EFAMA

European Fund and Asset Management Association

EFAMA REPLY TO EUROPEAN COMMISSION's TARGETED CONSULTATION ON THE SUPERVISORY CONVERGENCE AND THE SINGLE RULE BOOK

21 May 2021

Rue Marie-Thérèse 11 | B-1000 Bruxelles
T +32 2 513 39 69 | info@efama.org | http://www.efama.org/
EU transparency register: 3373670692-24

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EXECUTIVE SUMMARY

Since its founding about a decade ago, ESMA has gradually become more relevant in regulating EU capital markets, by fulfilling both a direct supervisory, as well as a broader coordination mandate between the national competent authorities (NCAs). Insofar as asset management activities are concerned, across both individual and collective portfolio offerings, we observe that ESMA's track record – as a consultative and coordination body, entrusted with key regulatory powers in the preparation of implementing Level 2 and Level 3 measures – remains to be improved.

Such improvement should come about not by further expanding its existing powers, but by making more efficient and effective use of those already at its disposal. The latter have been only recently enhanced via the conclusion of the ESFS review with the publication of an amended ESMA Founding Regulation in December 2019 and effective since January 2020. Since then, ESMA has hardly had sufficient time to test its enhanced convergence powers and draw meaningful conclusions from them, rendering the purpose of the present consultation largely premature.

We therefore do not support any changes to the ESMA Founding Regulation, or further "quick fixes" to other relevant sectoral legislation applying to our industry at this stage. Instead, ESMA should be granted more time to fully and effectively avail itself of its renewed convergence powers. Through these, the creation of a Single Rulebook and consistent European-wide supervision for the asset management industry can thus be achieved within the current framework, albeit more gradually and with more predictable outcomes for firms and their clients alike.

More broadly, we have identified several areas for improvements that could already strengthen ESMA's role at the centre of EU capital markets:

- First, given the urge to adopt new legislation in light of prevailing political priorities, ESMA is often not given enough time to consult both its own members and external stakeholders on very technical matters and to a sufficient degree. As a result, ESMA's Level 2 or Level 3 outputs are not sufficiently thorough, nor clear, leading to divergent interpretations between NCAs and market participants alike. Accompanying this is the excessive granularity of Level 1 requirements, to the extent that ESMA cannot define critical technical details to a sufficient degree;

- Second, a better synchronisation of the legislative process with ESMA's Level 2 and Level 3 work via longer timelines thus remains critical for ESMA to gain greater experience and credibility vis-à-vis EU capital market players. In this context, we also strongly call for ESMA to exercise regulatory forbearance powers in the form of "no-action letters" by allowing NCAs and firms to temporarily waive (Level 1) requirements that are incomplete in the absence of implementing acts or guidelines. We note in this regard that the new provisions included in ESMA's amended Founding Regulation to this effect remain unsatisfactory;

- Third, such improvements must be accompanied by a greater emphasis on NCAs' ongoing supervision and enforcement actions, as EU rules cannot and should not be amended continuously. To the extent that ESMA can allow NCAs to share their experiences and best practices in supervision and enforcement cases, and possibly even coordinate between individual national actions, we believe that its authority can only be further strengthened;

- Finally, there are unregulated business activities where greater regulatory focus and scrutiny would be welcome. We refer in particular to the activities of critical service providers in the ICT and sustainability-related services realm. In relation to the latter, we consider it important that EU-wide regulation for ESG data providers be considered, even the prosect of a direct mandate for ESMA in this regard.

As a concluding remark, we believe that supervisory and regulatory convergence through the ESAs should be pursued to deliver the ambitions of CMU, as a crucial factor to ensure comparability and a regulatory level-playing field across Member States. To deliver such objective in a more practical and efficient manner, we consider that the ESAs – and ESMA in particular as far as asset management activities and actors are concerned – should prioritise by realising greater convergence in some of the thematic areas highlighted in their annual work programmes, rather than via Level 1 empowerments handed down from the EU legislators. As an example of this improved *modus operandi*, one could consider the many areas where ESMA has opted to consider supervisory briefings, launch common supervisory actions (CSAs), thematic reviews, etc.

CONSULTATION QUESTIONS

A. QUESTIONS FOR THE ASSESSMENT OF THE EUROPEAN SUPERVISORY AUTHORITIES (ESAS) AND THE RECENT CHANGES IN THEIR FOUNDING REGULATIONS.

General questions

Question I ESMA: How do you assess the impact of each ESA's activities on the aspects below?

	1 (less significant impact)	**2** (not so significant impact)	**3** (neutral)	**4** (significant impact)	**5** (most significant impact)	**Don't know – No opinion – Not applicable**
The financial system as a whole	☐	☐	☐	☐	☐	☒
Financial stability	☐	☐	☐	☐	☐	☒
The functioning of the internal market	☐	☐	☐	☐	☐	☒
The quality and consistency of supervision	☐	☐	☐	☐	☐	☒
The enforcement of EU rules on supervision	☐	☐	☐	☐	☐	☒
Strengthening international supervisory coordination	☐	☐	☐	☐	☐	☒
Consumer and investor protection	☐	☐	☐	☐	☐	☒
Financial innovation	☐	☐	☐	☐	☐	☒
Sustainable finance	☐	☐	☐	☐	☐	☒

Please note: By eliciting answers through the compilation of the above multiple-choice answer table, EFAMA notes that the questions raised can be interpreted in several ways, leading to very different possible answers. We therefore prefer to express our views in writing by answering the questions below.

Please explain your answer to question I on ESMA

We believe that ESMA can leverage its existing powers further to develop an effective and consistent supervision and single rulebook across the EU. Among the **areas for improvement**, we believe that

in its technical standards and guidelines ESMA should strike a better balance between clearer regulatory expectations and flexibility for market participants. Moreover, we note that ESMA's supervisory convergence tools – in particular Q&As, CSAs, and "no-action letters" – could be further refined (please refer to questions III, 1.1.5, 1.2.1, 1.4.10, 1.7.5, and 5.1 for more details).

In relation to **financial stability**, ESMA's activities in the asset management sector have overall enhanced the resilience of the EU financial system. Its Guidelines on Liquidity Stress Tests and Leverage represent a clear example in this regard, accompanied more recently by a Common Supervisory Action (CSA) on UCITS Liquidity Risk Management. We generally welcome ESMA's findings according to which the European asset management industry remains resilient with adequate liquidity risk management processes in place and overall low levels of leverage, demonstrating that there may often be excessive concerns over the investment management industry's perceived systemic importance (please also refer to questions 4.1 and 5.1).

Regarding the **functioning of the internal market**, ESMA is expected to further strengthen the Single Market for investment funds, following the review of the UCITS and AIFMD frameworks under the recent amendments aimed at removing cross-border barriers to fund distribution (e.g. the setting-up of a central database containing the summaries of national requirements for marketing communication and the list of all UCITS and AIFs that operate cross-border). In this regard, we nevertheless note that, once again, critical Level 1 amendments to the UCITS and AIFMD frameworks will soon become effective (as from 2 August 2021) in the absence of the accompanying and necessary final guidelines (i.e. those on marketing materials which are unlikely to be translated in time and come into effect by the abovementioned date). Moreover, in relation to the adoption of ESMA's draft ITS on the standardisation of information for cross-border fund distribution stemming from the recent amending regulation (i.e. Regulation 2019/1156), the Commission is yet to adopt these at the time of writing, leaving firms hardly sufficient lead time to prepare.

Concerning the **quality and consistency of supervision,** national supervision over the European asset management industry is of a high quality, although additional efforts are required to ensure consistent supervision across Member States. Throughout our response, we stress that ESMA has improved the quality of supervision in Member States by adopting guidelines, opinions and Q&As. These instruments, as well as the enhanced supervisory convergence tools emerging from the recent ESFS review (such as peer reviews and CSAs), shall further contribute to build a common supervisory culture. In this respect, please refer to questions 1.1.1, 1.5.1 and 1.7.5 for our assessment.

In relation to the **enforcement of EU supervisory rules**, we recommend that ESMA should be more active in monitoring and ensuring a consistent enforcement of EU law across the continent. ESMA only conducts a few investigations on breaches of Union law each year and has also been slow in monitoring the use of sanctions in Member States under the UCITS and AIFM Directives. ESMA could certainly play a bigger role in this area through a better appreciation of the use of sanctions by Member States, as important differences remain in the number of measures that are taken each year and the amount of monetary sanctions imposed on contravening parties (please refer to question 1.5.1 on breaches of Union law).

As to **international supervisory coordination**, we are not able to assess how ESMA has contributed, in accordance with Article 33 of its Founding Regulation, to improve the EU's monitoring of third-country developments. We can, however, opine on the role that ESMA has played within IOSCO and the FSB. Here, we would appreciate ESMA becoming more active in the recurring debate on the alleged systemic vulnerabilities in the asset management sector, currently influenced by the central banking community (see also questions 1.9.1 and 1.9.2).

Regarding **consumer and investor protection**, ESMA has had a positive impact in the EU, notably

by adopting numerous technical standards, guidelines, and Q&As in the interest of investors and banning products that were harmful to the average European consumer. We note, however, that despite ESMA's best efforts, investor protection is one of the areas where there is yet the most divergence between Member States. Beyond this, it is difficult for EFAMA to assess more granularly how ESMA has contributed to investor protection given that little information on ESMA's analysis of consumer trends, market conduct reviews, etc. is available. We nonetheless call for more investor education initiatives, as financial education contributes to both better investor protection, as well as to improved financial stability (please refer to section 1.8 for additional views).

Finally, regarding **sustainable finance**, we note that ESMA has played a positive role in the development of the European sustainable finance framework. We welcome ESMA's commitment to promoting sustainable finance as demonstrated by its recent Strategy on Sustainable Finance.[1] So far, ESMA's main achievements in this area, for the asset management industry at least, have been to adopt RTS on respectively the SFDR and the Taxonomy Regulation. We elaborate on some of our outstanding concerns with these RTS in our response to question 5.1 further below. Notwithstanding our reservations, the role of ESMA in the preparation of guidelines and Q&As on many aspects stemming from EU sustainability initiatives and which remain to be clarified will be crucial in the near future.

Question II. ESMA: In your view, do ESMA's mandate cover all necessary tasks and powers to contribute to the stability and to the well-functioning of the financial system?

☐ Yes

☒ No

☐ Don't know / no opinion / not relevant

If you think that there are elements which should be added or removed from the ESMA's mandate, please provide a substantiated answer:

EFAMA believes that ESMA has all the necessary tasks and powers to contribute to the stability and the well-functioning of the European asset management industry. While we oppose any direct supervision by ESMA over the European asset management industry and any extension of ESMA's supervisory convergence powers, we recognise that expanding ESMA's powers in the areas of sustainable finance and digital operational resilience may be called for.

In principle, we are in favour of regulation for ESG data, research and ratings, as expressed recently by the French and Dutch securities supervisors[2]. As a preliminary step, an *ad hoc* mandatory regulatory framework for sustainability service providers (SSPs) should be adopted by the EU, accompanied where warranted by the potential direct supervision by ESMA over some of these, as for instance ESG rating providers. We also believe that ESMA should play a role in establishing and governing the European Single Access Point (ESAP).[3] Lastly, we agree with the European Commission's DORA proposal, according to which the ESAs should directly supervise ICT third-party service providers that are deemed crucial for the orderly functioning of European capital markets (please refer to question

[1] ESMA Strategy on Sustainable Finance, 6 February 2020, available at the following link.
[2] AMF/AFM Joint Position Paper, *Call for a European Regulation for the provision of ESG data, ratings, and related services*, December 2020, available at the following link.
[3] EFAMA Response to the European Commission's consultation on the establishment of the European Single Access Point (ESAP), 12 March 2021, available at the following link.

3.4 for more details).

As regards **direct supervision over asset management companies**, it is our long-standing position that ESMA should not receive direct oversight powers over these. NCAs remain the best suited for supervising asset managers, be they UCITS management companies or AIFMs (including those managing EuVECAs, EuSEFs or ELTIFs). NCAs have a long-standing experience in authorising and supervising asset managers and investment funds in their jurisdictions. They are also closer to local markets and understand their specificities, as well as the additional requirements applying to market actors (including investors) in critical areas where EU laws are still not harmonised as for instance corporate law, contract law, insolvency law, tax law, etc. (see also question 3.4 for more specifics).

Concerning **supervisory convergence in the asset management sector**, the European securities supervisor already has a large spectrum of tools at its disposal. Yet, these tools, and in particular guidelines, are not always used to their full potential. It is thus not warranted to grant ESMA any additional powers as long as the existing toolbox is not utilised to its fullest (please refer to question III in this regard). Furthermore, we note that ESMA has barely begun using its new powers stemming from the 2019 Review of ESMA's Founding Regulation. These include, among others, thematic reviews [Article 9(1)(aa)], supervisory briefings/common supervisory actions (CSAs) [Article 29(2)], peer reviews [Article 30], and coordination groups [Article 45b]. Given that these new powers only came into force in January 2020, more time is needed to evaluate their effectiveness in bringing about greater supervisory convergence.

Lastly, we call the attention of the European Commission to support the **competitiveness of the European financial sector**, including asset management companies operating in accordance with EU Single Market rules. It is necessary, for instance, to preserve the competitiveness of the latter while these serve their clients worldwide and face rising competition in foreign markets. Increasingly, however, European asset managers face the prospect of losing their competitiveness as a result of EU regulation that is often disproportionate and difficult, where not impossible, to implement. Moreover, there is also an intra-EU competitive dimension that deserves to be acknowledged: increasingly burdensome regulation will likely lead to a far more consolidated market, preventing the entry of new market participants and the burgeoning of innovation in ways to better manage investors' money in support of the European recovery and its sustainable transition.

Looking at the international landscape, it is also worth noting that, in other jurisdictions such as in the United Kingdom and the United States, governments have mentioned the competitiveness of their national financial industry as one of their supervisors' key objectives.[4] Yet, ESMA's present mandate does not include competitiveness and, in light of ESMA's results over the past 10 years, considerations around the EU's competitiveness have been absent from its supervisory culture. The Commission could therefore consider to include as a longer-term objective the competitiveness of the European financial industry in the list of objectives to be pursued by ESMA by amending Article 1, paragraph 5, of ESMA's Founding Regulation. We believe this amendment is important to also mark a decisive shift of the European supervisor away from what our industry perceives as a bias against market-based financing and one that is responsible – together with low levels of financial literacy – for keeping the bulk of the EU's household population away from EU capital markets. In this regard, we urge the Commission to realise that investment outcomes for investors are just as important as their protection, where more regulation is not always and necessarily the better outcome for them.

In sum, EFAMA believes that, beyond the prospect to consider additional competence in the areas of

[4] Please refer, for instance, to *Executive Order 13563: Improving Regulation and Regulatory Review* for the United States (available here) or *Letter from the Chancellor of the Exchequer providing recommendations for the FCA* in the case of the United Kingdom (available here).

sustainable finance and digital operational resilience, ESMA already disposes of all the necessary tools to foster a qualitatively good and consistent regulatory environment for the European asset management industry.

Question III. ESMA: In your view, does ESMA face any obstacles in delivering on its mandate?

☒ Yes

☐ No

☐ Don't know / no opinion / not relevant

Please explain what you consider to be the main obstacles for ESMA:

Several obstacles prevent ESMA from further contributing to a high-quality and consistent European-wide regulation by relying on its existing toolkit. We make a few observations in this regard as follows:

Confusion, conflicts and uncertainties between Levels 1, 2 and 3

We note that legislative acts at Level 1 frequently disregard the amount of work that ESMA needs to carry out a proper assessment of its legal and technical options when adopting technical standards or guidelines. Because legislative acts often set unrealistic implementation deadlines, ESMA is regularly in a position where it has to rush to adopt technical standards/guidelines or simply cannot deliver on time. In the former case, the outcome is sub-optimal because it means that rules implementing Level 1 or Level 2 acts are not sufficiently thought through. In the latter case, the outcome is equally sub-optimal because market participants face considerable legal uncertainties given that they are required to comply with Level 1 or Level 2 rules without having sufficient guidance on how these rules should be interpreted.

EFAMA sees two potential solutions to this specific issue: ESMA could either be granted full-fledged powers to issue "no-action letters", or alternatively, EU legislators could adopt a more flexible approach when setting deadlines in legislatives acts (please refer to questions 1.2.1 and 6.6 for more details on these two solutions).

Governance and self-restraint

Decision-making within ESMA can be either very slow due to conflicting interests between national authorities, or overtaken by one national authority that aims to "export" its policy design to the rest of the EU. These governance issues might be further aggravated by the so-called "Meroni doctrine", which may also impose a self-constraint on ESMA by fear of overstepping its authority.

These governance and self-restraint issues mean that ESMA often requests changes to the Level 1 or 2 legislation, even though the problems it has identified could be better and more proportionately addressed by Level 3 measures.

There is indeed a preference among certain NCAs to obtain Level 1 or 2 clarifications through the intervention of the EU legislators, especially where these are consistent with what are perceived to be national best practices. We understand there are attempts by NCAs at "exporting" their own domestic practices by consolidating these, elevating them to become proposals for amendments to existing EU legislation. While some of these initiatives have often been justified on grounds of improving investor

protection, there have been more than one instance where they were not supported by any convincing evidence (refer to question 1.7.5 for a concrete example).

The Meroni (non-delegation) doctrine may also explain ESMA's self-constraint. According to this doctrine, EU legislators should not delegate to a third party – including an EU agency – discretionary powers that would allow that third party to make policy choices and be in charge of the *de facto* execution of an economic policy of the Union. While this doctrine acknowledges that some delegation of discretionary powers to ESAs is possible, there remains an important degree of scrutiny over the extent to which ESAs can use their discretionary powers.[5] ESMA may, in some circumstances, be excessively cautious when deciding to adopt guidelines and may feel more comfortable to adopt such acts when there is a Level 1 or Level 2 empowerment, or a recommendation by the ESRB.

The AIFMD Review is a good illustration in this regard. Leading up to the AIFMD Review launched by the Commission in October 2020, ESMA sent a letter to the European Commission in August 2020, recommending changes to the current UCITS and AIFMD frameworks.[6] Yet, it is our opinion that many of the issues identified by ESMA in its letter – such as the issues related to ancillary services, delegation, "white labelling", and the availability of liquidity management tools (LMTs) across jurisdictions – would be better and more proportionately addressed through means of Level 3 measures rather than Level 1 or Level 2 amendments.[7]

We would thus remind ESMA that it has wide-ranging powers to promote supervisory convergence and that, before requesting any legislative change, it should first make full use of these powers. Under its recently amended Founding Regulation 1095/2010, ESMA has significant room for appreciation under Article 1(2) to take initiatives that are not expressly warranted by the EU legislators by means of a Level 1 or 2 act. The resulting power to issue guidelines under the following Article 16 is broad and encompasses the scope of several directives, including UCITS and the AIFMD. Where interpretations around existing requirements from different NCAs vary, guidelines are naturally better suited and more proportionate to meet the end of agreeing on a common interpretation of the underlying and very clear legal requirements.

Focus on rules rather than supervision

There is an excessive concern about regulatory and supervisory convergence, which in turn regularly translates into a call for increased harmonisation at the EU level. Whereas greater harmonisation may sometimes be warranted, it does not always bring about the sought after convergence. In sectors that are already heavily regulated, it is more appropriate to focus on supervision rather than additional regulation.

We would therefore recommend EU legislators to focus their attention on sectors that are currently unregulated and ESMA to focus on monitoring and ensuring better national supervision over financial market actors and their activities, including asset management and other sectors (please refer to question 1.1.1 for more details). In our view, ESMA's focus should be predominantly on ensuring that the rules laid out in Levels 1, 2, and 3, are appropriately implemented and enforced, while availing itself of its existing suite of tools through targeted actions (e.g. supervisory briefings, CSAs, peer reviews, coordination groups, etc.) to this end.

[5] See for instance the recent Opinion of the European Court of Justice (C-911/19) against the EBA Guidelines on product oversight and governance arrangements for retail banking products.
[6] ESMA's Letter to the European Commission on the Review of the AIFMD, 18 August 2020, available at the following link.
[7] EFAMA Response to the European Commission's consultation on the review of the AIFMD, filed on 29 January 2021, available at the following link.

Patience will be a crucial element for the success of better supervision and enforcement. Firstly, it is important for ESMA and NCAs to focus each year on a few strategic priorities to ensure that sufficient resources are allocated to these priorities. Secondly, it is equally important to acknowledge that resources within asset management companies (especially smaller players) are also limited and that too many simultaneous supervisory actions may prevent them to provide qualitative contributions to supervisors. This is especially true considering the transformative changes that the investment management industry is presently undergoing such as the integration of sustainability/ESG factors into operational business models.

It is only once a thorough supervisory action has been conducted, during which ESMA was able to collect enough data and identify – through the discussion of supervisory cases by NCAs – precise concerns with the existing regulatory framework, that ESMA should consider reviewing existing guidelines, adopt new measures, or recommend Levels 1 or 2 amendments to EU legislators.

Greater recognition of ESMA in policy-making on securities market-related matters

There have been instances where the Commission has attributed competences to prepare financial market legislative initiatives, as well as follow-up implementing technical standards to the EBA, rather than to ESMA. Confined to a consultative role, the latter should have alternatively led – in light of its mandate and competence over MiFID-related market activities and actors – the preparatory and implementing work in relation to a self-standing regime for MiFID investment firms under the IFD/IFR initiatives.

Conversely, we welcome ESMA's greater involvement in the work of the ESRB, as an effective way to avoid an ever-present central banking bias of the EU's macroprudential supervisor towards financial market actors and activities (inclusive of asset management).

1. The supervisory convergence tasks of the ESAs

1.1. Common supervisory culture/supervisory convergence:

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

☐ 2

☐ 3

☒ 4

☐ 5 – the most significant contribution

☐ Don't know / no opinion / not relevant

Please explain your answer to question 1.1.1 for ESMA and indicate if there are any areas for improvement:

In EFAMA's view, ESMA is gradually contributing to promote supervisory convergence across the EU. We warn, however, that regulatory and supervisory convergence should not be pursued as a means unto itself. Although it is crucial to ensure comparability and a level-playing field, existing divergences across Member States should not be systematically perceived as negative. In many cases, regulatory or supervisory divergence occurs to either take into account national specificities (but always within a common EU/ESMA framework), or to specify and accommodate general EU law requirements to concrete firm/market operational requirements.

There are cases where the issue is not whether there is enough convergence, but rather whether there is sufficient national supervision and enforcement. In this regard, the November 2020 ESMA Report on the use of sanctions for UCITS raises the question of whether there is indeed sufficient supervision and enforcement in some Member States (please refer to question 1.5.1 for more details).[8]

Question 1.1.2 ESMA: To what extent the following tasks undertaken by the ESMA have effectively contributed to building a common supervisory culture and consistent supervisory practices in the EU?

	1 (less significant contribution)	**2** (not so significant contribution)	**3** (neutral)	**4** (significant contribution)	**5** (most significant contribution)	**Don't know – No opinion – Not applicable**
Providing opinions to competent authorities	☐	☐	☐	☐	☐	☒
Promoting bilateral and multilateral exchanges of information between competent authorities	☐	☐	☐	☐	☐	☒
Contributing to developing high quality and uniform supervisory standards	☐	☐	☐	☐	☐	☒
Contributing to developing high quality and uniform reporting standards	☐	☐	☐	☐	☐	☒
Developing and reviewing the application of technical standards	☐	☐	☐	☐	☐	☒
Contributing to the development of sectoral legislation by providing advice to the Commission	☐	☐	☐	☐	☐	☒
Establishing (cross)sectoral training programmes	☐	☐	☐	☐	☐	☒
Producing reports relating to its field of activities	☐	☐	☐	☐	☐	☒
Conducting peer reviews between competent authorities	☐	☐	☐	☐	☐	☒
Determining new Union strategic supervisory priorities	☐	☐	☐	☐	☐	☒
Establishing coordination groups	☐	☐	☐	☐	☐	☒

[8] Please refer to the ESMA third annual report on the use of sanctions for UCITS, published on 12 November 2020, available at the following link.

Developing Union supervisory handbooks	☐	☐	☐	☐	☐	☒
Monitoring and assessing environmental, social and governance-related risks	☐	☐	☐	☐	☐	☒
Adopting measures using emergency powers	☐	☐	☐	☐	☐	☒
Investigating breaches of Union law	☐	☐	☐	☐	☐	☒
Coordinating actions of competent authorities in emergency situations (e.g. Covid-19 crisis)	☐	☐	☐	☐	☐	☒
Mediating between competent authorities	☐	☐	☐	☐	☐	☒
Monitoring the work of supervisory and resolution colleges	☐	☐	☐	☐	☐	☒
Publishing on their website information relating to their field of activities	☐	☐	☐	☐	☐	☒
Monitoring market developments	☐	☐	☐	☐	☐	☒
(Only for the EBA) Monitoring liquidity risks in financial institutions	☐	☐	☐	☐	☐	☒
(Only the EBA) Monitoring of own funds and eligible liabilities instruments issued by institutions	☐	☐	☐	☐	☐	☒
Initiating and coordinating Union-wide stress tests of financial institutions	☐	☐	☐	☐	☐	☒
Developing guidelines and recommendations	☐	☐	☐	☐	☐	☒
Developing Q&As	☐	☐	☐	☐	☐	☒
Contributing to the establishment of a common Union financial data strategy	☐	☐	☐	☐	☐	☒
Providing supervisory statements	☐	☐	☐	☐	☐	☒
Other instruments and tools to promote supervisory convergence, please	☐	☐	☐	☐	☐	☒

Please note: By eliciting answers through the compilation of the above multiple-choice answer table, EFAMA notes that the questions raised can be interpreted in several ways, leading to very different possible answers. We therefore prefer to express our views in writing by answering the questions below.

Please specify to what other instruments and tools to promote supervisory convergence you refer:

The other instruments and tools that we refer to are Common Supervisory Actions (CSAs).

Please add any qualitative comments you may wish to explain your reasoning when answering question 1.1.2 on ESMA:

Several of the powers mentioned above have contributed to developing the single rulebook, as well as increasing supervisory convergences within the EU. However, it is important to note that, for some of these powers, and especially those that were revised during the 2019 ESFS Review, more time is needed to assess their effectiveness.

Providing opinions – Opinions can be an effective convergence tool. For instance, ESMA's 2017 Opinion on supervisory convergence in the area of investment management following the withdrawal of the United Kingdom contributed to increasing convergence around authorisation and delegation, as multiple NCAs aligned their supervisory practices onto the recommendations made in the Opinion and as further testified in the welcomed work undertaken by the Supervisory Coordination Network (SCN).[9]

Promoting mutual exchange of information – The European asset management industry already provides extensive data to NCAs and National Central Banks (NCBs). We therefore support greater exchange of information between public authorities – including NCBs – to ensure that these authorities have the data they need to adequately supervise the asset management sector while preventing any additional or excessive reporting burdens on management companies.

ESMA could certainly play a role in further fostering such an exchange of information. That being said, greater ESMA involvement should not come at the expense of NCAs' ability to collect supervisory data from asset managers on their territory. Collecting supervisory data is indeed a pre-requisite for many other supervisory activities such as monitoring market developments, or intervening in case of an emergency. NCAs should thus remain competent for gathering data from the investment management industry, while sharing the data they collect with ESMA to allow the latter to monitor market developments and meet the other objectives of its mandate.

Contributing to developing high-quality and uniform reporting standards – NCAs are still using very different formats for their respective supervisory reporting exercises and, hence, reducing comparability and putting additional burden on asset managers operating cross-border. The lack of comparability in the data collected by NCAs limits the possibility for host NCAs to rely on data obtained through exchanges with home supervisors and lead to overlapping supervisory reporting exercise in the home and host Member States. Further work on uniform reporting standards would be welcomed to ensure that the data collected by home supervisors are under a format that can be used by other NCAs.

Developing and reviewing the application of technical standards/guidelines – Technical standards and guidelines are key instruments to develop a high-quality singe rulebook. Overall, EFAMA is satisfied with the quality of ESMA's technical standards/guidelines, although we believe that ESMA should put more efforts in ensuring that these standards or guidelines are better balanced. It is indeed not rare that technical standards or guidelines are so granular that they leave no flexibility to management companies. Too prescriptive rules not only prevent asset managers from adapting the rules to their specific situation, but it also puts the European asset management industry at a competitive disadvantage on the international stage (please refer to question 5.1 where we provide more details).

Contributing to the development of sectoral legislation by providing advice to the Commission – It is of course crucial that ESMA provides the European Commission with advice when the latter is intending to launch a legislative initiative. We question, however, to what extent ESMA has recently provided sufficient detailed advices to the Commission. Referring one more time to ESMA's August 2020 Letter on the AIFMD Review, we note that ESMA only provided a list of policy recommendations

[9] Please refer ESMA's Opinion to support supervisory convergence in the area of investment management in the context of the United Kingdom withdrawing from the European Union, July 2017, available at the following link.

without identifying sufficiently precise reasons to justify them. Absent these important details, we remain concerned about the "politicisation" of ESMA at the centre of Europe's securities supervisory bodies.

Conducting peer reviews – Although there have been only a few peer reviews in the asset management realm, namely the ones concerning the *Guidelines on ETFs and other UCITS issues* and the *Guidelines on stress test scenarios under the MMF Regulation*, these have contributed to clarifying outstanding interpretation issues. It is too early for us to assess changes brought by the 2019 ESFS Review to peer reviews given that, since January 2020, ESMA has not conducted any such review in the asset management sector (please refer to questions 1.3.3 for additional views).

Establishing coordination groups – In our view, these coordination groups could play a central role as ESMA strives to promote supervisory convergence. They allow NCAs to discuss supervisory cases and develop a common supervisory culture. Yet, and to the best of our knowledge, ESMA has only set up two such groups: the Supervisory Coordination Network (SCN) in 2017 and the Coordination Network on Sustainability (CNS) in 2019.

Investigating breaches of Union law – We are not convinced that ESMA has made full use of its powers under Article 17 of the ESMA's Founding Regulation as ESMA only conducts a few breach of Union law investigations each year (please refer to question 1.5.1).

Coordinating actions of competent authorities in emergency situations (e.g. Covid-19 crisis) – Coordination during situations of emergency is obviously crucial, especially to prevent cross-border financial ripple effects. In the case of the COVID-19 crisis, this coordination however did not contribute materially to the overall resilience of the European asset management industry. Moreover, this coordination was not sufficient to avoid additional supervisory burdens on asset managers during the period of crisis management (please refer to questions 1.6.1 and 1.6.3 for more elements).

Initiating and coordinating Union-wide stress tests of financial institutions – Stress tests are important to ensure that, in the face of unexpected adverse developments, the industry remains resilient. We welcome the fact that ESMA published in September 2019 a framework for sector-wide stress simulations for the investment fund sector and conducted a first study regarding the application of this framework on a sample of more than 6000 UCITS bond funds. These are positive developments, but we would recommend ESMA to review some of the assumptions it used in its case study (more information can be found in question 4.1).

Developing Q&A – Q&As are an effective tool to further specify rules and ensuring greater supervisory convergence. Although Q&As are by definition non-binding, asset managers do nonetheless follow their recommendations closely. Because each new clarification can lead to time- and resource-intensive changes to underlying systems, it is important that ESMA provides more transparency into the Q&A decision-making process (please refer to question 1.1.5 for more details).

Common Supervisory Actions – CSAs are an important tool in ESMA's toolbox as they allow ESMA to coordinate supervisory actions across the EU and to gather targeted evidence that are instrumental in further improving the EU financial services policy. It is, however, premature to assess the effectiveness of these initiatives in the asset management sector since the first one – namely the CSA on UCITS liquidity risk management – has only been launched in January 2020 with the results coming in late March 2021. Our impression of this first CSA is positive, although there remain areas for improvement in terms of coordination between NCAs, as well as predictability for asset managers (please refer to question 1.4.10).

In the framework of the ESAs review:

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

Please refer to our response to question 1.1.5.

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 identify areas for improvement and explain your answer to question 1.1.5:

New or revised Q&As can lead to time- and resource-intensive changes to underlying systems, despite the fact that they are not legally binding (in EU Law at least).[10] With no lead time, asset managers have often been confronted with the need to adjust their operations, product disclosures, etc., to comply with ESMA Q&As. In some instances, these have even reversed existing interpretations to the legal texts offered until then by the responsible NCAs[11].

It is therefore important to ensure that stakeholders are properly consulted before any new Q&A is adopted, or when an existing one is under revision. According to Article 16b(4) of the amended Founding Regulation, ESMA may request advice from the ESMA Stakeholder Group, or conduct open public consultations, albeit upon the request of three of voting members on the ESMA Board of Supervisors. For the reasons highlighted above, this outcome remains sub-optimal. Also, despite these provisions, and to the best of our knowledge, stakeholders in the asset management sector have so far never been consulted on upcoming reviews to Q&As.

We would also call for greater predictability as to when Q&As are updated. Currently, it is impossible to predict when a Q&A will be amended as the ESMA website only provides whether a question is pending or has been rejected. It is therefore not possible for asset managers to prepare in advance for any change to these Q&As by setting aside resources to implement these changes. To improve predictability, ESMA could, for instance, publish in advance – as the EBA does – the list of questions it intends to review in the near future, or conduct these reviews on a pre-defined timeline (e.g. semi-annually or annually). It is equally important to provide sufficient time to market participants to comply with new Q&As, as it has not always been the case in the past. For instance, in 2017, ESMA published Q&As on investor protection issues and expected these Q&As to be implemented only a few days later.

Finally, we would like to underscore that Q&As should remain focused and technical. We have noticed that ESMA sometimes uses Q&As to make policy choices. As a way of illustration, ESMA amended in 2016 the AIFMD Q&As to require asset managers to apply delegation rules to all activities falling within Annex I of the AIFMD and to prohibit externally-managed AIFs from conducting core investment

[10] It is important to note that in some jurisdictions Q&A are de facto binding given that the NCAs incorporate ESMA's guidance in the guidance they provide to market participants (e.g. CSSF's circulars in Luxembourg).
[11] We refer in this respect to the March 2019 update of the relevant Q&As on the Application of the UCITS Directive (ESMA 34-43-392), in relation to the interpretation of certain UCITS KIID disclosure requirements, as per the relevant provisions of Regulation (EU) No. 583/2010 (the "KIID Regulation").

management functions (please refer to 2 and 3 of section VIII).[12] Against this background, it is our opinion that Q&As should be used to address technical issues. For instance, how to fill-in a specific data field in a reporting template.

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

Please explain your answer to question 1.2.1:

The introduction of the "no-action letters" among ESMA's supervisory toolbox is a welcomed addition, as it allows ESMA to address practical difficulties in implementing a legislation due, for example, to a lack of clarity, conflicting rules, or delays in finalising any Level 2 or Level 3 measures. This occurrence has emerged several times in recent years, including most recently with the implementation of the SFDR and PRIIPs.

Despite the EU legislator's will to include "no-action letters" into the revised ESMA toolkit (Article 9a) under the amended Founding Regulation, the final text only confirms a lengthy and impractical process, whereby ESMA is to notify the NCAs and the Commission in detail, accompanied by an opinion on necessary actions (in the form of a new legislative proposal and or delegated/implementing measures) required to address an exceptional situation. Pending these actions, ESMA will only be able to issue opinions (…) *with a view to furthering consistent, efficient and effective supervisory and enforcement practices, and the common, uniform and consistent application of Union law*. At the end of this lengthy process, the clauses that are subject to a "no-action letter" from ESMA would still apply to market participants and there is no guarantee for the former that their respective NCAs will not sanction them for not complying with EU law.[13]

We would thus support a future amendment to ESMA's Founding Regulation for it to issue "no-action letters" that can suspend for a time-limited 6-month period the application of a Level 1 or Level 2 act. We are aware that, legally speaking, such an amendment might be difficult to introduce in light of the Meroni doctrine. This reinforces the claim we made in our response to question III above, according to which, such non-delegation doctrine prevents ESMA from growing into a full-fledged European securities supervisor.

[12] ESMA Q&As on the application of the AIFMD, 30 March 2021, available at the following link.
[13] See for instance the ESMA "no-action letter" regarding ESG disclosures applying to index providers under the Benchmark Regulation.

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

"No-action letters" in other jurisdictions mean that the relevant supervisor has the power to temporarily disapply – without having to go through the legislator – a legal provision when that provision lacks legal clarity or is in conflict with another set of rules. This is currently not the case in the European Union as we have outlined in our response to the previous question.

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? (5000 character(s) maximum)

The use of "no action letters" would be particularly useful in the EU, considering that Level 1 and Level 2 acts often enter into force without being specified further by a delegated/implementing act or through a series of guidelines (please refer to question 6.1 for more details). In that context, a "no-action letter" could have been useful in the case of the implementation of the SFDR or the PRIIPs Regulation. Such a letter could still be useful in the implementation context of the cross-border distribution of funds, where the Level 1 directive will enter into force in August 2021 despite the fact that Level 2 and 3 measures are still pending as outlined in our response to question I.

1.3. Peer reviews

Question 1.3.1 To what extent peer reviews organised by the ESAs have contributed to the convergence outcomes listed below.

Please distinguish between the situation before the 2019 review and afterwards.

Situation before the 2019 ESAs review for ESMA:

	1 (less significant contribution)	**2** (not so significant contribution)	**3** (neutral)	**4** (significant contribution)	**5** (most significant contribution)	**Don't know – No opinion – Not applicabl**
Convergence in the application of Union law	☐	☐	☐	☐	☐	☒
Convergence in supervisory practices	☐	☐	☐	☐	☐	☒
More widespread application of best practices developed by other competent authorities	☐	☐	☐	☐	☐	☒
Convergence in the enforcement of provisions adopted in the implementation of Union law	☐	☐	☐	☐	☐	☒
Further harmonisation of Union rules	☐	☐	☐	☐	☐	☒
Other, please indicate	☐	☐	☐	☐	☐	☒

Situation after the 2019 ESAs review for ESMA:

	1 (less significant contribution)	**2** (not so significant contribution)	**3** (neutral)	**4** (significant contribution)	**5** (most significant contribution)	**Don't know – No opinion – Not applicable**
Convergence in the application of Union law	☐	☐	☐	☐	☐	☒
Convergence in supervisory practices	☐	☐	☐	☐	☐	☒
More wide spread application of best practices developed by other competent authorities	☐	☐	☐	☐	☐	☒
Convergence in the enforcement of provisions adopted in the implementation of Union law	☐	☐	☐	☐	☐	☒
Further harmonisation of Union rules	☐	☐	☐	☐	☐	☒
Other, please indicate	☐	☐	☐	☐	☐	☐

Please explain your reasoning when answering question 1.3.1 for ESMA and give examples: (5000 character(s) maximum)

The few peer reviews that have been conducted in the asset management sector have proven beneficial, allowing to clarify how some rules should be interpreted and implemented. EFAMA cannot, however, comment on the improvements that the 2019 ESFS Review may have brought given that there have not been any such reviews in the asset management sector since the entry into force of the amended supervisory regime in January 2020.

Question 1.3.2 How do you assess the impact of each of the changes below introduced by 2019 ESAs review in the peer review process?

	1 (least effective)	**2** (rather not effective)	**3** (neutral)	**4** (rather effective)	**5** (most effective)	**Don't know - No opinion – Not applicable**
Ad-hoc Peer Review Committees (PRC) composed of ESAs' and NCAs' staff and chaired by the ESA are responsible for preparing peer review reports and follow-ups.	☐	☐	☐	☐	☐	☒
The peer review report is now adopted by written procedure on non-objection	☐	☐	☐	☐	☐	☒

basis by the Board of Supervisors.						
Transparency provisions: if the PRC main findings differ from those published in the report, dissenting views should be transmitted to the three European Institutions.	☐	☐	☐	☐	☐	☒
PRC findings may result in recommendations to NCAs under Article 16 of the ESAs Regulations that are now distinguished from guidelines, addressed to all NCAs. The use of this type of individual recommendations entails the application of the "comply or explain" mechanism and allows a close follow-up.	☐	☐	☐	☐	☐	☒
Mandatory follow-up to peer reviews within two years after the adoption of the peer review report.	☐	☐	☐	☐	☐	☒
The possibility to carry out additional peer reviews in case of urgency or unforeseen events (fast track peer reviews).	☐	☐	☐	☐	☐	☒
The Management Board is consulted in order to maintain consistency with other peer reviews reports and to ensure a level playing field.	☐	☐	☐	☐	☐	☒

Please note: By eliciting answers through the compilation of the above multiple-choice answer table, EFAMA notes that the questions raised can be interpreted in several ways, leading to very different possible answers. We therefore prefer to express our views in writing by answering the questions below.

Please explain your reasoning when answering question 1.3.2:

Please refer to our response in the previous question.

Question 1.3.3 ESMA: Do you think mandatory recurring peer reviews, covering also enforcement aspects, could be introduced in some sectoral legislation?

☐ Yes

☒ No

☐ Don't know / no opinion / not relevant

Please explain your answer to question 1.3.3 for ESMA:

Peer reviews are an excellent instrument to ensure better supervisory convergence. However, these are very-resource intensive and therefore it should not be to the EU legislators to decide when a peer review is required, but rather ESMA, in accordance with its strategic supervisory priorities. The risk with peer reviews mandated by the EU legislators would be that ESMA would have to conduct too many reviews at the same time and would have to dilute the quality of these reviews as a consequence. Moreover, it would also cut across the current separation of powers/responsibilities that exists between ESMA and the EU legislators. It cannot be excluded that a CSA could be launched for political motives rather than for addressing potential and more genuine supervisory concerns.

1.4. Other tasks and powers

Question 1.4.1 ESMA: In your view, is the collection of information regime (Art 35 ESAs Regulations) effective?

☒ Yes

☐ No

☐ Don't know / no opinion / not relevant

Please identify any areas for improvement for ESMA, please explain:)

ESMA's collection of information regime might be less important in the asset management sector than in other sectors because NCAs are required by law to share with ESMA the data they collect based on the AIFMD supervisory reporting framework.

To the best of our knowledge, there may be circumstances where ESMA may request, through NCAs, additional data from management companies based either on Article 35 of ESMA's Founding Regulation, or Article 24, paragraph 5, of the AIFMD. In such cases, we would recommend ESMA to clearly disclose to NCAs the reasons for which they require this additional information. In turn, NCAs could explain to reporting officers working in asset management companies why such data is needed. This would help the latter to point NCAs towards the most pertinent information, instead of offering data without knowing whether it will be useful to the purpose of the exercise launched by ESMA.

Question 1.4.2 In the framework of the 2019 ESAs review, in you view, are the new Union strategic supervisory priorities an effective tool to ensure more focused convergence priorities and more coherent coordination (Article 29a ESAs Regulations)?

☒ Yes

☐ No

☐ Don't know / no opinion / not relevant

Please you identify areas for improvement, please explain: (5000 character(s) maximum)

EFAMA welcomes the use of Union strategic supervisory priorities by ESMA. These will help ensure greater supervisory convergence among Member States by allowing ESMA to coordinate NCA's supervisory actions in specific areas. It will also allow ESMA to collect consistent supervisory data from every Member State, on condition that ESMA is able to ensure consistent implementation of common supervisory actions (please refer to question 1.4.10 on this specific point).

The new supervisory priorities have been activated for the first time in November 2020, with identification of costs and performance for retail investment products and data quality as the priorities for 2021.[14] As a result, it is still too early to assess whether these becomes translated into effective supervisory convergence.

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? If yes, which ones.

☐ Yes

☒ No

☐ Don't know / no opinion / not relevant

If you think there is the need to amend or add a tool to the toolkit of ESMA, please specify which one(s): (5000 character(s) maximum)

Please refer to our response to question II.

Question 1.4.6 ESMA: What are, in your view, the main remaining obstacle(s) to allow for a more effective supervisory convergence? (5000 character(s) maximum)

Please refer to our response to question III.

Question 1.4.10 Please assess the effectiveness of supervisory convergence tools developed by the ESAs (e.g. common supervisory actions, real case discussions, etc.) for achieving supervisory convergence:

☐ 1 – Least effective

☐ 2 – Rather not effective

☐ 3 - Neutral

☐ 4 – Rather effective

☐ 5 – Very effective

[14] ESMA Press Release, ESMA identifies costs and performance and data quality as new Union Strategic Supervisory Priorities, 12 November 2020, available at the following link.

☒ Don’t know / no opinion / not relevant

Please explain your answer to question 1.4.10: (5000 character(s) maximum)

CSAs are an important tool in ESMA’s toolbox as they allow ESMA to coordinate supervisory actions across the EU and to gather targeted and consistent evidence that will be instrumental in further improving the European-wide supervision. Although it is yet premature to fully assess the effectiveness of these tools, we have identified a few areas of improvement for the future. For instance, in the case of the CSA on costs and fees for UCITS, the exercise fails to account for a more holistic approach to issue of costs, particularly in a context of:

- A global downward trend in fund fees observed across the asset management industry over for many years;
- A global upward trend in operational costs, due to an increasing use of data (for regulatory or commercial reasons), along with regular and significant price hikes imposed by a number of data service providers taking advantage of the oligopolistic environment in which they operate; and
- A global upward trend in regulation, leading asset management companies to have to significantly and continuously increase the resources dedicated to monitor, analyse and implement the numerous – and at times superfluous – rules imposed both by EU bodies and NCAs.

Furthermore, in relation to how the first phase of the CSA has been carried out in the first half of 2021, there has been poor coordination between national supervisors, with some NCAs not hesitating to modify the template questionnaire provided by ESMA. Each national supervisory action launched under these CSAs has also followed different timelines. Moreover, some NCAs have modified some of the questions or even introduced additional ones in the template provided by ESMA. This practice goes against the spirit of CSAs that are supposed to provide ESMA with consistent supervisory findings from all over the European Union. We also note that there has been scarce coordination among NCAs to ensure that the same asset managers operating cross-border received only one questionnaire. Taken together, this has meant that asset managers operating in several Member States not only received several uncoordinated requests for inputs, but sometimes were asked different questions from one Member State to the other. We therefore recommend greater coordination between NCAs and more advanced notifications to market participants as regards timing.

1.5. Breach of Union law and dispute settlement

Question 1.5.1 Do you think that the ESAs’ powers in relation to breaches of Union law (Article 17 ESAs’ Regulations) and binding mediation (Article 19 ESAs’ Regulations) are effective?

☐ Yes

☒ No

☐ Don’t know / no opinion / not relevant

Please explain your answer to question 1.5.1:

It is our impression that ESMA could have been more active in promoting consistent interpretation and enforcement of EU law across Member States through EU law enforcement measures.

Firstly, we question whether ESMA has made full use of its powers under Article 17 of the ESMA's Founding Regulation (breaches of Union law). Although ESMA receives several hundreds of complaints every year, it only annually conducts a few preliminary investigations that often not do not materialise into concrete actions. For instance, looking at its annual report for 2019, ESMA has only carried out three preliminary investigations out of the 35 admissible complaints it received that year, none of which materialised into concrete actions.[15] However, we acknowledge that some proceedings did produce positive changes, such as the one on UCITS eligibility requirements in Luxembourg.[16]

Secondly, ESMA should better monitor enforcement by NCAs in the asset management sector. Although the UCITS and AIFMD sanctioning regimes should not be changed as national supervisors have all the tools at their disposal to adequately enforce the directives' provisions, it is crucial that ESMA properly assess whether NCAs make full use of these tools. Under Article 99 of the UCITS Directive and 48 of the AIFMD, ESMA is required to publish every year an annual report on the use of sanctions in the UCITS and AIF sectors. Yet, ESMA has only started to publish such reports for the UCITS sector in 2018 (even though it was required to have started in 2016) and in 2020 for the AIF sector (even though it was required to do so starting from 2013).

The recent ESMA's Reports on the use of sanctions under the UCITS and AIFMD seem to point towards different enforcement levels across the European Union. The 2019 Report on the use of sanctions under the UCITS Directive outlines that 16 out of the 31 EEA NCAs – 50% of the NCAs – did not take any enforcement measure based on Article 99 of the UCITS Directive in 2019. Moreover, this report also points out that, since 2016, no less than 29% of the NCAs did not take any such measures in the UCITS sector. Interestingly, one jurisdiction was responsible for 90% of sanctions in the EU during the last few years. Equally, the Report on the use of sanctions under the AIFMD outlines that 14 out of the 31 EEA NCAs – 45% of the NCAs – did not take any enforcement measure based on Article 48 of the AIFMD in 2019. While this represents an increase since 2018, where 55% of the NCAs did not take any such measure, ESMA still notes that 35% of the NCAs did not take any measure either in 2018 nor in 2019. The two reports remark that, in many Member States, only a few measures were taken each year and that the amount of sanctions issued at national level remained relatively low.[17]

We nonetheless call for caution in the interpretation of these reports as differences in the use of enforcement tools should not automatically be interpreted as enforcement shortcomings from certain NCAs. As ESMA acknowledges it: *(…) the issue at hand can be complex and multifaceted and (…) no automatic parallelism should be drawn between the number/amount of sanctions (penalties and measures) issued by the relevant NCA and the quality of their supervisory activity*. This being said, the differences between Member States are sufficiently material to justify greater scrutiny from ESMA.

[15] ESMA 2019 Annual Report, 15 June 2020, available at the following link.

[16] ESMA 2017 Annual Report, 15 June 2018, available at the following link.

[17] ESMA Report on penalties and measures imposed under the AIFM Directive in 2018-2019, 12 November 2020, available at the following link; ESMA Report on penalties and measures imposed under the UCITS Directive in 2019, 12 November 2020, available at the following link.

1.6. Emergency situations and response to COVID-19 crisis

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

☐ 1 – the less significant impact

☐ 2

☒ 3

☐ 4

☐ 5 – the most significant impact

☐ Don't know / no opinion / not relevant

Please explain your answer to question 1.6.1 for ESMA:

ESMA's response to the COVID-19 crisis was timely to ensure that markets remained opened and gave flexibility to market players. We welcome ESMA's commitment to open capital markets given that open markets allow the process of adjusting prices to new information to continue and provide liquidity to the benefit of investors by allowing them to rebalance portfolios and meet contractual obligations.

Among the measures taken by ESMA in the asset management industry during the crisis, we note the support for increased coordination between NCAs, giving the latter a platform where they could exchange on market developments in a regular basis (including large redemptions in their respective jurisdictions). Moreover, we also note the relief provided by ESMA regarding a number of disclosure deadlines (although only through a public statement that faces similar issues to the one we have outlined for the "no-action letters" in question 1.2.1).[18] Although these measures were helpful, one cannot say that they averted market disruptions.

Question 1.6.2 Please rate the effectiveness of the ESAs' follow-up actions on the European Systemic Risk Board (ESRB) recommendations below in the context of the COVID-19 crisis.

	1 (least effective)	**2** (rather not effective)	**3** (neutral)	**4** (rather effective)	**5** (most effective)	**Don't know - No opinion – Not apliccable**
Market illiquidity and implications for asset managers and insurers	☐	☐	☐	☐	☐	☒
Impact of large scale downgrades of corporate bonds on markets and	☐	☐	☐	☐	☐	☒

[18] ESMA Public Statement, *Actions to mitigate the impact of COVID-19 on the deadlines for the publication of periodic reports by fund managers*, 9 April 2020, available at the following link.

entities across the financial system						
System-wide restraints on dividend payments, share buybacks and other pay-outs	☐	☐	☐	☐	☐	☒
Liquidity risks arising from margin calls	☐	☐	☐	☐	☐	☒

Please note: By eliciting answers through the compilation of the above multiple-choice answer table, EFAMA notes that the questions raised can be interpreted in several ways, leading to very different possible answers. We therefore prefer to express our views in writing by answering the questions below.

Please explain your answer to question 1.6.2:

ESMA followed through on the ESRB's recommendations by publishing in November 2020 a report on liquidity risk in investment funds[19] and by extending its 2020 CSA on liquidity risk management in UCITS.[20]

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

☐ Yes

☒ No

☐ Don't know / no opinion / not relevant

Please give concrete examples of situations where the coordinating activities carried out by ESMA did not successfully contribute to address the COVID-19 challenges:

It is our understanding that national supervisors were satisfied by the coordination role played by ESMA during the COVID-19 crisis. We are aware that NCAs met on a regular basis within ESMA to discuss market developments in the asset management sector and, in particular, the threat associated with large redemptions. This coordination was unfortunately not sufficient to ensure a thorough coordination between NCAs in terms of supervisory reporting as we outline below.

Uncoordinated *ad hoc* reporting requirements by national supervisors on large redemption events put additional burden on cross-border asset managers during the crisis. These asset managers indeed had to provide additional information based on different formats to different NCAs, thereby putting additional pressure on the teams having to deal with the stressed market conditions. Better data sharing, as well as harmonisation of supervisory reporting templates, could ensure that during the next crisis the burden associated with such *ad hoc* reporting requirements would be reduced.

[19] ESMA Report, Recommendation of the European Systemic Risk Board (ESRB) on liquidity risk in investment funds, 12 November 2020, available at the following link.
[20] ESMA 2021 Annual Work Programme, 2 October 2020, available at the following link.

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:

EFAMA would indeed support greater coordination by ESMA to ensure greater data sharing and harmonisation of supervisory reporting template used by NCAs. As mentioned previously, the European asset management industry already provides extensive data to NCA and to NCBs. We therefore support greater exchange of information between public authorities – including NCBs – to ensure that these authorities have the data they need to adequately supervise the asset management sector, while preventing any additional and excessive reporting burden on management companies.

Moreover, NCAs are still using very different formats for their respective supervisory reporting exercises and, hence, reducing comparability and putting additional burden on asset managers operating cross-border. The lack of comparability in the data collected by NCAs limits the possibility for host NCAs to rely on data obtained through exchanges with home supervisors and lead to overlapping supervisory reporting exercise in the home and host Member States. Further work on uniform reporting standards would be welcomed to ensure that the data collected by home supervisors are under a format that can be used by other NCAs.

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?

☐ Yes

☐ No

☒ Don't know / no opinion / not relevant

Please provide examples where the new coordination groups could be useful:

These coordination groups could play a central role in ESMA's strive to promote supervisory convergence as it allows NCAs to discuss supervisory cases and develop a common supervisory culture. Yet, and to the best of our knowledge, ESMA has only set up two such groups: the Supervisory Coordination Network (SCN) in 2017 and the Coordination Network on Sustainability (CNS) in 2019. Moreover, it must be acknowledged that the SCN did not succeed in bringing about convergence on the supervision of delegation in the European asset management sector as we outline in our response to the next question.

Question 1.7.5 ESMA: In your view, does the coordination function of the ESMA, ensuring that the competent authorities effectively supervise outsourcing, delegation and risk transfer arrangements in third countries, work in a satisfactory way?

☒ Yes

☐ No

☐ Don't know / no opinion / not relevant

Please explain your answer to question 1.7.5 on ESMA:

ESMA's coordination function on delegation/outsourcing in the European asset management sector worked properly, although it was not apparently sufficient to ensure a full convergence of views between national supervisors.

ESMA set up in 2017 the ad hoc Supervisory Coordination Network (SCN) to consider multiple authorisation requests brought before NCAs by asset management companies looking to delegate/relocate their functions or activities outside the European Union. Around 250 live delegation cases were discussed by the SCN between 2017 and 2020 and – to the best of our knowledge – none have been challenged.[21]

From an industry perspective, we are conscious that few national supervisors deem the current delegation framework to be unsatisfactory. Yet, these have not expressed their concerns in greater depth, preferring to have ESMA adopt a tough stance on delegation in its August 2020 Letter to the European Commission on the review of the AIFMD. EFAMA believes that a deep dialogue between NCAs on this topic should continue with the objective of arriving to a common interpretation of the existing regulatory requirements or at least a clear understanding of where NCAs diverge in their respective interpretations of the delegation rules.

1.8. Tasks related to consumer protection and financial activities.

Question 1.8.1 ESMA: What are, in your view, the ESMA's main achievements in the consumer and investor protection area?

ESMA certainly had a positive impact on investor protection in the European Union, notably by adopting numerous technical standards, guidelines, and Q&As on investor protection under MiFID II/MiFIR and banning products that were harmful to European investors.

Despite this, investor education remains an area where there is important regulatory and supervisory divergence between Members States. Any action to reduce these divergences should nonetheless never neglect that national supervisors have to keep sufficient leeway to adapt EU investor protection rules to their national context (please refer to questions III and 6.5 on ways to address such divergences).

Beyond this, it is difficult for EFAMA to assess the impact of ESMA's work in these areas as this information is not publicly available. Analysis of consumer trends, market conduct reviews, and

[21] ESMA's press release of 29 May 2020, available at the following link.

indicator developments are necessary first steps for ESMA to develop adequate Level 3 measures; we would therefore expect ESMA to be active in these areas. Finally, EFAMA would also strongly support greater involvement by ESMA in financial literacy as the latter is not only instrumental to ensure greater investor protection, but can also have a positive impact on financial stability.

Question 1.8.3 In the framework of 2019 ESAs' review, the ESAs can now, where sectoral legislation enables them, use their product intervention powers for practices and products that cause consumer harm and after two prolongations of six months, an automatic one-year prolongation of the prohibition is possible (Article 9.5). In your view, are these powers effective for their intended purpose? Please explain your answer.

☒ Yes

☐ No

☐ Don't know / no opinion / not relevant

Please explain your answer to question 1.8.3:

ESMA's intervention powers seem indeed to be effective as the European supervisor was able to prohibit the marketing and sales of binary options (in 2018) and contracts for difference (in 2019) to retail clients in light of investor protection concerns.

Question 1.8.4 Would you consider it useful if the ESAs could adopt acts of general application in cases other than those referred to in Article 9(5) of the ESAs Regulations?

☐ Yes

☒ No

☐ Don't know / no opinion / not relevant

Please explain your answer to question 1.8.4:

EFAMA does not see any situation that would justify prohibiting or restricting the marketing, distribution or sale of certain financial products, instruments, or activities, other than a significant threat to consumer protection or financial stability. We care to remind that product intervention powers should be a last resort instrument in ESMA's toolbox, given that such prohibitions apply to a whole product class, indistinctly. It seems therefore proportionate to only use these powers when there is a significant threat to either consumer protection or financial stability.

Question 1.8.5 ESMA: Could you provide concrete examples where enabling the use of the product intervention powers in sectoral legislation would be useful?

It is not necessary to include any additional product intervention powers in sectoral legislations as ESMA already enjoys wide ranging powers under MiFIR. Indeed, to take the asset management sector as an example, even though there is no such clause in the UCITS Directive nor the AIFMD, ESMA has

already the power to ban, based on Article 40 of the MiFIR, the distribution of investment funds that it deems harmful to investors. In practice, by using its MiFID powers, ESMA can forbid distributors such as banks or insurance companies to distribute these funds. It is true that, de jure, an asset manager could circumvent this interdiction by setting up its own distribution channel given that, under Article 2 of the UCITS Directive and Article 6 of the AIFMD, distribution is considered as an authorised ancillary service. Such a possibility seems, however, to EFAMA a farfetched one.

1.9. International relations.

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 the ESAs should be active?

EFAMA believes that ESMA should be more active on the international stage, and in particular on the debate on systemic risks within the Financial Stability Board (FSB), which is currently influenced by the central banking community. Given that ESMA does not have a seat at the FSB, we would highly recommend ESMA to push IOSCO to be more active within the FSB to ensure that the voice of securities supervisors is heard on that important file for the asset management industry.

Question 1.9.2 ESMA: In the framework of 2019 ESAs' review, how do you assess the new ESAs' 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?

We understand that this question refers to Article 33 of the ESMA's Founding Regulation, according to which ESMA should monitor third countries developments in order to support the European Commission's work on equivalence. We are not, however, in a position to respond to this question as there is only one equivalence provision in the UCITS and AIFM Directives: the Non-EU AIFM Passport (Article 35 of the AIFMD). Yet, this provision was never operationalised and non-EU AIFMs currently access the Single Market through National Private Placement Regimes (Article 36 of the AIFMD). As a result, and in all likelihood, we believe that ESMA is not currently monitoring regulatory developments in the asset management sector in third country jurisdictions.

Question 1.9.4 ESMA: How do you assess the role of each ESA in the development of model administrative arrangements between national competent authorities and third-country authorities? Should this role be further specified?

Memorandums of Understanding (MoUs) negotiated by ESMA with third country supervisors are usually quite extensive and allow for intensive cooperation between European authorities and the aforementioned supervisors.[22] From our perspective, we deem these satisfactory, as well as the bilateral cooperation agreements between EU and third-country supervisors that underpin cross-border asset management activities.

[22] Refer, for instance, to the Multilateral Memorandum of Understanding concerning consultation, cooperation and the exchange of information between each of the EEA competent authorities and the UK Financial Conduct Authority, available at the following link.

2. *Governance of the ESAs.*

2.1 General governance issues

Question 2.1.1 Does the ESAs' governance allow them to ensure objectivity, independence and efficiency in their work/decision making?

☐ Yes

☐ No

☒ Don't know / no opinion / not relevant

Please explain your answer to question 2.1.1:

At this stage, we prefer to not opine, although would seek to comment on more tangible proposals on reforming the present ESAs' governance structures.

In the case of ESMA, one reason we see in favour of reforming these is that at times its Board of Supervisors has adopted Guidelines as a mere "copy-paste" of one of its Members national regulatory practices. The ESMA Guidelines on performance fees in UCITS and certain AIFs, published in March 2020, bear testimony to this, despite the objections of an important part of our industry and their national supervisors.

2.3 Financing and resources.

Question 2.3.1 Do you consider the provisions on financing and resources for the general activities of the ESAs appropriate to ensure sufficiently funded and well-staffed ESAs taking into account budgetary constraints at both EU level and the level of Member States?

☒ Yes

☐ No

☐ Don't know / no opinion / not relevant

Please explain your answer to question 2.3.1:

ESMA's financing should remain on the current 40/60 split between EU budget and other sources, but a new allocation between ESMA's regulatory and supervisory activities could be envisaged. It would allow ESMA to focus more on its supervisory convergence activities, such as coordination groups, peer reviews, CSAs, etc.

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

Please explain your answer to question 2.4.1:

It is our view that, overall, stakeholders are sufficiently consulted, although we have identified some areas of improvements: more stakeholder involvement in the adoption process of Q&A, longer consultation periods, and need to avoid a duplication between EC and ESMA's consultations.

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

Please explain your answer to question 2.4.6:

The current composition of the SMSG ensures a relatively balanced representation of stakeholders in the relevant sectors. The role of the Chair is particularly important when it comes to ensuring inclusive exchange of views, building trust among members, and reaching consensus. Lastly, the presence of ESMA senior staff members at the meetings is particularly important and appreciated. We can say the same for the composition of the Consultative Working Group (CWG) with ESMA's Investment Management Standing Committee (IMSC).

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

3. Direct supervisory powers.

Question 3.1 Please assess ESMA's direct supervisory powers in the field of:

	1 (lowest rate)	**2**	**3**	**4**	**5** (highest rate)	**Don't know – No opinion – Not applicable**
Credit Rating Agencies	☐	☐	☐	☐	☐	☒
Trade Repositories under EMIR	☐	☐	☐	☐	☐	☒
Trade Repositories under SFTR	☐	☐	☐	☐	☐	☒
Securitisation Repositories (STS)	☐	☐	☐	☐	☐	☒

Please explain your answers to question 3.1:

We would prefer let the relevant stakeholders answer the questions on direct supervision considering that the asset management industry is supervised at the national level.

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

☐ Yes

☒ No

☐ Don't know / no opinion / not relevant

Please explain your answer to question 3.4:

As outlined in our response to question II, EFAMA supports the direct supervision/oversight by the ESAs over critical ICT third-party service providers and believes that the same could be considered for some sustainability-related data service providers where deemed appropriate and following an in-depth market analysis. Conversely, we are strongly opposed to any direct supervision by ESMA over the European asset management industry.

Critical ICT third-party service providers

As foreseen by the current European Commission's proposal Digital Operational Resilience Act (DORA), there are several arguments supporting the direct oversight by the ESAs of ICT third-party service providers that are critical for the orderly functioning of European capital markets.

These services providers have typically a dominant market position for their services and wield unique technical expertise and significant pricing power. Experience has revealed instances where such companies have refused to be audited by their contracting clients (including asset management companies), rendering an ex ante and ongoing assessment of their cyber-defences difficult, where not

impossible. This situation is not satisfactory for the European asset management industry given that potential business disruptions in their activities may have significant knock-on effects on capital markets (e.g. in the form of sudden data cut-offs that can lead to flash crashes in the market as it was almost the case with the 2017 cut-off in the Bloomberg TOMS system).

The proposal on DORA provides that each critical ICT third-party service providers should be supervised by one of the three ESAs as "Lead Overseer". The responsible ESA would be designated based on the main sector serviced by the critical ICT third-party service providers (please refer to Article 28, paragraph 1, point (b)). We would caution against such an approach because it would imply that one ESA, for instance EBA, would have to supervise an ICT service provider without fully anticipating the potential consequences that its decisions would have on other sectors such as the insurance sector or in others of the capital markets. We would, for this reason, prefer to see the joint committee of the ESAs be responsible for every critical ICT service provider.

Sustainability-related service providers

EFAMA is favourable to the idea that certain sustainability-related service providers, such as for instance ESG rating providers, could be brought into the scope of direct supervision by the ESAs, as advocated for by the French AMF and Dutch AFM in their joint position paper on the regulation of ESG data, ratings, and related services, as well as ESMA in its January 2021 letter to the European Commission on ESG ratings.[23]

The transition to a low-carbon economy will require immense data sets to analyse all three E, S and G factors across all economic activities. This will further strengthen the market power of data providers whose methodologies, market practices and analyses will determine when and where capital will be deployed to. Although their activities will lie at the core of the Union's sustainability transition, these market players are neither regulated, nor supervised.

However, before considering the supervision of these services providers, it is essential to first develop a tailored regulatory framework in light of their specific business model, including a better understanding of key data flows, the market they operate in (including potential barriers therein), their transparency, as well as any potential competitive market failures.

Asset management

There is presently no convincing case for ESMA to obtain direct supervisory powers over asset managers, be they AIFMs (including EuVECAs, EuSEFs or ELTIFs), UCITS management companies or other, as we have subsequently argued as part of the ESFS (and more recently in the AIFMD Review).[24]

Moreover, as we have also observed during the works of the Commission's High Level Forum (HLF) on CMU and subsequent final report released in June 2020, European savers/investors are best served by effective and proportionate supervision by those authorities which have a close understanding of the local market. The asset management sector is, in particular, characterised by the existence of a number of "centres of excellence" where particular expertise, whether in relation to the operation of funds, or the management of assets, has developed. The benefits of this proximity and granular

[23] AMF/AFM Joint Position Paper, *Call for a European Regulation for the provision of ESG data, ratings, and related services*, December 2020, available at the following link; EFAMA Press Release, *Asset Managers support call for regulation of ESG data, research and ratings*, 18 December 2020, available at the following link; ESMA Letter to the European Commission on ESG Ratings, 28 January 2021, available at the following link.

[24] EFAMA Policy Paper on the Review of the European System of Financial Supervision, 8 January 2018, available at the following link; EFAMA Response to the European Commission's consultation on the Review of the AIFMD, available at the following link.

knowledge of local players, market conditions and investors were, once again, clearly demonstrated in the Covid-19 context.

By the same token, as the Commission is aware, beneath the opportunities offered by the system of EU distribution passports, fund distribution within the EU Single Market inevitably reflects different national approaches, each tied to a Member State population's attitudes towards saving and investing. We therefore believe the role of national supervisors also remains critical to adapt EU legislation to local conditions, ensuring proportionality is respected, all while acting as the first point of reference for retail investors. NCAs are the best placed to accurately assess harmful practices and to clearly and efficiently communicate with investors in their native language to warn against such practices.

Lastly, and more practically, besides the broad EU body of norms in the form of "Level 1", Level 2" and "Level 3" provisions, a management company's daily operations and fund offerings rely on myriads of necessary national provisions, steeped in either common or civil law traditions (e.g. company law, contract law, insolvency law, tax law etc.), thus falling within the remit of each Member State. The absence of EU law provisions in these very specific domains would inevitably create a sort of legal "dualism", risking to draw ESMA and NCAs/national authorities (and possibly even national courts) into protracted legal disputes related to ESMA's supervisory decisions.

4. The role of the ESAs as regards systemic risk.

Question 4.1 ESMA: Please assess the aspects described below regarding the role of ESMA as regards systemic risk:

	1 (lowest rate)	**2**	**3**	**4**	**5** (highest rate)	**Don't know – No opinion – Not applicable**
The quality of the analysis of market developments	☐	☐	☐	☐	☐	☒
The quality of the stress test and transparency exercises that were initiated and coordinated by the ESAs	☐	☐	☐	☐	☐	☒
The interaction between the ESRB and ESAs on the development of a common set of quantitative and qualitative indicators to identify and measure systemic risk	☐	☐	☐	☐	☐	☒
The cooperation within the European System of Financial Supervision (ESFS) to monitor the interconnectedness of the various subsectors of the financial system they are overseeing	☐	☐	☐	☐	☐	☒
The broader cooperation between the	☐	☐	☐	☐	☐	☒

ESRB and the ESAs within the ESFS						
The contribution of the ESAs to facilitating the dialogue between micro- and macro-supervisors	☐	☐	☐	☐	☐	☒

Please note: By eliciting answers through the compilation of the above multiple-choice answer table, EFAMA notes that the questions raised can be interpreted in several ways, leading to very different possible answers. We therefore prefer to express our views in writing by answering the questions below.

If you identify room for improvement for ESMA, please specify how this could be addressed:

As regards the quality of the stress tests, we welcome the fact that ESMA published in September 2019 a framework for sector-wide stress simulations for the investment fund sector and conducted a first study regarding the application of this framework on a sample of more than 6000 UCITS bond funds.[25]. There is, however, scope to improve these simulations and their relevant analysis by refining estimates of market liquidity and by benchmarking estimated flows to empirical data, in line with our AMIC/EFAMA Joint Report of January 2020.[26]

B. QUESTIONS ON THE SINGLE RULEBOOK

5. The ESAs work towards achieving a rulebook

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

☒ Yes

☐ No

☐ Other

☐ Don't know / no opinion / not relevant

If you have identified areas for improvement for ESMA, please explain: (5000 character(s) maximum)

The effectiveness of ESMA's technical standards and guidelines can be undermined by some measures being misguided, excessively granular, or via the lack of their implementation by national supervisors. For instance,

- SFDR RTS: Despite relevant improvements to its initial draft RTS proposal, the sustainability disclosures proposed by ESMA's draft final RTS still face a series of shortcomings. Firstly, our members struggle with several legal interpretations of the RTS. For example, it is not clear what the legal obligations regarding SFDR website disclosures are when portfolio management is delegated to a non-EU asset manager. Our members also face challenges in understanding

[25] ESMA Economic Report, Stress simulation for investment funds, 5 September 2019, available at the following link.
[26] AMIC/EFAMA Joint Report, Managing fund liquidity: Risk in Europe Recent regulatory enhancements & proposals for further improvements, 6 January 2020, available at the following link.

the difference in the ESAs final report between the term “consider PAIs” and “take into account PAIs” at the product level. Secondly, there are timing issues related to the Taxonomy-related SFDR RTS amendments, whose final report will be published by the ESAs only after the Commission will have endorsed the draft RTS in June this year. As a result, the RTS would not be endorsed as a single rulebook, but in two sets of RTS coming into force at different times, thereby confusing the market and increasing the number of times pre-contractual documents would need to be updated. Thirdly, we note that the ESAs recommended KPI metrics in the Taxonomy-related product disclosures in SFDR consultation was not consistent with the Commission’s draft delegated act under Article 8 of the Taxonomy Regulation (e.g. sovereign bonds and derivatives), and neither with the portfolio “greenness” formula in the EU Ecolabel for retail financial products; and

- Guidelines on Liquidity Stress Testing: The guidelines are sometimes excessively detailed and prescriptive, which contradicts the principles-based approach that ESMA intended to take. This not only leads to an important administrative and cost burdens, but also to procyclicality and financial stability risks, where all market participants follow a same detailed parameters without natural diversification based on the assessment of market conditions and on each fund’s strategy and liquidity profile. Moreover these guidelines do not foresee how to offer asset managers greater access to data to carry out their stress testing. We believe the communication of information by fund distributors or other intermediaries to fund managers, and potentially including some further details around certain types of (retail) investor profiles and their shares/units held, should become available free of charge in the general collective interest. [27]

Lastly, as we outlined in our response to question 1.1.1 and 1.5.1, there may be an insufficient focus on supervision and enforcement at the national level, which in turn may undermine the effectiveness of ESMA’s technical standards and guidelines.

Question 5.2 Do you assess the procedure for the development of draft technical standards as foreseen in the ESAs Regulations effective and efficient in view of the objective to ensure high quality and timely deliverables?

☐ Yes

☐ No

☒ Other

☐ Don’t know / no opinion / not relevant

Please specify what you mean by “other” in your answer to question 5.2: (5000 character(s) maximum)

A first issue that we have identified is that EU legislators do not leave enough time to ESAs to develop their draft technical standards and guidelines. The former only adopt high-level rules at Level 1 and leave it to ESMA to operationalise these rules. In itself, this is the right approach in our opinion, but it comes with its own share of challenges, in particular the need to appropriately time the entry into force

[27] EFAMA Response to ESMA’s consultation paper on the guidelines on liquidity stress testing in UCITS and AIFs, 22 March 2019.

of measures at Levels 2 and 3.

The process for drafting ESMA technical standards is sometimes very lengthy and the deadlines for the entry into force of Level 1 rules, fixed by EU legislators, are not always realistic, especially considering the fact that the European Commission still has to adopt the technical standards into a delegated or implementing act (e.g. see for instance the SFDR RTS). It is however crucial in terms of legal certainty that Level 2 and 3 measures are available in time for the application of Level 1 rules.

We see two potential solutions to this problem. First, ESMA's recourse to "no-action letters" could be reviewed to allow ESMA to temporarily waive Level 1 rules until sufficient legal certainty is provided to market participants (please refer to question 1.2.1 for more details). Second, another solution would be to have a flexible timeline in the Level 1; for instance, rather than setting defined deadlines, legislative acts could mention that a given Level 1 act should enter into force six months after the adoption of the technical standards (please refer to 6.6 for more explanations).

A second issue that we have noticed is that sometimes ESAs have to adopt technical standards for a same legislative act without any coordination at the level of the Joint Committee of the ESAs. As a way of illustration, the draft RTS on Article 8 of the SFDR, where ESMA published a completely different RTS from EBA and EIOPA, forced the European Commission to develop a delegated act based on diverging advices. Such a situation should be avoided as it is not conducive to good rule-making.

A last comment would be that better communication between ESMA and the European Commission during the drafting of technical standards would go a long way to ensure that these standards are in line with the Commission's expectation and to ensure that it does not have to reject the proposed standards as it was the case with the PRIIPS RTS.

Question 5.3 When several ESAs need to amend joint technical standards (e.g. PRIIPs RTS) and there is a blocking minority at the Board of Supervisors of one of the ESAs, what would you propose as solution to ensure that the amendment process runs smoothly?

EFAMA does not see any issue with the current process and is opposed to any idea to introduce a 2/3 majority in the decision-making process.

The problem that arose with the PRIIPs RTS should be reviewed by the Commission. The latter should have accepted the ESA's joint technical standards rather than pressuring them into aligning themselves with the Commission's views. The blocking minority at the EIOPA's Bord of Supervisors is a direct consequence of the Commission pressuring the ESAs.

Moreover, we believe that the introduction of a 2/3 majority to the current framework in order to circumvent a potential blocking majority would undermine the quality of the forthcoming EU legislation given that it might hypothetically neglect the perspective coming from either the banking, insurance/pension, or capital markets sectors.

Question 5.4 In particular, are stakeholders sufficiently consulted and any potential impacts sufficiently assessed?

☐ Yes

☐ No

☒ Other

☐ Don't know / no opinion / not relevant

Please specify what you mean by "other" in your answer to question 5.4:

Stakeholders involvement is satisfactory. Although impact assessments are based on consultations and inputs from expert workshops, it is our opinion that these exercises have only a limited added value due to the time constraint faced by ESMA when developing technical standards or guidelines. The different policy choices outlined by these assessments remain, in our views, largely subjective.

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)?

Please give your reasons for each

The European asset management sector is already significantly regulated through Level 1 and Level 2 legislation. The priority for ESMA should be to ensure, through Level 3 measures, that EU legislation is further specified and consistently implemented across Member States. Rather than cumulating requirements, ensuring that existing rules are effectively applied – also by strengthening enforcement where necessary – should be the priority. Moreover, for reasons explained above, maximum harmonisation is not necessary, nor warranted, for an industry that is very diverse and very heterogenous across product and client types, and where NCAs also continue to play a key role in their respective home markets.

In terms of areas where further harmonisation may be considered, we would consider allowing "sophisticated retail investors" to opt up to the "professional investor" status in MiFID II.[28]

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? Please select as many answers as you like

☐ Banking

☐ Insurance

☒ Asset management

☐ Market infrastructure (CCPs, CSDs)

☐ Market organisation (MiFID, MIFIR, MAR)

☒ Other

[28] EFAMA Response to the European Commission on the review of the MiFID II/MIFIR regulatory framework, 18 May 2020, available at the following link.

Asset Management

Please identify the relevant sectoral legislation in the area of Asset Management for which national rules going beyond its minimum requirements and explain

There is indeed gold-plating, or at least regulatory and supervisory divergence, in the European asset management sector, but this state of affairs is only partly intentional and is often due to national supervisors plugging the interpretative gaps left open by the EU legislators and/or ESMA.

For instance, below are a few areas where there is regulatory or supervisory divergences across Member States:

- Regulatory fees: National supervisors charge sometimes quite different fees for the authorisation and supervision of funds in their jurisdictions;

- UCTIS/AIFMD supervisory reporting: Under the UCITS Directive, there is no requirement to introduce supervisory reporting regimes, but some Member States have introduced such a regime. Moreover, although such a supervisory reporting framework exists under the AIFMD, it is not always implemented in a consistent or coordinated way (see our response to question 1.1.2 on this last point);

- ESMA also identified several additional divergences between Member States in its aforementioned August Letter to the European Commission on the review of the AIFMD.

It is our view, however, that most of these divergences are not excessively detrimental to our industry and that none of these divergences require an intervention at Level 1 or 2. It would be more appropriate to start by targeted supervisory convergence actions (e.g. via a thematic review or CSA), then potentially considering more binding actions at a later stage, as recommended in our response to question 6.5.

Other

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

There are also supervisory and regulatory divergences, where not gold-plating, in other legislative areas such as in:

- MIFID II: Member States impose different investor protection requirements;

- EMIR: Similarly to the situation under the AIFMD supervisory reporting framework, the reporting regime under EMIR is not always implemented in a consistent and coordinated way;

- AMLD: National supervisors have different requirements as regards onboarding of clients as part of their anti-money laundering requirements;

- Securitisation Regulation: In one jurisdiction, the national supervisor requires the pre-approval of trades on securitised assets; and

- SFDR: Not every Member State has adopted the same definitions regarding which funds qualify as Article 8 and Article 9 funds.

These divergences should not be addressed via legislative changes, but rather at Level 3 through supervisory convergence actions by ESMA.

6.4 Questions regarding the appropriate level of regulation.

Question 6.4.1 In your view, are there circumstances in existing EU legislation where level 1 is too granular, or for other reasons, would rather be preferable to have a mandate for level 2, or guidance at level 3?

☒ Yes

☐ No

☐ Don't know / no opinion / not relevant

Please specify the area (and if possible, specific piece of legislation) and explain why (e.g. in order to have appropriate flexibility to adapt the specifics of the regulation in case of change of circumstances) :

EFAMA supports a regulatory approach where EU legislative acts outline the high-level principles and rules that are to be complemented by more granular rules at Level 2 and Level 3. We acknowledge, however, that determining the level of granularity at Level 1 for each legislative act should be done on a case-by-case basis. While some legislative acts require greater granularity to ensure that products are safe for (retail) investors (e.g. the UCITS Directive), other acts require more flexibility at Level 1 either because the technical rules require greater expert knowledge to be specified through implementing acts (e.g. the SFDR and Taxonomy Regulation) or because the object of the Level 1 rules is very heterogenous (e.g. the AIFMD).

As a general principle, however, the Commission should always carefully consider the risk of inserting quantitative thresholds in Level 1 legislation, where these risk becoming the object of political contention between the co-Legislators, thereby drifting away from the practical and implementable outcomes intended. Alternatively, to ensure legislation follows market evolutions and dynamics, such thresholds should become subject to a periodic adjustment or review process without necessarily triggering a full-fledged review of the entire Level 1 act. As an example of how numerical thresholds can be purely artificial and actually counteract the initial intent of a Commission proposal, one can refer to the ELTIF Regulation. In this regards, the strict and overlapping quantitative limits set to govern investments by retail investors into ELTIFs were initially justified largely on grounds of investor protection, albeit have resulted in making the product unappealing to distributors and consequently to retail investors alike. The same we believe is true for the existing minimum threshold (€10 million) governing investment amounts in eligible real assets.

Question 6.4.2 On the other hand, in your view, could reducing divergences in rules at level 1 (legislation agreed by the co-legislators), as well as rules regarding delegated acts (regulatory technical standards) or implementation at level 2, (implementing acts and implementing technical standards) and/or level 3 ('comply or explain guidance' by ESAs) further enhance the single rulebook?

☐ Yes

☒ No

☐ Don't know / no opinion / not relevant

Question 6.4.2.1 Which of the three levels and/or a combination thereof are more effective in building the single rulebook? (multiple choices allowed)

☒ Level 1(legislation agreed by the co-legislators)

☒ Level 2 (e.g. delegated acts and technical standards)

☒ Level 3 ('comply or explain guidance' by ESAs)

Please explain your answer to question 6.4.2 and 6.4.2.1:

There is no one level of regulation which is more effective than another. It is fundamental to take a systemic perspective when assessing the effectiveness of the these different levels and understand that one level builds onto the other.

Legislative acts at Level 1, we believe, should outline high-level principles and rules and be complemented by more granular rules at Level 2 and Level 3. There are, however, circumstances, as we outlined in our response to question 6.4.1 where greater granularity at Level 1 is warranted. ESMA should provide EU legislators with expertise to ensure that they properly understand the implications of their policy choices, especially when they weigh in on more technical files (see also to question 1.1.2 on that last point where we argue that ESMA has recently failed to provide that technical expertise).

Delegated and implementing acts at Level 2 and Level 3 should specify these high-level principles and rules based on the expertise provided by the ESAs and stakeholders. Rules should be introduced at Level 2 to ensure consistency across Member States, but should remain sufficiently broad to allow enough flexibility for Member States and market participants to adapt these rules to their specific situations. ESAs may adopt further guidance at Level 3 when it deems that there is lack of clarity as regards certain rules or that divergences in the implementation of the rules by Member States or market participants undermine the policy objectives set at Level 1. It is therefore particularly important that ESAs have sufficient leeway to ensure that they can adopt guidelines and other L3 measures when necessary and not only when they are empowered by a legislative act or a recommendation from the ESRB.

It is only when these three levels interact in harmony that the effectiveness of the single rulebook is achieved. Indeed, for instance, if rules at Level 1 are not intelligible or too granular, they are likely to undermine the capacity of the European Commission and the ESAs to appropriately complement them with high-quality and consistent rules at Levels 2 and 3. Conversely, if rules at Level 2 or Level 3 are absent or poorly conceived, then rules at Level 1 remain on paper only.

Question 6.5 Generally speaking, which level of regulation should be enhanced/tightened in order to ensure uniform application of the single rulebook? (multiple choices allowed).

☐ Level 1(legislation agreed by the co-legislators)

☐ Level 2 (e.g. delegated acts and technical standards)

☒ Level 3 ('comply or explain guidance' by ESAs)

Please explain your answer to question 6.5 and substantiate with examples, where possible:

The appropriate level of regulation varies from one legislative sector to another depending on the level of regulation already achieved in a givens sector. In the case of the European asset management sector, and more generally in other sufficiently regulated sectors, further harmonisation should be achieved by priority through Level 3 measures. Higher level changes should intervene only once ESMA's efforts to promote the supervisory convergence have demonstrably failed.

It is particularly important that there first be a technical dialogue between NCAs on any potential convergence matter in order to build a better understanding of the reasons driving the divergences between Member States. The collection of evidence as regards the potential negative consequences stemming from such divergences should naturally be part of this first phase. Through such process, NCAs are more likely to agree on a common approach, improving trust between them and empowering the ESAs to consequently issue better guidance.

Only where this work is hampered and/or in the presence of significant market failures requiring EU legislative action, should Level 1 changes be pursued, or the ESAs empowered to prepare Level 2 delegated or implementing acts.

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?

We believe that the ESAs should be given more time when preparing technical standards, as currently the deadlines impose on them by the EU legislators are often unrealistic and lead to poor regulatory outcomes (see for instance SFDR, PRIIPs, EMIR, or CSDR). Moreover, as per our previous answer, it is critical for the financial industry to not have to implement Level 1 legislation before the corresponding implementing acts are prepared by the ESAs and adopted by the Commission.

The SFDR Level 1 legislation applying this year from the 10 March without its corresponding final RTS (expected to be adopted by mid-2021 and effective as from January 2022) and a stream of further delegated acts (applicable as from October 2022) amending UCITS, AIFMD and MiFID II legislation are a substantial concern to our entire industry. The problem is compounded by the fact that the Level 2 measures also descend from multiple Level 1 pieces of legislation. Similarly, although the original PRIIPs' application date was 31 December 2019 for UCITS funds, the ESAs were only able to agree on draft RTS in February 2021 after a long back and forth between the European Supervisors, the European Commission, and the EU legislators, and the RTS are now waiting for the European Commission's endorsement. The Commission had, as a result, to postpone twice the PRIIPS' application date to ensure legal certainty.

A sensible proposal to avoid legal and operational uncertainties, as well as a precious expense of resources for our industry and clients, would be for the Commission to propose that, in the future, Level 1 legislation should generally apply as from six months after all of its corresponding implementing/delegated acts have been finalised. In this regard, we note the positive precedent set by the pan-European Pension Product (PEPP) Regulation (2019/1238), where the Level 1 entered into force but became applicable only twelve months from the publication in the EU Official Journal of its corresponding delegated acts. For the reasons mentioned above, we believe such precedent should become a standard. Alternatively, as referred in our response to question 1.2.1, ESMA could be granted more extensive "no-action letter" powers to face such situations.

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About EFAMA

EFAMA, the voice of the European investment management industry, represents 28 Member Associations, 57 Corporate Members and 23 Associate Members. At end Q4 2020, total net assets of European investment funds reached EUR 18.8 trillion. These assets were managed by more than 34,350 UCITS (Undertakings for Collective Investments in Transferable Securities) and almost 29,650 AIFs (Alternative Investment Funds). At the end of Q2 2020, assets managed by European asset managers as investment funds and discretionary mandates amounted to an estimated EUR 24.9 trillion.

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Contact

Federico Cupelli
Senior Regulatory Policy Advisor
Federico.cupelli@efama.org | +32 2 548 26 61