation and sometimes the use of individual and firm specific approaches. We believe that this continues to highlight the importance of effective frameworks for the on-going development of the 'soft' engagement mentioned in section 2.4.3 above to ensure consistency and the application of good practice.

Question 5.1
ESMA: Do you consider that the technical standards and guidelines/recommendations developed by ESMA have contributed sufficiently to further harmonise a core set of standards (the single rulebook)? If you have identified areas for improvement for ESMA, please explain.

- Yes
- No
- Other
- Don't know / no opinion / not relevant

Many technical standards and guidelines/recommendations developed by ESMA have contributed to harmonisation and the development of single rulebook. However, there are examples where ESMA's guidelines have led to divergence. For example, an overly narrow interpretation in ESMA's Guidelines of how the market making exemption in the Short Selling Regulation (SSR) should be applied led to a situation where ESMA's guidelines were not followed in full by all Member States. We believe this was caused by the introduction of requirements in ESMA's guidelines that went beyond what was required in the Level 1 text of the SSR. We made representations to ESMA and the European Commission at the time when the guidelines were being developed explaining our concerns and providing legal analysis supporting what we considered an appropriate interpretation of the Level 1 text.

Question 5.2
Do you assess the procedure for the development of draft technical standards as foreseen in the ESA Regulations effective and efficient in view of the objective to ensure high quality and timely deliverables? Please specify what your mean by 'other' in your answer to question 5.2. Please explain your answer to question 5.2. If you have identified areas for improvement, please explain.

- Yes
- No
- Other
- Don't know / no opinion / not relevant

As explained under Question 6.6, an ongoing challenge in EU legislative processes remains the need for realistic implementation timelines and 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.

Question 5.4
In particular, are stakeholders sufficiently consulted and any potential impacts sufficiently assessed? Please specify what your mean by 'other' in your answer to question 5.4.

- Yes
- No
- Other
- Don't know / no opinion / not relevant

In the area of securitisation, AFME believes that issues regarding the legal interpretation of Level 1 requirements, which created significant problems to market participants, were not subject to an appropriate consultation process by ESMA. We refer to the proposals set out in ESMA's Final Report on "Technical standards on disclosure requirements under the Securitisation Regulation" published on 22nd August 2018. This Final Report featured an approach that created major challenges to market participants and affected the launch of the new STS Framework and the functioning of securitisation markets in Europe generally. It included new and unexpected proposals which were materially different from those on which ESMA consulted from December 2017 to March 2018. The proposals required private securitisations to disclose the same information as public transactions, an approach which we believe was inappropriate and inconsistent with the needs of the European securitisation market. The new proposals in the Final Report should have been subject to full consultation with the industry given the very significant changes made after the publication of the original consultation. AFME understands that the reason for the removal of the adjusted standard for private transactions was legal advice received by ESMA and the Commission (after the initial consultation) that it was not possible under the

Level 1 text to provide an adjusted regime for private transactions. AFME disagrees with the view that the Level 1 text prohibited an adjusted standard for private transactions. At the time, we raised concerns about proportionality and questioned whether the co-legislators could have intended a disclosure requirement so burdensome as to make it not practically possible for large numbers of issuers and originators to meet it – thereby running a serious risk of closing large parts of the securitisation markets that were functioning well.

While the market has done as much as it reasonably can to transition to the new standard, difficulties still remain which act as a continuing burden and deterrent to issuers to undertake securitisation.

Question 5.6
Would you consider it useful if the ESAs could adopt guidelines in areas that do not fall under the scope of legislation listed in Article 1 (2) of the ESAs founding Regulations and are not necessary to ensure the effective and consistent application of that legislation? Please specify in which areas it would be useful for the ESAs to adopt such guidelines:

- Yes
- No
- Don't know / no opinion / not relevant

We believe it is very important that guidelines by the ESAs:

- do not go beyond the scope of agreed provisions in Level 1 acts – i.e. guidelines should not extend the scope of provisions covered or impose additional obligations;
- are limited to clarifying specific aspects related to rules adopted;
- fully adhere to the political mandates;
- are subject to open public consultations as a rule – market participants should continue to be allowed to provide their input to the drafting process and to express their view about their potential impact of proposed guidelines before they are finalised.

Question 5.10
EBA: What is your assessment of the work undertaken by EBA regarding opinions and technical advice?

The EBA's CFAs on Basel III have been an extremely impressive and comprehensive body of work and provided much needed insight into the impact of Basel III on the EU banking system. There have nonetheless been some areas where we would recommend improving transparency:

- Providing insight into the actual capital shortfall banks will face to meet market expectations not just the required minimum capital. This is important as banks' capital plans will be based on market determined capital requirements which will always be in excess of regulatory minima. Providing improved transparency in this area will allow for a better understanding of the capacity that banks have to support their customers particularly during periods of stress. It will also enable a better assessment of the time that will be needed to reach the market required levels of capital and how this might in the meantime interact with lending capacity and distribution policies.
- In the latest exercise the EBA took out some of the biggest dealer banks from the sample (this exercise therefore may not be fully representative of EU capital markets).

6. General questions on the single rulebook

Question 6.1
Which are the areas where you would consider maximum harmonisation desirable or a

higher degree of harmonisation than presently (rather than minimum harmonisation)?

We believe the EU would benefit from greater convergence of national insolvency laws and support the CMU objectives in this area.

There would also be benefit in harmonising EU-wide definitions of key concepts in financial markets (e.g. financial instrument or legal owner of a security) and standardising rules and operational practices in post-trading, including corporate actions processing, to deepen integration and achieve legal and operational consistency.

A truly integrated single capital market requires consistent definitions of fundamental legal and operational concepts. Without consistent definitions, investors and other market participants are faced with significant complexity and risk in their capital market activities.

Two important core concepts are those of financial instrument, and of legal owner ("shareholder") of a security. (1) Without a consistent definition of financial instrument, market participants are faced with the reality that whether an asset is considered a financial instrument, and whether EU rules relating to financial instruments are applicable, may depend on different national definitions. (2) If national laws identify as the legal owner of a securities position a party in the custody chain other than the end investor, then this creates operational complexity, and the potential risk that the legal owner may be treated as the owner in the event of an insolvency, or with respect to the exercise of rights associated with the securities. The end investor is the party at the end of a custody chain that holds the securities position on a securities account provided by a CSD or an intermediary but that does not book those securities on any securities account provided by itself to a client.

Meanwhile, a lack of standardisation of rules and operational practices governing the attribution of entitlements to participate in corporate actions, and the exercise of those entitlements, increases the cost and risk of corporate action processing for end investors and for intermediaries (brokers and custodians). As a result, some end investors may not be able to exercise the rights associated with their ownership of securities, and end investors and intermediaries face barriers accessing national securities markets across the EU.

In respect of the supervision of CSDs, AFME agrees with the CMU HLF Report which stated that "ESMA's work within the current scope of its mandate in terms of convergence should be continued and strengthened. The aim should be to ensure convergence in supervisory approaches across the Member States to reduce administrative burdens on CSDs and to generate the value added for the EU financial markets in terms of the CSDR objectives."

Another area where greater harmonisation would be desirable would be in the field of reporting. Currently, there are overlaps in reporting requirements, the same information being asked by different supervisors at national and European level and entities have had to adapt in order to comply with the various requirements. We consider that greater coordination among authorities could be of significant help for these purposes. Reporting requirements should be aligned across Member States, including in a limited number of templates all the information needed by all the different regulators and supervisors at different levels.

Question 6.2
Which are the areas where you consider that national rules going beyond the minimum requirements of a Directive (known as "gold- plating") are particularly detrimental to a single market?

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

It is important to monitor and address instances of harmful gold-plating of EU legislation. By way of example, AFME members report that in Spain rules regarding the outsourcing authorisation procedure are stricter. While the EBA guidelines require to 'adequately inform competent authorities in a timely manner' regarding the planned outsourcing of critical services, the obligation established in Rule 43 of Circular 2/2016 of Bank of Spain is that entities 'formally inform beforehand, with a minimum period of one month, any planned outsourcing of critical services'. This results in a de facto approval procedure that brings to a halt any outsourcing process until the conformity (as a 'non-opposition') of the supervisor is received. We believe that this creates challenges for Spanish banks requiring therefore the need to adapt national legislation (i.e.: RD 84/2015 and Circular Bde 2/2016) to European rules (EBA/GL/2019/02).

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

An ongoing challenge in EU legislative processes remains the need for realistic implementation timelines and 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.

The Securitisation Regulation is a case in point: the new framework went live on 1 January 2019 with much of the Level 2/3 work incomplete, which caused significant challenges to market participants. The implementation of the Market Abuse Regulation (MAR) was another example that demonstrated the negative impacts on implementation for both the industry and NCAs when Level 2 rules were finalised after the application date of the Level 1 Regulation. In the last few years EMIR (i.e. margin rules), CSDR, PRIIPs or MiFID II/MiFIR have proved how challenging, and sometimes impossible it is to meet absolute application dates.

The delegation of tasks to the ESAs, and their time and resources for them, should be considered once a 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 make the following recommendations:

- 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. Stakeholders should be given ample time to consider the implications of Level 2 measures and feed their input into the ESAs various consultations;

- the Level 1 measures should allow enough time for Level 2 and 3 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.

The Commission and co-legislators should also consider allowing in Level 1 texts the possibility of applying a phased approach to the implementation of high impact regulatory changes, as opposed to a "big-bang" implementation of major new frameworks.

Another aspect where concerns have emerged is in the interaction between the timing of entry into application of a regulatory requirement and the timing of a legislative review concerning the respective requirement. For example, a broad review of the CSDR is due to be launched by the Commission in 2021. However, the current date of entry into application of the CSDR settlement discipline regime is 1 February 2022. This means that the CSDR is expected to be under review by the Commission and co-legislators at a time when key requirements in the settlement discipline area – specifically the mandatory buy-in requirement which requires revision before attempting implementation – are due to go live. AFME members are currently facing significant uncertainty in this area.

AFME and other associations have written to the Commission and ESMA to highlight that the current legislative timetable requires market participants to proceed with a major implementation exercise without any indication of the scope or timing of the review process - noting that some revisions to the mandatory buy-in regime are essential. At best this will result in ongoing implementation efforts and investment being rendered redundant; at worst it will mean repeating the exercise. Having such uncertainty around a regulatory implementation project of this profile and scale is damaging to the development and reputation of the EU's financial markets.

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

- Yes
- No
- Don't know / no opinion / not relevant

☐ YES Please specify which one

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

Other			

Banking

Please identify the specific piece(s) of legislation at level 1 in the area of banking that should become more detailed and contain a higher degree of harmonisation and explain:

The benefits of the Banking Union have yet to materialise for the European banking sector. Cross-border capital and liquidity flows remain restricted and the Banking Union is not yet recognised as a single jurisdiction.

An example of regulatory fragmentation are the rules for internal MREL, which require a full allocation of loss-absorbency at the subsidiary level, contrary to the spirit of the globally agreed standards which provide for greater flexibility. Moreover, transactions between entities within the same banking group (intragroup transactions) do not receive any regulatory relief in the European prudential framework, and are applied at the level of every subsidiary of the bank (at "solo level", as opposed to the group/consolidated level). Whereas, they are calibrated by the Basel Committee for application at the "consolidated level". This imposes additional costs on firms and hampers the flow of funds within banking groups.

Some European authorities have adopted ring-fencing policies. There are multiple studies showing that ring-fencing is characterised by a "prisoner's dilemma" effect, whereby the advantages for a ring-fenced jurisdiction in the form of a reduced probability of local failure only materialise if no other jurisdiction adopts similar decisions. If all jurisdictions enact similar ring-fencing policies, the benefits of a central "reserve pool" of capital held at parent group level are lost and they are all worse off.

Some European authorities have adopted ring-fencing policies. These inhibit the free flow of capital and liquidity across the Union and as studies have shown risk make the banking system as a whole more brittle. If accepted, the maintenance of a central "reserve pool" of capital with clear conditionality attached to its use is likely to stimulate progress towards a genuine Banking Union. Should this not be possible then legislation permitting the waiver of local capital and liquidity requirements where certain thresholds were met would be an alternative way forward, provided that such thresholds did not require excessive levels of localised capital and liquidity to be held in relation to the risks that they were supporting.

Market infrastructure (CCPs, CSDs)

Please identify the specific piece(s) of legislation at level 1 in the area of Market infrastructure that should become more detailed and contain a higher degree of harmonisation and explain:

The European post-trade landscape remains fragmented along national lines, impairing cross-border investment. AFME believes that the review of the CSDR should aim to facilitate the ability of CSDs to provide services to issuers on a cross-border basis, and tackling the barriers in the CSDR that restrict the provision of such services.

An important factor leading to the segmentation of national capital markets across Europe is the existence of nationally based issuer CSDs, coupled with differences and complexities in access requirements. One of the objectives of CSDR was to achieve increased competition in the provision of services by issuer CSDs to issuers, and to encourage the development of issuer CSDs that can offer services to issuers from many countries. With respect to these objectives, CSDR has

had very little effect, with very few CSDs currently being able to offer services to issuers on a cross-border basis.

One significant reason is the complexity and cost of the CSDR process for the authorisation of such services, as set out in Articles 23 and 49 of CSDR. This specific CSDR process is much more burdensome than the standard "passporting" process under most European legislation.

The review of CSDR should lead to measures to increase competition between CSDs. One specific measure should be to bring the CSDR "passporting" process into line with the approach taken by other pieces of European legislation.

In the area of settlement finality, in order to achieve the aims of the legislation (the Settlement Finality Directive) and ensure the primacy of the settlement finality rules over national insolvency regimes, we suggest that the legislation should take the form of a Regulation.

In relation to the settlement discipline regime, AFME believes that the establishment of a central database of in-scope securities subject to the settlement discipline regime (and the relevant reference price, penalty rate and extension period) maintained by ESMA is essential to providing clarity for all market actors and reducing the likelihood of disputes.

Market organisation (MiFID, MIFIR, MAR)

Please identify the specific piece(s) of legislation at level 1 in the area of Market organisation that should become more detailed and contain a higher degree of harmonisation and explain:

MIFID II/R Post-trade transparency deferrals regime

In relation to post-trade transparency requirements for fixed income instruments under MiFID/R, the national discretion enshrined in the current regime regarding post-trade transparency has resulted, so far, in a non-harmonised application of deferrals. We are supportive of harmonisation across the deferrals regime; however, we caution that such harmonisation should not reduce the maximum T+2 price and 4 week volume deferral period, so as not to cause any undue risk to liquidity providers.

Data consolidation/Golden source

We support the creation of a "golden source" listing all instruments which are in scope for transaction reporting and post-trade transparency under MiFID II/R. Provided that improvements are made both to reliability and quality of FIRDS, we deem this register as the "natural candidate" to operate as a "golden source". More broadly, it would be useful that all ESMA registers become golden sources i.e. unique and reliable databases which would i) enable market participants to use the same sets of data ii) provide market participants with comfort that the same data is consistently applied by different reporting parties thereby reducing the risk of inconsistent/discretionary reporting and iii) provide market participants with clarity regarding the scope of their reporting obligations (e.g. which financial instruments are eligible for reporting and which are not under MiFID II/MiFIR reporting rules).

Please specify to what other legislative area(s) you refer:

- Anti-Money Laundering
- Shareholder Rights Directive (SRD II)

Please identify the specific piece(s) of legislation at level 1 in this/these other area(s) that should become more detailed and contain a higher degree of harmonisation and explain:

- Anti-Money Laundering Directive
- Shareholder Rights Directive (SRD II)

Please provide examples in this/these other area(s) and explain:

Anti-Money Laundering

The EU current minimum harmonisation approach has resulted in a fragmented AML/CFT regulatory landscape. Some of the areas that require immediate attention at EU level include the following.

Moving towards a maximum harmonisation approach: A clear, co-ordinated and simplified set of rules that need to be directly transposed into Member States laws will help to better tackle financial crime. Some of the priorities areas that should be further harmonised include identification of beneficial owners (which should be aligned with FATF recommendations and performed on a risk-based approach), harmonisation of the application of Enhanced Customer Due Diligence (EDD) measures for transactions involving high-risk third countries, definitions of Know Your Customer triggers (including, but not limited to: harmonised definition of the term suspicious activity report (SAR) and SAR-Filing-Threshold, uniform rules on filing STORs and SARs, harmonisation of 'Record Keeping' and 'Record Deletion' requirements, a common list of asset freezes that would make the customer screening processes across the EU more effective). Additional areas which could be harmonised through a regulation include: standardisation of Data verification requirements, recognising Digital identity verification (eID) as an integral and reliable part of CDD processes, and clarifying and harmonising expected due diligence measures.

Shareholders Right Directive (SRD II)

The adoption of the new SRD II has not been conducive to harmonisation among Member States. The most relevant reasons include: i) late transposition and adoption of implementation regulations among Member States ii) conflicts with legacy domestic legislation iii) technological challenges iv) COVID-19 disruption.

The lack of a harmonised definition of "shareholder" at EU level raises interpretative doubts about the fulfilment of the obligations for intermediaries under the current legislation and stands out as the most serious flaw of the current SRDII regime.

Additional flaws of the SRDII regime include:

- the absence of clear definitions and rules regarding, e.g, i) the scope of the discipline as well as ii) the information flow across the value chain as a whole together with the heterogeneity of the transpositions at national level as well as secondary local implementing regulations and operational market practices raise legal uncertainties in addition to operational risks and make extremely problematic both the interpretation and the application of many rules of the above-mentioned regime, both legally and operationally throughout the custody chain;
- a clear, specific and unambiguous definition of "corporate event" is still missing. Seemingly, it is not clear whether SRDII and Implementing Regulation 2018/1212 should apply i) exclusively to those corporate events which imply an option right to the benefit of the shareholders or ii) to the whole set of these events. Precise definition of the financial instruments in scope is desired;
- the definition and rules regarding electronic voting are not harmonised throughout the

different EU27 Member States' legal systems.

We welcome the intention announced in the CMU Action Plan to assess the possibility of i) introducing an EU definition of 'shareholder' and ii) further clarifying and harmonising the rules governing the interaction between investors, intermediaries and issuers as regards the exercise of voting rights and corporate action processing and to investigate in particular the following: i) the attribution and evidence of entitlements and the record date ii) the confirmation of the entitlement and the reconciliation obligation iii) the sequence of dates and deadlines iv) any additional national requirements (in particular, requirements of powers of attorney to exercise voting rights) and v) communication between issuers and CSDs as regards timing, content and format.

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