



**EUROPEAN COMMISSION**  
DIRECTORATE-GENERAL FOR FINANCIAL STABILITY, FINANCIAL SERVICES AND CAPITAL  
MARKETS UNION

## **CONSULTATION DOCUMENT**

### **TARGETED CONSULTATION ON THE SUPERVISORY CONVERGENCE AND THE SINGLE RULE BOOK**

Taking stock of the framework for supervising European capital markets, banks, insurers  
and pension funds

#### **Disclaimer**

This document is a working document of the Commission services for consultation and does not prejudice the final decision that the Commission may take.

The views reflected on this consultation paper provide an indication on the approach the Commission services may take but do not constitute a final policy position or a formal proposal by the European Commission.

You are invited to reply **by 21 May 2021** at the latest to the **online questionnaire** available on the following webpage:

[https://ec.europa.eu/info/publications/finance-consultations-2021-esas-review\\_en](https://ec.europa.eu/info/publications/finance-consultations-2021-esas-review_en)

Please note that in order to ensure a fair and transparent consultation process **only responses received through the online questionnaire will be taken into account and included in the report summarising the responses.**

This consultation follows the normal rules of the European Commission for public consultations. Responses will be published unless respondents indicate otherwise in the online questionnaire.

Responses authorised for publication will be published on the following webpage:  
[https://ec.europa.eu/info/publications/finance-consultations-2021-esas-review\\_en](https://ec.europa.eu/info/publications/finance-consultations-2021-esas-review_en)

## INTRODUCTION

There has been considerable progress on both supervisory convergence and the single rulebook since the three [European Supervisory Authorities \(ESAs\)](#) were created in 2011. Nevertheless, both require continued and appropriately targeted efforts to make further progress. In this context, the Commission's capital markets union (CMU)<sup>1</sup> action plan published on 24 September 2020 includes the following action:

**CMU action plan** - Action 16: *The Commission will work towards an enhanced single rulebook for capital markets by assessing the need for further harmonisation of EU rules and monitoring progress towards supervisory convergence. It will take stock of what has been achieved in Q4 2021 and consider proposing measures for stronger supervisory coordination or direct supervision by the European Supervisory Authorities.*

*The Commission will also carefully assess the implications of the Wirecard case for the regulation and supervision of EU capital markets and act to address any shortcomings that are identified in the EU legal framework.*

The [CMU](#) is the EU's plan to create a truly single market for capital across the EU. It aims to get investment and savings flowing to the companies and projects that need them across all Member States, benefitting citizens, investors and companies, regardless of where they are located. The CMU provides new sources of funding for businesses, helps increase options for savers and makes the economy more resilient.

Without well-developed and integrated capital markets, there can be no economic prosperity. And without supervision, capital markets could not contribute to economic prosperity. Supervision is an essential condition for a well-functioning CMU. This will be particularly relevant in a post-Brexit world with multiple financial centres across the EU. Gradual progress towards more integrated capital markets supervision will be indispensable.

It is essential for people and firms to have confidence in the financial system and also for the providers of financial services to operate in a stable and fair environment. Supervision should ensure that divergences in outcomes of supervisory practices in Member States do not undermine confidence, stability, investor protection and fairness in the Single Market. The three European Supervisory Authorities (ESAs) are mandated to ensure the convergence of supervisory practices among the national competent authorities<sup>2</sup>. In addition, the [European Securities Markets Authority](#), is responsible for direct supervision of some market activities and market operators. However, supervisory convergence reaches its limits where the national rules that supervisors have to apply and enforce differ between Member States or where the common European rules leave room for interpretation or too much discretion to Member States for its transposition, application and enforcement. The ambition for a European single rulebook therefore seeks to reduce differences between national laws and to provide more detailed rules where it is important for stability and fairness in the single market. Taken together,

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<sup>1</sup> The EP adopted an own initiative report on further development of the CMU on 8 October and the Council adopted its conclusions on the Commission's CMU AP on 3 December 2020.

<sup>2</sup> Within the [banking union](#), the [single supervisory mechanism](#) ensures uniform supervision of banks. For banking resolution, the [single resolution board](#) is directly responsible for resolution planning and decisions for all significant banks and cross-border ones.

supervisory convergence and the single rulebook provide the framework for effective and efficient supervision.

The input to this consultation, which seeks to take stock of what has been achieved so far, will feed into the preparation of the report required by the CMU action plan which will cover the review<sup>3</sup> required under the ESAs founding Regulations as well. This consultation seeks targeted views on certain aspects related to the 2019 ESAs review<sup>4</sup> and contributes to a wider debate on supervisory convergence and the single rulebook.

Please note that not all questions are relevant for all stakeholders and that you are not expected to reply to each question. Please indicate the ESA for which the reply is intended.

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<sup>3</sup> Article 81 of the [ESAs founding Regulations](#) requires the Commission to review the functioning of the ESAs every 3 years, and next time by end 2021.

<sup>4</sup> The ESAs founding Regulations were amended in 2019. These recent legislative changes entered into force in January 2020 ([Regulation \(EU\) 2019/2175, which reviews the powers, governance and funding of the ESAs.](#))

- [EBA Regulation consolidated version 01/01/2020](#)
- [EIOPA Regulation consolidated version 01/01/2020](#)
- [ESMA Regulation consolidated version 01/01/2020](#)

## CONSULTATION QUESTIONS

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

- I. How do you assess the impact of each ESA's activities on the aspects below? Please rate the ESAs impact on each aspect from 1 to 5, 1 standing for "less significant impact" and 5 for "most significant impact":

	1	2	3	4	5	No opinion
The financial system as a whole			x			
Financial stability				X		
The functioning of the internal market			X			
The quality and consistency of supervision			X			
The enforcement of EU rules on supervision			X			
Strengthening international supervisory coordination				X		
Consumer and investor protection			X			
Financial innovation			X			
Sustainable finance				X		

Please explain your answer

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

YES

NO

- III. In your view, do the ESAs face any obstacles in delivering on their mandates? If the answer is yes, please explain what you consider to be the main obstacles.

YES

NO

Firstly, the continuous amount of regulatory work stemming from reviews of existing legislation as well as new regulation carrying new tasks puts a strain on the existing resources as new resource allocation or funding seldom accompanies the tasks. Moreover, it persistently requires reallocation of the existing resources from the essential work on supervisory convergence while the call for greater focus of this latter work steadily grows.

Secondly, unrealistic or overly ambitious timing of delivery of products (particularly technical standards) set out in the Level 1 regulation combined with the amount of work expected to be delivered strains the limited resources available at the ESAs and the National Competent Authorities (NCAs). This will and does affect the quality of material, as it results in a process with too short turnarounds for scrutiny of material as well as difficulty in maintaining reasonable consultation periods with stakeholders.

Thirdly, the trend of inserting mandatory convergence activity within the level 1 texts (such as mandatory peer reviews) or forced areas of focus potentially in isolation of market developments, will increasingly take away the ability of the ESAs and in particular the NCAs to plan their supervisory work taking into account relevant risk based assessments with a view to acting where the highest risk would be or emerge and without regard to the degree of added value. Planning of supervisory activity must be done in view of the circumstances at hand, which is in the hands of the relevant supervisors, not the legislators.

## 1. The supervisory convergence tasks of the ESAs

### 1.1. Common supervisory culture/supervisory convergence:

- 1.1.1. To what extent the ESAs do contribute to promoting a common supervisory culture and consistent supervisory practices? Please rate in a scale from 1 to 5 (“5” being the most significant contribution and “1” the less significant contribution). Please explain your answer and indicate if there are any areas for improvement.

Generally, we believe the ESAs actively contribute to this mandate and we also believe it is one of the most important aspects of their work.

However, there is room for further improvement and we have focused on a few essential issues that admittedly should and could not be tackled through legislation but rather the nature of cooperation.

The fundamentals for reaching a common approach are that all parties of a process have a good understanding of the premises for the results and decisions made during the legal assessments and reports. This is only achieved by a strong culture of information sharing also within the ESAs themselves. The role of coordination is key for the ESAs. This requires the ESAs to facilitate constructive discussions with transparent feedback on the different steps of developments of products, including how approaches have been decided upon and provide legal clarifications on such where relevant and beneficial for the understanding. This can still be improved upon. We also believe that this would naturally carry over on further consistency in supervisory practices.

We believe the ESAs must act as honest brokers taking into account all relevant information and views to evidence the work. This includes not only the views of ESA staff but naturally also suggestions from NCAs all of which is based on experience and expertise as well as their views on what may be of importance in an area to facilitate better supervisory convergence.

An example for illustration purposes is that since 2013 NCA members have suggested that the EBA develop and publish guidance on intraday liquidity management, just like Basel published its guidance in 2013 on monitoring tools for intraday liquidity management. However, this has not been undertaken primarily with the argument that there is no mandate in the Capital Requirements Regulation (CRR) to assess the topic of intraday liquidity. However, the same argument has not been invoked when developing the LCR implementation reports which have been carried out.

	1	2	3	4	5	No opinion
Promote a common supervisory culture and consistent supervisory practices			x			

- 1.1.2. To what extent the following tasks undertaken by the ESA(s) have effectively contributed to building a common supervisory culture

and consistent supervisory practices in the EU. Please rate each task from 1 to 5, 1 standing for "less significant contribution" and 5 for "most significant contribution":

	1	2	3	4	5	No opinion
Providing opinions to competent authorities				x		
Promoting bilateral and multilateral exchanges of information between competent authorities				X		
Contributing to developing high quality and uniform supervisory standards			x			
Contributing to developing high quality and uniform reporting standards			x			
Developing and reviewing the application of technical standards			x			
Contributing to the development of sectoral legislation by providing advice to the Commission			x			
Establishing (cross)sectoral training programmes				x		
Producing reports relating to their field of activities			x			
Conducting peer reviews between competent authorities			x			



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

Please add any qualitative comments you may wish to explain your reasoning.

Below we have included comments on elements that are not covered in other areas of this document.

On the issue of **exchange of information**, we believe that promoting bilateral and multilateral exchanges of information between NCAs can be improved and should be encouraged by the ESAs at all working levels. To this effect a more consistent and transparent approach in sharing comments received and providing feedback on the handling thereof, whether from stakeholders or NCA members is

required. We are aware that this may be time consuming but also believe it is the backbone of high quality work, which will translate into constructive discussions, multilateral exchanges of views and information and a fully evidenced product.

We wish to highlight that the ESAs have a large amount of IT-related tasks stemming from primary and secondary legislation. However, the amount of tasks allocated to them also results in there being too many projects to address within a given period of time. This results in delays in establishing the relevant IT-basis which in turn results in **non-compliance with reporting obligations**, as such were dependant on the IT-basis being in place. This in turn results in reporting challenges for the financial institutions whereby these entities would be in breach of legal reporting requirements. An example is LCR that came into force 1 October 2015. However, the institutions first reported LCR in relation to the legislation in September 2016 due to lack of an IT-reporting tool, partly due to large burdens in the IT-area overall, partly due to delay because of lack of sufficient prioritisation in finalizing the IT setup for the new LCR reporting.

We find the ESAs play an important role of providing **advice to the Commission** in order to inform an area prior to legislative action. Early consultation of the ESAs/NCAs in the legislative process contributes to legislation that can be more easily be implemented in practice in a more harmonised manner from the beginning where there is less need of “translation” of abstract concepts into practically applicable provisions.

We note that the ESAs have received stronger mandates to develop **supervisory handbooks** in their remits. This concept is not new, but is also not defined and may comprise many elements, such as supervisory statements that in turn are also not further clarified anywhere. While these tools are now explicitly mentioned we do not believe there is need of any further inclusion of rigid definitions, nor on-going inclusion and thus mention of all supervisory convergence tools in legislation. This would be too cumbersome and counterproductive to on-going development and adjustment to the needs of the NCAs and ESAs. We note that the handbooks should reflect an actual and practical need stemming from the supervisory activity, both from the level of the ESAs as well as the NCAs.

We do not have extensive firsthand experience with official **mediation processes** facilitated by the ESAs. However, a range of new requirements and deadlines were introduced with the recent review of 2019 and changes to the internal rules of procedures. In this context it is important to ensure that mediation processes are applied when there is an actual important point of contention between the NCAs. The focus of the ESA in a mediation process is that of facilitating fluid, open communication and cooperation between the NCAs, not rigid compliance with deadlines. We would therefore urge not to constrain these processes by excessive formal requirements.

We have a couple of general comments with regard to **guidelines and Q&As**. Overall these two tools are useful in providing answers to challenges raised by NCAs as well as stakeholders with regard to the common understanding and

application of the rules as well as communication on such conclusions and approaches.

However, the Danish FSA experiences that the ESAs have a tendency particularly in this work to see the market only as one market and thus steer the work towards a “one size fits all” approach. However, the EU internal market continues to comprise many different Member States’ markets at different levels of maturity which is also acknowledged by the regulation, ESAs and the Commission. We believe that the more explicit references to these aspects in regulation as well as communication by the ESAs has yet to fully be integrated in the development of the products. Time should be allowed for this to take effect as well as support the ESAs in facilitation of open and constructive discussions.

- 1.13. One of the roles of the ESAs is to promote and facilitate the functioning of supervisory colleges, where established by sector legislation, and foster the consistency of the application of Union law among them. Please rate the ESAs’ contribution to the objectives below from 1 to 5, 1 standing for "less significant contribution" and 5 for "most significant contribution". Please explain your reasoning.

	1	2	3	4	5	No opinion
Promote the effective and efficient functioning of colleges of supervisors			X			
Foster consistency in the application of Union law among colleges			X			
Promote converging supervisory practices among colleges.			X			

We believe the description of the role of the ESAs is correct and the ESAs do to a certain extent meet the expectations of facilitation and coordination of the functioning of the colleges and consistency across relevant colleges and sectoral areas. In this regard, it is important that the colleges remain fora for open communication between supervisors with respect for the participants' experiences. The Danish FSA notes that issues relating to potential lack of application of Union law may surface during the work in colleges. Often they will be addressed through the course of exchanges of views, experiences and adaptation to the new knowledge in the college. However, if it is not resolved, the issue of lack of application of Union law should be addressed through the specific remedies designed for such purpose. If investigated and followed through in the college itself, it could taint the goal of these fora regarding openness in communication and consistency in cooperation and application.

1.14. In the framework of the 2019 ESAs review. How do you assess the new process for questions and answers (Article 16b)?

Generally, the Danish FSA has not experienced major changes to the process in practice aside from the delay in providing timely responses when questions are referred to and dealt with by the Commission. We recognize the Commission's role of interpreting the Union law. However, we do not believe it is possible to make this full split between the application of law from the interpretation of Union law. They are intertwined with each other. Furthermore, we note that the raison d'être of the ESAs is exactly to ensure the expertise in reading and applying rules in financial regulation is fully taken into account when applying the EU rules.

1.15. 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** Please identify areas for improvement, please explain

**NO** Please give reasons.

We find the Q&A to be an efficient and useful tool to address issues as they arise whether from regulators or stakeholders and facilitate convergent approaches as well as making them public so the stakeholders can adapt their approaches accordingly. Several of the new elements are positive. However, it is too early to have a full evaluation of all the aspects, including the use of public consultation and the web-based tool. We do have a couple of remarks based on experiences thus far by the Danish FSA.

Firstly, the Danish FSA has seen a prolongation of the response time when questions are submitted to the Commission for a response. The turn-around time at the Commission must be shortened in order for this tool to be effective.

Secondly, we find that public consultation for selected Q&As could be relevant as answers sometimes carry significant consequences for the market. However, initial identification of the need to apply this tool is also dependent on the initial description of the issue at hand provided by the submitter. This may on the one hand mean that some issues are not identified as needing broader consultation until potentially at a much later stage. On the other hand extensive public consultation of all Q&As is not desirable as this would not be viable from a resource nor efficiency perspective and would significantly change the nature of the tool towards other tools such as guidelines in art. 16 of the ESA regulations.

Thirdly, we believe it is important to have a transparent follow-up system after the answers are provided, not only to also assess whether any further steps need to be taken but also to ensure the content is up-to-date. We believe this could be accommodated through a more firm obligation to review published Q&As.

Fourthly, the web-based tool is still under development also in light of the added general obligation for the ESAs to have a rulebook available on the website following from changes to article 8 in the 2019 ESA-revision. It is important to ensure that it is sufficiently interactive with good search functions to allow for easy access and use by the users.

## 1.2. No action letters

- 12.1. In the framework of the 2019 ESAs review. 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? Please justify your answer.

YES

NO

The intended purpose of the no-action letters mechanism was, according to the review, to create an: “alert and convergence system” which will ensure that the ESAs in exceptional circumstances and when there are significant issues raised by legal acts (e.g., rules that conflict with each other; absence of a delegated or implementing act that raises legitimate doubts about the legal consequences of the level 1 act; absence of guidelines that makes application of the act difficult) alert the Commission and Competent Authorities about what those issues are and where necessary issue an opinion to ensure convergent enforcement practices in relation to the issues raised.

It is important that the ESAs and the NCAs have the necessary powers to express themselves about severe challenges in complying with legislation. However, it is unclear at this time whether this mechanism is fit for purpose.

The Danish FSA experiences that there seems to be an increase in use of the tool among the ESAs with a view to resolving situations of implementation deadlines where the Commission has not yet adopted delegated acts. However, we do not believe no-action letters is the appropriate tool to address such issues as this is a challenge to be addressed by the co-legislators and the Commission when setting and complying with deadlines.

Considering the wording limits the use of no-action letters, we believe that this specific tool should be used with the utmost restraint and only in significant situations.

122. In the framework of the 2019 ESAs review. How does the new mechanism, in your view, compare with “no action letters” in other jurisdictions?

We have not conducted a full analysis of this tool with other jurisdictions. As it is formulated today it looks to ensure that the ESAs do not set aside implementation or application dates of legislative acts by de facto delaying their application. This is not within the competences of an authority or agency as their competences are strictly limited by the delegation and the legal acts themselves. These are matters for the co-legislators, not the ESAs.

123. In the framework of the 2019 ESAs review. Could you provide examples where the use of no action letters would have been useful or could be useful in the future?

No-action letters can be a useful mechanism for establishing a common approach to legislation in instances where delegated acts are absent and there are doubts about implementation of the level 1 text. However, we would not encourage the use of no action letters to dis-apply legislation and only use them when absolutely necessary. The Danish FSA experiences that the mechanism can also have a conflict-escalating effect on the cooperation and relationship with the Commission. This should be avoided.

### 1.3. Peer reviews

13.1. Please specify 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. Please rate each outcome from 1 to 5, 1 standing for "less significant contribution" and 5 for "most significant contribution":

<b>Situation before the 2019 ESAs review</b>	1	2	3	4	5	No opinion
Convergence in the application of Union law			X			
Convergence in supervisory practices				X		
More wide spread application of best practices developed by other competent authorities				X		
Convergence in the enforcement of provisions adopted in the implementation of Union law		X				
Further harmonization of Union rules	X					
Other, please indicate						x

<b>Situation after the 2019 ESAs review</b>	1	2	3	4	5	No opinion
Convergence in the application of Union law			X			
Convergence in supervisory practices				X		
More wide spread application of best practices developed by other competent authorities				X		
Convergence in the enforcement of provisions adopted in the implementation of Union law		X				
Further harmonization of Union rules	X					
Other, please indicate						x

Please explain your reasoning/give examples.

Overall, we believe it is premature to provide a full view of the extent of changes following from the 2019 review and several aspects have yet to be put to use. Thus, the full effect on the convergence outcomes will only be available in two years.

We believe it is also important to distinguish between the peer review and its outcomes on the one hand and enforcement of Union law on the other hand.

Generally, peer reviews have since the beginning been an effective tool to facilitate convergence in application of Union law and supervisory practices through the exercise of comparing approaches across the EU and learning from the identified good practices.

It has been used as a true convergence tool facilitating information and knowledge sharing as well as increased cooperation at a high level. The tool has also evolved from being more desk-based analysis of how rules are incorporated into national procedures to include analyses of the actual processes, on-site visits, etc. This also means that peer reviews have become quite resource-intensive for the ESAs and NCAs alike. Therefore, it is not feasible nor useful to conduct a huge amount of peer reviews annually and it is important that they are conducted in areas where there is benefit in identifying the level of convergence and practices. We also note that the increasing amount of legislative mandated peer reviews in level 1 legislation hamper the ability of the ESAs to conduct such targeted and relevant peer reviews as resources will have to be allocated to ensure compliance with the legislative mandates.

Secondly, peer reviews may provide insight as to the manner of use of provisions, including enforcement provisions. If divergences in approaches are identified such can be subject for follow-up action with the aim to seek convergent approaches. Follow-up action is also catered for in the legal provision. However, we strongly believe that peer reviews are not in and of themselves tools to enforce the Union rules. Other remedies address such action. Ultimately, enforcement action of non-application of Union law is for the Commission to act upon and the co-legislators to address through legislation if and where appropriate.

132. How do you assess the impact of each of the changes below introduced by 2019 ESAs review in the peer review process? Please rate each change from 1 to 5, 1 standing for "less effective" and 5 for "most effective"



	1	2	3	4	5	No opinion
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.			x			
The peer review report is now adopted by written procedure on non-objection basis by the Board of Supervisors.	X					
Transparency provisions: if the PRC main findings differ from those published in the report, dissenting views should be transmitted to the three European Institutions.	X					
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.	X					
Mandatory follow-up to peer reviews within two years after the adoption of the peer review report.	X					
The possibility to carry out additional peer reviews in case of urgency or unforeseen events (fast track peer reviews).	X					
The Management Board is consulted in order to maintain consistency with other peer reviews reports and to ensure a level playing field.						x

Please explain your reasoning

Generally, the structure and organisation of the Peer Review Committees seems to have functioned well.

Below we have focused our comments on elements where we believe the 2019 ESA-review has unnecessarily complicated the peer review tool.

We find the provision indicated as a “**transparency provision**” above concerning transmitting of dissenting views to the three European Institutions highly problematic both from a political point of view but also in ensuring the ESAs are not unduly influenced by institutions when acting in their supervisory capacity. Firstly, peer reviews concern matters of hands-on supervisory convergence work, a task by nature independent of political influence. This provision has the ability to directly impair or give cause for concern of potential impropriety in the ESAs and their members' ability to comply with the obligations to act independently and without taking instructions from other Union institutions or bodies.

Secondly, the presence of such reporting requirements is in stark contrast to the

expectation that NCAs themselves act independently and thus is at odds with the mandate for the ESAs to foster and monitor supervisory independence of NCAs. Thirdly, the Peer Review Committee is established to conduct the peer review and submit draft reports, conclusions etc. As such the PRC is in effect a preparatory body for the BoS. The relevant outcome of a concrete peer review for the public and for the three European Institutions is that which has been approved by the BoS and published. We find it is critical that the BoS as the highest decision-making body of the ESAs is effectively bypassed by this submission of dissenting views directly to the political establishment.

In relation to the **adoption procedure** by written procedure on non-objection basis the Danish FSA experiences that it does not facilitate and actually prevents a good exchange of views and experiences at the BoS. Past experience shows that discussions at the BoS level of peer review outcomes has been a core part of ensuring knowledge of the outcomes, processes during a peer review and facilitate good follow-up activity. This interaction is much less feasible in written procedures. Moreover, the reverse voting requirement (simple majority to object) in a written procedure in effect makes it impossible for Member States to achieve enough votes to object to the outcomes of the review even where there may be good reason for doing so. This would not seem to be conducive to good decision-making. In addition, it is a very different approach to handling reports, etc. than in other similar institutions such as the ECB.

It is too early to assess the element of the **recommendations to NCAs** versus general guidelines as none have been set out yet. It will be imperative that the “comply or explain” mechanism under Article 16 of the ESAs Regulations actually is a dual recourse with the opportunity to explain actions. We will monitor this to see the approach taken by the ESAs.

The 2019 ESA review provided a strict regime for **follow-up** with set deadlines. We recognize benefits of conducting follow-ups to ensure on-going involvement among the NCAs, particularly on topics of large or substantial reviews. However, the fixed timing requirement on all conducted peer reviews introduced by the 2019-revision (together with mandated topics in level 1) de facto significantly constrain the ESAs ability to plan their activities. For example if a peer review is introduced too quickly after the launch of the regulation or just as a substantial review has been undertaken it will have no added value. Furthermore, even where peer reviews are scheduled and approved by the BoS, it must be possible to re-address and adapt the planning to take into account resources needed, new trends or supervisory areas requiring attention, even tasks set out by the Commission with short deadlines as well ensuring that a peer review should be run for the added value of the results and not because it is on a work programme.

Generally we believe that peer reviews in order to be an effective supervisory tool must be well planned in order to create value. Moreover, it is in their nature to look at several NCAs with a view to compare approaches and identify areas that are well functioning or need improving. The **urgent cases or unforeseen events** would arise of specific issues being assessed from the point of view of potentially flawed application of Union law. Therefore, we do not consider the peer reviews as the right tool use to assess issues that have arisen as a matter of urgency or without warning.

133. Do you think mandatory recurring peer reviews, covering also

enforcement aspects, could be introduced in some sectoral legislation? If the answer is yes, please specify the piece of legislation and concrete provision under which mandatory peer reviews could be introduced.

YES

NO

134. Are there improvements that could be made to the peer review process? Please specify which ones.

YES

NO

As commented on in response to question 1.3.2 we believe the approval procedure should revert to the regular procedure of discussion at the BoS preferably at a physical meeting followed by majority approval requirement as in Article 44 of the ESAs Regulations. Furthermore, the reporting of dissenting views to the political system should be removed to ensure the independence and integrity of the supervisory role of the ESAs and the NCAs.

The follow-up requirement could be maintained but the timing be removed or at minimum extended to allow for efficient work programme planning. If the timing is maintained it should be supplemented with an option to re-address the planning as a whole or leave options for NCAs to opt out of a review based on reasonable grounds.

#### 1.4. Other tasks and powers

- 14.1. In your view, is the collection of information regime (Art 35 ESAs Regulations) effective? If you identify areas for improvement, please explain.

YES

NO

Generally, we believe the ESAs have the necessary competencies to collect information required to fulfill their tasks. The Danish FSA experiences that increased use of IT-tools to facilitate this information collection is beneficial. We believe focus should be on ensuring user friendliness and efficient data extraction, also in existing systems. A concrete example is that the Danish FSA experiences that the IT in relation to the eGate setup is not ideal as it has limited or rigid user options and lacks follow up on requests made.

- 14.2. In the framework of the 2019 ESAs review, in your 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)? If you identify any areas for improvement, please explain.

YES

NO

Overall, we support the added focus in the ESA work that the Union strategic supervisory priorities provide. Furthermore, we believe it is relevant for NCAs to take such priorities into account when considering their own strategies and activities. The tool is still in the implementation phase and it is too early to assess the full effect. However, we recall that the Union strategic supervisory priorities are not intended to be

nor are they an effective supervisory tool for the detailed planning of NCA activity. Planning must naturally allow also for national prioritisation based on their risk assessments to ensure prudent supervision. We therefore consider it important to ensure an inclusive approach with constructive discussions when setting the priorities and similarly with regard to the approach to targeted and proportionate reporting on them.

143. 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

144. Please assess in a scale from 1 to 5 the significance of the new ESAs' task of fostering and monitoring the supervisory independence of national competent authorities ("5" being the highest rate and "1" the lowest rate). Please explain.

	1	2	3	4	5	No opinion
fostering and monitoring supervisory independence		x				

145. What criteria would be the most relevant, in your view, for the ESAs to perform effectively their new task of fostering and

monitoring supervisory independence of national competent authorities? Please rate the relevance of each criteria in a scale from 1 to 5 (“5” being the most relevant criteria rate and “1” less relevant criteria).

	1	2	3	4	5	No opinion
operational independence				X		
financial independence	X					
appointment and dismissal of governing body	x					
accountability and transparency	x					
adequacy of powers and ability to apply them			x			
other, please specify						x

146. What are, in your view, the main remaining obstacle(s) to allow for a more effective supervisory convergence?

Firstly, when considering potential obstacles to effective supervisory convergence, one of the main challenges is changing legislation even before new acts are applied and the effects can be taken into account.

Secondly, while we aim for a common EU internal market it is still comprised of national markets and even local markets which means that “one size fits all” is not an automatic fit on all issues. Efficiency in supervisory convergence is measured on the similar outcomes that must not come about at the expense of due national assessments and adjustments to cater for their specificities.

Thirdly, efficiency is impeded where an act is passed without taking into account the practicalities and experiences in an area. Efficiency therefore requires new acts and changes to acts are evidence based, add value and take into account that burdens and costs are proportionate.

147. Do you consider that the ESAs ensure that enough information on their activities and on financial institutions is available? If not, what changes should be made in this area?

YES

NO

We believe the ESAs publish a wide range of reports, analysis, etc. on their work and there is adequate access to information.

Danish stakeholders continue to ask for more transparency on process and feedback regarding the content. The 2019-ESA review introduced a number of such requirements.

However, it is too soon to assess if this fulfills the wishes of the stakeholders.

148. Do you consider that the purpose and outcome of inquiries under Article 22.4 is clear? If the answer is no, please indicate what role such inquiries should play.

YES

NO

The provision was a flexible provision that allowed the ESAs to conduct either targeted or broader inquiries into areas of particular interest with the aim of collecting evidence of the current situation and thus also to contribute to impact assessments for coming work or focus areas. Such work was often organized within the preparatory bodies to the BoS but always with the consent of the BoS. However, the recent amendments to the system has added more procedural steps that may make this more difficult to operationalize and more resource intensive. At this time we are unsure of the added value of the new structure.

149. In your view, is there the need to add any tools or tasks in order to enhance supervisory convergence towards digital finance? If your answer is yes, please explain.

YES

NO

14.10. 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:

There is a wide scope for the ESAs to develop supervisory convergence tools to meet their needs. Currently, we would urge to focus on refining existing tools and align them across the ESAs in order to simplify the range of tools and increase transparency and comparability of the tools. This would in turn also support increased convergence.

#### 1.5. Breach of Union law and dispute settlement

15.1. 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? Please explain your answer.

YES

NO

The tools in relation to breaches of Union law and binding mediation are effective, however they shouldn't be used lightly. Particularly, we believe the Breach of Union Law-tool should be applied in limited and concrete situations, not with regard to general compliance assessments in an area as this is a matter for the Commission to investigate. Use of the Breach of Union Law-tool should always be used as a last resort. We wish to recall that the mere reputational impact of a pending Breach of Union Law case as well as the outcome has a severe impact on the subject of such an investigation merely due to the ESAs' position as European Supervisory Authorities. It is therefore imperative that the integrity of investigations or procedures are safeguarded.

15.2. Do you think that the use of the breach of Union law procedure by the ESAs is adequate? Please consider both before and after the 2019 ESAs' review and explain your answer.

Before 2019 ESAs' review

YES

NO

We refer to our response immediately above and elaborate that we believe the use of breach of Union law procedure by the ESAs should not be used in historical cases where no breach of Union law exists today. Rather we find that it should be used as a final solution for continued, ongoing and present breaches of Union law in order to achieve a future consistent application of Union law. We believe the Commission should address issues of historical nature.



We also believe that the information the ESAs use to inform of the process and results of a Breach of Union law procedure should reflect the report adopted by the BoS as the highest decision-making body.

After 2019 ESAs' review

YES

NO

Please refer to our response above on the situation before 2019 as it has not significantly changed with the review and it is too early to assess the specificities.

153. Should there be other instruments available to the ESAs to address instances of non-application or incorrect application of Union law amounting to a breach ex-post? If the answer is yes, what would be those instruments?

YES

NO

154. Do you think that the new written non-objection procedure by the BoS and the new independent panels for the decisions on

breaches of Union law and dispute settlements introduced in the 2019 ESAs' review have improved these decision making processes? Please explain your answer.

YES

NO

Generally, we believe that issues should be discussed at physical meetings with the opportunity to respond to questions and statements made, particularly the subject being assessed and ensure full information is tabled prior to a decision is made. The use of written procedures is generally used following a discussion to confirm a position or to take into account changes following the discussion. Without the prior discussion it is very difficult to have secured full disclosure of the issues at hand. Finally, we find the reverse no-objection criterion in effect removes the possibility of NCAs to question the decision at hand or reject the adoption of an issue when warranted. This seems to be unnecessarily constraining on the decision-making. However, the Danish FSA often experiences that other issues are tabled several times for BoS discussion in order to resolve an issue wherever possible. This fosters a cooperative basis for the work.

155. Do you think that the ESAs have always acted, where needed, under Article 17 and Article 19 of the ESAs' Regulations? If the answer is no, please give concrete examples where you consider that the ESAs should have taken relevant action under these Articles.

YES

NO

We believe that the ESAs have opened cases where there were no added value for achieving a consistent application of the Union law as it pertained to historic circumstances. However we have not experienced that they have failed to open a BuL investigation where needed.

156. Could you provide concrete examples where the introduction of further binding mediation provisions in sectoral legislation would be useful?

No. We do not believe binding mediation should be a specific sectoral tool allocated to specific situations or cases. We find the competence of the relevant ESA to enter into mediation when and where disputes arise is sufficient.

157. Why do you think the use of these ESAs' powers has been limited? Please explain how these processes could be improved.

We do not believe the powers have been limited but reflect that the NCAs seek to resolve issues and disputes between themselves or with the assistance of the ESAs

without resorting to actual mediation. We do not believe this is a negative process but evidence of the cooperative nature of relationships between NCAs.

### 1.6. Emergency situations and response to COVID-19 crisis

161. Please rate the impact of the ESAs' response in the context of the COVID-19 crisis from 1 to 5, 1 standing for "less significant impact" and 5 for "very significant impact". Please explain your answer.

	1	2	3	4	5	No opinion
ESAs' response to the Covid-19 crisis				x		

The question is difficult to answer as an overall response for all three ESAs as they had very difficult roles and responses. Generally, we believe that the ESAs successfully facilitated coordinated responses on a range of issues also following from changes in legislation.

For example in the market risk area, the EBA had a quick response on implementing regulatory guidance and changes following from the challenges from the crisis and addressed in the CRR quick fix.

However, there could be room for improvement. In some areas it is important that the view of the ESA is published in sufficient time for the market to take them into account in connection with their coming activities, e.g. a view on dividend payouts should be made public prior to the financial entities making their decisions in lieu of finalizing their accounts and preparing general assemblies. In other areas action must be taken swiftly in order to adequately address the issues as the situation otherwise ends up stabilizing itself without input from the ESA. Finally, it is important to ensure that a course of action addresses an issue at hand. For example in the summer and autumn 2020, the EBA looked into why institutions did not use their liquidity buffer in spring 2020 during COVID-19. However, most of the countries in the EU experienced an increase in liquidity and there was no a liquidity crisis nor a situation of stress.

Therefore, it did stand to reason that that the institutions had not used their liquidity buffer and for instance breached the LCR in that situation.

162. Please rate in a scale from 1 to 5, 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. Please explain.

	1	2	3	4	5	No

						opinion
Market illiquidity and implications for asset managers and insurers			x			
Impact of large scale downgrades of corporate bonds on markets and entities across the financial system			X			
System-wide restraints on dividend payments, share buybacks and other pay-outs			X			
Liquidity risks arising from margin calls			X			

Generally, the ESAs followed up in a reasonable manner.

On the issue of dividend payments etc. we believe that this was and still is a matter for the NCAs in their jurisdictions to assess based on their current situation as this also depends on the state of affairs influenced by many other aspects such as public recovery initiatives, etc. in the respective jurisdictions. Thus we believe it was limited what the ESA should have done.

163. Do you think the coordinating activities carried out by the ESAs have successfully contributed to address the challenges posed by the COVID-19 crisis? If the answer is yes, please explain. If the answer is no, please give examples.

YES

NO

We believe activities were successful in the midst of the crisis.

164. Do you think that the ESAs have always acted effectively, where needed, in the context of the COVID-19 crisis? If the answer is no, please give concrete examples where you consider that the ESAs should have taken relevant action.

YES

NO

165. Do you think Article 18.2 of the ESAs Regulation (declaration of an emergency situation) is fit for its intended purpose? Please explain your answer. If the answer is no please suggest potential changes.

YES

NO

166. In case you identified areas for improvement in the ESAs' powers in

emergency situations, do you have any suggestions on how to address them?

N/A

1.7. Coordination function (Art 31 ESAs' Regulations)

1.7.1. Do you think the coordination role of the ESAs is effective? If you identify areas for improvement, please explain.

YES

NO

Overall, the ESAs are fulfilling their coordination role and continuously expand on the means for coordination. When carrying out their work the ESAs should continue to facilitate constructive dialogue and discussions between the NCAs and with the ESAs in order to achieve high quality and transparent solutions catering for all relevant aspects of an issues at hand.

We also note that the amount of reporting obligations on the industry has increased significantly over the years in the sectoral legislation. Therefore, any requests for further data or adjustments to reporting tools should be well founded taking into account the costs and resources in producing the data or adjustments to systems compared to the intended use of the data received.

1.7.2. Do you see a need for greater coordination between the ESAs and/or with other EU and national authorities as regards developing data requirements, data collection and data sharing? If yes, please explain your answer and indicate what changes you propose.

YES

NO

In principle we believe that coordination efforts and between NCAs can always be enhanced. However, we would urge that focus is dedicated to implementing changes following the 2019 ESA review as well as in recent sectoral legislation. This includes areas such as anti-money laundering in the EBA where there is a big task to coordinate and establish the central AML/CFT database.  
Given the amount of sectoral legislation we believe that greater coordination efforts could be well spent in the work with the Commission ensuring consistency of upcoming regulation with existing regulation.

1.7.3. 2019 ESAs' review. Please rate the effectiveness, in your view, of the tools below in order to fulfil the new coordination role of the ESAs facilitating the entry into the market of actors or products relying on technological innovation. ("5" being the most effective and "1" the least effective tool)

	1	2	3	4	5	No opinion
exchange of information and best practices					x	

adopt guidelines						x
adopt recommendations			x			

2019 ESAs review. [specific for ESMA]. Do you think ESMA’s new coordination function (Article 31b ESMA Regulation) in relation to orders, transactions and activities that give rise to suspicions of market abuses and have cross-border implications for the integrity of financial markets or financial stability in the EU is an effective tool? If the answer is yes, please provide examples where this new function has been or could be useful. If the answer is no, please explain the reasons.

YES

NO

174. 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? If the answer is yes, please provide examples where the new provision could be useful. If you identify room for improvement in this new provision, please explain.

YES

NO

This provision is in practice a codification of the existing culture in the ESAs to establish coordination groups where deemed necessary. Aside from this work is coordinated through working groups. It is too early to provide an assessment as to where this tool could be even more useful in this specific area.

175. In your view, does the coordination function of the ESAs, ensuring that the competent authorities effectively supervise outsourcing, delegation and risk transfer arrangements in third countries, work in a satisfactory way? Please explain your answer. If your answer is no, please indicate how the coordination function of the ESAs should be adjusted.

YES

NO

In our view, it is not the coordinating function of the ESA's that enables effective supervision of outsourcing, but rather the underlying legislation. The Danish FSA is of the view that the coordination function does not in any way hinder the supervision of outsourcing, and as such, works in a satisfactory way. From a broader perspective, the coordination function of the ESA's ensures that all competent authorities correctly have implemented relevant guidelines on outsourcing, making cooperation between national authorities easier in regards to outsourcing arrangements between these Member States.

1.8. Tasks related to consumer protection and financial activities.

1.8.1. What are, in your view, the ESAs' main achievements in the consumer and investor protection area?

The Danish FSA is of the view that the second EBA report on the application of the guidelines on product oversight and governance (POG) arrangements, (EBA/REP/2020/28) has been informative both with regard to the survey, that it included and the examples of good practice that is included in the report.

Another good example is the guidelines on complaints handling for the securities and banking sectors (JC 2018 35), that obliges financial institutions to try to solve disputes in house and provide NCAs with valuable information on the number of complaints



received by the financial institutions.

1.82. Please assess the impact of the ESAs' work on analysis of consumer trends, reviewing market conduct, developing indicators, contributing to level playing field, financial literacy and follow up to work in this area. Please rate the ESAs impact on each item from 1 to 5, 1 standing for "less significant impact" and 5 for "most significant impact". Please explain:

	1	2	3	4	5	No opinion
analysis of consumer trends			X			
reviewing market conduct				X		
developing indicators						X
contributing to a level playing field				X		

financial literacy	X					
follow up to work in this area	X					

183. 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

The idea behind the product intervention powers is that identified practices or products can be taken out of circulation for a period where it can be assessed whether adjustments can be made to ensure compliance with the rules or a permanent ban should be put in place. The idea of potential on-going prolongation of a prohibition would be counterintuitive from an investor- or consumer protection point of view and it is better protection to make a decision within the scheduled timeframe. At this point the rules with this extended ESA intervention has just come in and should only be assessed after they have had time to be applied.

184. 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 Please specify which ones

NO Please give reasons

The premise would result in a change the dynamics of legislative power in the EU thereby fundamentally changing the inter-institutional balance of the EU. The competence to adopt acts of general application in Article 9(5) of the ESAs Regulations presupposes a clear delimitation of the scope of competence being set out in the level 1 legislation and that their actions is that of execution of the will of the co-legislator. Any competence without such a delimitation would provide the ESAs with an arbitrary competence unbefit the role of executive arm of Commission. Moreover, it is uncertain that this would be in compliance with Danish regulatory tradition where we must indicate with relatively great precision what a provision is to be used for.

185. Could you provide concrete examples where enabling the use of the product intervention powers in sectoral legislation would be useful?

No.

2019 ESAs' review. [specific for EBA]. Under the expanded scope of the competences as regards the consumer credit directive and the payment account directive, EBA will also be able to look at consumer issues across a range of activities, for example lending

practices. How do you assess this change?

We believe that further convergence work in the area of the Consumer Credit Directive could be beneficial. The Danish FSA has in recent years had a special focus on creditworthiness assessments in connection with consumer loans. In the future EBA could e.g. carry out a cross-cutting study of how creditworthiness assessments are carried out when granting consumer loans, e.g. when these are granted in connection with the purchase of goods.

186. 2019 ESAs review. Please rate the new ESAs' task to coordinate mystery shopping activities of competent authorities, if applicable, according to its relevance to promote consumer protection at EU level (1 standing for "less relevant" and 5 for "most relevant"). Please explain your answer and indicate whether you consider enhancing national competencies for conduct supervision may be beneficial for the overall coordination of mystery shopping activities.

	1	2	3	4	5	No opinion

EU-level coordination of mystery shopping			x			
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Mystery shopping activities is an area that is not similarly regulated across the EU. For example in Denmark we have no legal basis to enter into such activities. We also see some challenges with regard to identification requirements of a mystery shopper when entering into a purchase agreement such as applying a national identification number in the process. Any enhanced activity in this area would still need to respect the presence or not of national legal basis and therefore whether or not an NCA could participate.

1.87. What are, in your view, the main strengths and weaknesses of the current framework on consumer protection (Article 9 ESAs Regulations) and what would you suggest to address any possible shortcomings?

The consumer protection area is extremely broad even if this is divided between the three ESAs regarding the three financial sectors. It is therefore essential that the ESAs have a thorough knowledge of trends in the market so that they can focus on problematic areas with regard to consumer protection. In order to fulfill this purpose the continued publication of a consumer trend report will serve as a tool for focusing its work. However, it is important to take into account that products, markets as well as the maturity of financial consumers can and do differ from Member State to Member State. We believe that the ESAs should address consumer issues that have a significant cross-border nature in a majority of Member States as other issues are adequately dealt with by the Member State due to proximity to the challenges.

1.88. Are there areas for improvement in the toolkit of the ESAs when it comes to coordinating supervisors in the area of consumer protection? Please explain your answer.

YES

NO

1.9. International relations.

1.9.1. How do you assess the role and competences of each ESA in the field of international relations? Are there additional international fora in which the ESAs should be active? Please specify.

Generally, there is potential for the ESAs to add value by coordinating Member States' participation in international fora. However, the specific participation in the fora should be left at Member State level.

EBA coordination on Basel issues is very useful as it also provides non-Basel Member States valuable insights in ongoing Basel work. ESMA coordination was very useful when setting out "Draft Administrative Arrangement for the transfer of personal data" between securities regulators, where ESMA facilitated the contact, cooperation with and decision of the European Data Protection Supervisor (EDPS) as well as the cooperation

with IOSCO in establishing an Oversight Mechanism to monitor the application of the signed arrangements.

192. 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?

It is still too soon to evaluate properly on how the ESA's role in monitoring regulatory and supervisory developments in third countries. The ESA work on this is still being framed. We should allow the ESAs time to have concrete experience in this regard.

193. Are the powers and competences in the field of international relations as set out in Article 33 of the ESAs' Regulations adequate in light of the tasks conferred on each of the ESAs? If you identify areas for improvement, please specify.

YES

NO

As stated above, experience is still limited. We need more experience before suggesting changes to the framework.

194. 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?

Aside from the positive experience with ESMA's work in relation to GDPR requirements in connection with the transfer of personal data to third countries as well as setting out model draft memorandums of understanding under the AIMFD, there is not much experience in ESAs developing model administrative arrangements between NCAs and third country authorities.

The EEA and UK aside, we do not see a need for the ESAs to generally engage in developing model agreements since there is great difference in the necessity and operational requirements for NCAs and other third country authorities. However, if a more general need should arise in accordance to a sectoral piece of regulation or on a horizontal EU piece of regulation a role for the relevant ESA should be considered.

- 1.10. The role of the ESAs as enforcement actors/enforcers.

- 1.10.1. Under Articles 17 (*breach of Union law*), 18 (*action in emergency situations*) and 19 (*settlement of disagreements between*

*NCA*s in cross-border situations/binding mediation), in case a competent authority fails to ensure that a market participant or financial institution complies with requirements directly applicable to it, the ESAs have the power to investigate the alleged breach or non-application of Union law and, following a specified procedure and under certain conditions, adopt an individual decision towards the market participant or financial institution requiring it to comply with EU law. How do you assess the role of each ESA under these articles of the founding Regulations?

We believe the ESA's roles are adequate at this time.

1.102. Do you see room for improvement in the way each ESA could ensure that competent authorities enforce more effectively EU rules towards market participants/financial institutions? Please explain your answer.

YES

NO

Generally, we believe the current actions are sufficient.

The basis for supervisory compliance in the financial regulation is that the NCA is responsible for and ensures that EU rules towards market participants/financial institutions are complied by. In addition to select, targeted theme reviews or similar, compliance is mainly achieved and checked through the course of on-going supervisory activity based on the activity planning in the specific jurisdiction and taking into account the premises of risk-based activity. The notion of efficiency is therefore always in development and dependent on the risk appetite in a sector.

1.103. In your view, are the powers of the ESAs to enforce EU rules towards market participants/financial institutions under Articles 17, 18 and 19 ESAs Regulations well balanced, adequate and effective? Please substantiate your answer.

YES

NO

We believe it is appropriate to retain the current system of the NCAs enforcing the rules towards its market participants/financial institutions and only if the NCA fails this obligation, the ESA may act.

1.104. Do you think the respective roles of the ESAs and of the Commission are clearly defined in Article 17, 18 and 19 ESAs Regulations? Please substantiate your answer.

YES

NO

1.105. Do you think the use of sanctions laid down in the EU acquis by competent authorities in case of non-compliance of market participants/financial institutions with EU rules is, in practice, sufficiently dissuasive or disproportionate? If not, what role could sectoral legislation and each ESA play in improving the situation? Please substantiate your answer and give examples.

Sufficiently dissuasive

Disproportionate

Other, please explain

The general use of sanctions by the NCAs in case of non-compliance is a matter of assessing adequacy of the sectoral legislation and as a first measure it is the responsibility of the NCA and its Member State. Further assessment of an NCAs lack to ensure compliance with EU-rules is a matter for the Commission in assessing the status of adequate implementation of regulation and finally a matter for the European Court of Justice to render an opinion on. We do not believe the ESA should have a further role in this regard.

## 2. Governance of the ESAs.

### 2.1. General governance issues

2.1.1. Does the ESAs' governance allow them to ensure objectivity, independence and efficiency in their work/decision making? Please explain. If you consider that there should be differences in governance between different types of tasks, please indicate.

YES

NO

We do not believe that the governance structure should be subject to vast differences dependent on tasks. All tasks follow the same structure with regard to development, i.e. through working groups with input from ESA and NCA staff with final BoS approval. The overall structure ensures the elements of objectivity, independence and efficiency. Moreover, in order to support and foster the necessary cooperative nature enshrined in the ESAs the BoS should as far as possible aim to progress through consensus and sharing of best practices among NCAs and with the ESAs.

2.1.2. 2019 ESAs' review. In your view, has the new provision in Article 42 of the ESAs' Regulations according to which the Board of Supervisors members must abstain from participating in the discussion and voting in relation to any items of the agenda for which they have an interest that might be considered prejudicial to their independence, improved the decision making process? Please explain your answer.

YES

NO

It is necessary to ensure the decision making process is not influenced by undue interests. However, this basic principle is neither new nor has it changed in content with the addition to the provision. However, we recall the fact that BoS and MB members are also representatives of their respective NCAs. They are obliged to bring their national experience both personal and from the NCA to the table which is also a fundamental element of the ESFS-system. Similar is also true for the Chairman of the ESAs, particularly with the new voting rights and roles in a number of areas. This does not



constitute a conflict of interest in and of itself.

2.13. 2019 ESAs' review. Do you think the requirements in Articles 3 and 43a of the ESAs' Regulations are sufficient to ensure accountability and transparency? If you identify areas for improvement, please explain.

YES

NO

We believe that the provisions are sufficient. Considering the ESAs are supervisory authorities we also believe that the 2019 ESA-review introduced certain undesirable actions, including an unfortunate mix of roles for particularly the European Parliament as it facilitates a deeper role in relation to the on-going supervisory work of the ESAs. In this regard we refer to the reporting of dissenting views from the Peer Review Committee in Article 30 without involving the BoS in such reporting and without indicating why the European Parliament needs this information or how it should react to it. There is also the introduction of confidential discussions between the ESA and the European Parliament behind closed doors in Article 8(8). These provisions should not lead to interference with the supervisory actions of the ESAs.

We believe transparency and accountability is important in the ESA system. Publication of summaries of BoS meetings contributes to this. However, we find it odd that the European Parliament should have further information than the Council or that available to the public as Article 43a would facilitate.

2.14. 2019 ESAs' review. To what extent the recent enhancements in the role of Chairperson improve the decision making process? Please rate each change from 1 to 5, 1 standing for "less significant improvement" and 5 for "most significant improvement". Please explain your answer.

	1	2	3	4	5	No
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						opinion
Request to the Board to establish internal committees for specific tasks			X			
Set the agenda to be adopted by the Board and table items for decision	X					
Call a vote at any time	X					
Propose the composition of independent panels for breach of Union law investigations and dispute settlements.		x				
Propose the composition of peer review committees for peer reviews		x				
Propose a decision to launch an inquiry and convene an independent panel for the purposes of Article 22 (4) ESAs Regulation	X					
Vote in the Board of Supervisors (except on matters that are decided on the basis of qualified majority voting)			x			
Other, please indicate						

The Danish FSA is of the view that generally, the Chairmen have administered their new competences in a professional and cooperative manner. The elements regarding the preparation and conduct of the BoS are to a large extent codification of existing processes.

It is still an adaptation phase to ensure full implementation of all the new processes with regard to the proposal competences but the Danish FSA experiences that it seems to function in a satisfactory manner. Generally, the Danish FSA sees little use in the changes to the process for initiating the inquiry-function given the nature of these is to investigate an issue on a more general capacity.

2.15. Should the role of the Chairperson be strengthened in other areas? If so, in which areas (please substantiate).

YES

NO

## 2.2. Decision-making bodies and preparatory bodies

2.2.1. Does the current composition of the Board of Supervisors (BoS) and of the Management Board (MB) ensure that decisions are taken efficiently and independently? If you identify areas for improvement, please explain.

YES

NO

We are of the view that the current composition and system does ensure independent decision-making. It is also our impression from the Danish FSA that efficiency has not significantly deteriorated with the increased role of the Management Board. However, it is still early days as many of the processes with natural relevance for the Management Board are being carried out in accordance with the full effect of the new procedures for the first time in 2021.

222. Do the current voting modalities (e.g. simple majority, qualified majority...) of the BoS ensure efficient decision making? Please explain. If the answer is no please indicate how voting modalities could be streamlined.

YES

NO

As far as possible the BoS should aim to progress through consensus and sharing of best practices among NCAs.

[Only for EBA]. Does the current voting system that, for some decisions, requires additional simple majorities from competent authorities participating and not participating in the Banking Union ensure efficient and balanced decision making? Please explain.

YES

NO

We believe this mechanism continues to be important to ensure protection of NCAs from non-participating Member States of the Banking Union so they are not without influence on the work of the EBA compared to that of the SSM. Moreover, the Danish FSA has not experienced that the mechanism has negatively influenced decision-making in the EBA.

223. Does the current allocation of tasks between the BoS and the MB ensure that the ESAs are run effectively and perform the tasks conferred on them? If you identify areas for improvement, please explain.

YES

NO

224. 2019 ESAs' review. To what extent the enhanced role of the Management Board has improved the decision making process. Please rate each change from 1 to 5, 1 standing for "less significant improvement" and 5 for "most significant improvement". Please explain your answer.

	1	2	3	4	5	No opinion
The MB can give opinions on all matters to be decided by the Board of Supervisors.			X			
The MB ensures the consistent use of a methodology for all peer reviews conducted			X			
The MB proposes a peer review work plan every two years.			X			
The MB can set up coordination groups on its own initiative			x			

The Danish FSA is of the view that this has not influenced the efficiency of the ESAs and the work done. However, it is premature to assess the full effect as many processes

are only fully implemented with processes in 2021.

225. Should the role of the Management Board be strengthened in other areas? If so, in which areas (please substantiate).

YES

NO

226. 2019 ESAs' review. Do you think the written non-objection procedure for core convergence tools (breaches of Union law, dispute settlements and peer reviews) is effective for achieving its objective? Please substantiate your answer. If your answer is yes, please indicate if there should be more decisions taken under this procedure and in which areas.

- YES
- More decisions in this manner
- No further decisions in this manner
- 

NO

The Danish FSA experiences that the extensive use of written procedures with reverse non-objection procedures on issues that have not been discussed at the BoS does not facilitate constructive and fruitful discussions. Moreover, the Danish FSA finds that the reverse no-objection requirement may prevent relevant views to be included during the decision-making process and would therefore advise against further expanding the use of them.

227. Do you think ad hoc committees composed of staff of the ESAs and members from the competent authorities (e.g. peer review committees) are effective tools to improve the decision making process? If your answer is yes, please indicate if there should be more decisions taken under this procedure and in which areas.

YES

NO

The composition comprising a mix of ESA and NCA staff is not a new element as most committees were also established in this manner prior to the 2019-ESA review, particularly with a view to include their experience but also support the written outcomes of the work conducted. While a mix is beneficial, the primary objective should be to ensure transparent and constructive discussions with inclusion of all relevant views on equal footing.

228. Do you think the functioning of preparatory/supporting bodies of the ESAs (e.g. technical working groups, standing committees, task forces etc.) is effective and efficient? If you identify any shortcomings please specify how these could be addressed.

YES

NO

Tekst:

How can shortcomings be addressed?

The information below is based on experiences from the Danish FSA as a member of the ESAs and their bodies. Generally, we believe the supporting bodies are efficient means for the work and we recognize the benefits of ESA staff forming an integral part of the preparatory and supporting bodies as well as undertaking the majority of the drafting. However, the Danish FSA experience some hick-ups in the working procedures and approaches that we wish to mention.

Firstly, as the ESAs have matured the Danish FSA experience that ESA staff is taking on a stronger role with a voice as a “supervisor of supervisors” which is not envisaged as their role in the EFSF nor is it always conducive to being an honest broker in a process.

Secondly, we appreciate the vast amount of documents – both final and draft documents- underpinning the high quality work being undertaken. However, the Danish FSA find it increasingly challenging to review all the material as it is often distributed to the NCA members very close to the actual meeting, allowing very little time for preparation. It also influences on the approval processes and optimal results as NCA members will be pressed to secure mandates for the work where needed. We would wish that this was to a higher degree factored into preparations and timetables.

Thirdly, given the amount of issues to be addressed not all issues can be dealt with extensively at physical meetings. This makes it even more important with due inclusion of all relevant arguments in a process and transparency in how comments are handled. This is equally relevant for the internal process with NCAs as it is towards stakeholders where the 2019 ESA-review provided increased transparency to the latter.

Finally, the Danish FSA wishes to continue the good and important work in the ESAs in a constructive and inclusive manner for all parties based on cooperation and exchange of views to achieve the highest quality possible on the outcomes.

229. Please assess the impact of the work undertaken by preparatory/supporting bodies of the ESAs (e.g. technical working groups, standing committees, task forces etc.) on the ESAs’ overall work and achievements. Please rate the impact from 1 to 5, 1 standing for "less significant impact" and 5 for "most significant impact": If you identify any shortcomings please specify how these could be addressed.

	1	2	3	4	5	No opinion
Standing committees and other permanent committees			X			
Other preparatory bodies (e.g. technical working groups)				X		
Committee on consumer protection and financial innovation				X		
Proportionality Committee			x			

The included information is based on experiences from the Danish FSA as a member of the ESAs and their bodies.

Generally, the Danish FSA believe the work undertaken in these fora is of vital importance to ensure material has undergone thorough analyses and discussions prior to submission for approval by the BoS (or other decision-making forum) in order to provide high quality information for an informed decision.

Therefore, it is important that processes allow for thorough discussions and preparation of documents facilitated by ESA staff as honest brokers in the process.

It is too early to fully assess the impact of the new Proportionality Committees in the ESAs.



(only for ESMA) Should there be a different governance in case of direct supervisory decisions in ESMA (for example, similar to the new governance for CCPs)? If the answer is yes, please indicate your suggestions for improvements and the expected benefits.

YES

NO

### 2.3. Financing and resources.

231. 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? Please explain your answer. If the answer is no, please indicate what other sources of finance could be considered.

YES

NO

232. Do you think that the ESAs have sufficient resources to perform their tasks? Please explain.

YES

NO

Generally, we believe that the increase in tasks from recent legislation has not sufficiently been accompanied by funding. We do acknowledge the difficulties in delivering a large contribution to the single rulebook, extensive supervisory convergence work, IT projects combined with a wide range of other tasks in the ESA Regulations. However, given these conditions and the necessity of adequate preparation of material we believe that it may be more an issue of the ESAs focusing even more on a tougher prioritisation according the budget available and the tasks at hand and lower expectations of deliverables.

We see a significant challenge in the continuously growing IT-costs due to a multitude of IT-projects at the ESAs, some of which have been set out as level 1 demands but without funding to accompany it.

233. Do you think there are enough checks and balances for how the ESAs spend their budget? Please explain.

YES

NO

#### 2.4. Involvement and role of relevant stakeholders

24.1. In your view, are stakeholders sufficiently consulted or, on the contrary, are there too many consultations? Please explain your

answer.

YES

NO

Too many consultations

It is important to involve stakeholders in order to ensure fully informed basis for decision-making. While there may be cause for targeted roundtables on narrow or very specific issues, it is necessary to ensure that all relevant parties are invited to such to ensure relevant expertise on the issues on the table is present. However, the Danish FSA have experienced that particularly the EBA could in some instances have invited all impacted stakeholders. An example is the EBA's guidance on article 26 in the LCR Delegated Regulation in the second EBA report on LCR implementation. The guidance has a considerable impact on the LCR requirement for the specialized mortgage credit institutions. However, EBA did not include specialized mortgage credit institutions in the consultation, despite suggestions to do so.

242. Please assess in a scale from 1 to 5 the quality, in your view, of the consultations launched by the ESAs (5 standing for the highest quality). Please explain your answer.

	1	2	3	4	5	No opinion
General consultations launched by the ESAs			X			
Specific consultations when developing data collection requirements			x			

243. Are the ESAs sufficiently transparent and accessible for stakeholders to ensure effective and efficient interaction? Please explain your answer.

YES

NO

The new requirement of providing feedback on the handling of responses to consultations has not yet fully reached its potential. Aside from this Danish stakeholders still ask for better information on how the ESA deals with crossborder issues, subject of course to what information may be divulged taking into account obligations of professional secrecy.

244. Please rate in a scale from 1 to 5 the impact of stakeholders groups within the ESAs on the overall work and achievements of the ESAs (1 standing for "less significant impact" and 5 for "very significant impact"). Please explain your answer.

	1	2	3	4	5	No opinion
EIOPA Insurance & Reinsurance Stakeholder Group						x
EIOPA Occupational Pensions Stakeholder Group						x
ESMA Securities and Markets Stakeholder Group						x
EBA Banking Stakeholder Group						x

2019 ESAs' review. Please assess the significance of the recent changes in the composition, selection, term of office and advice of the stakeholders groups (Article 37 ESAs Regulations)? Please rate each change from 1 to 5, 1 standing for "less significant" and 5 for "most significant". Please explain your answer.

	1	2	3	4	5	No opinion
Composition of stakeholders groups	X					
Selection of members	X					
Term of office	X					
A third of its members can issue a separate advice		x				

It is too early to effectively assess the changes as the terms of current members have not completed full cycles yet. However, the main challenge is to attract candidates to cover all segments as well as attracting sufficiently high level candidates that are available and willing to contribute to the work.

245. Does the composition of stakeholders groups ensure a sufficiently balanced representation of stakeholders in the relevant sectors? Please explain your answer.

YES

NO

246. In your experience, are the ESAs' stakeholders groups sufficiently accessible and transparent in their work? If the answer is no, please indicate the areas where the transparency could be improved.

YES

NO

## 2.5. Joint bodies of the ESAs

25.1. Please assess the aspects described below regarding the Board of Appeal (BoA) of the ESAs. Please rate the effectiveness of each aspect from 1 to 5 (1 least effective, 5 most effective). If you identify areas for improvement, please explain.

	1	2	3	4	5	No opinion
Organisation						X
Functioning and time limits						X

One joint Board of Appeal for the 3 ESAs						X
The composition of the BoA						X

252. Please assess the aspects described below regarding the Joint Committee of the ESAs. Please rate the effectiveness of each aspect from 1 to 5 (1 least effective, 5 most effective). If you identify areas for improvement, please explain.

	1	2	3	4	5	No opinion
Functioning			X			
Working methods			X			
Ensuring cross-sectoral cooperation				X		
Ensuring consistent approaches				X		
Decision making process			X			
The legal structure (no legal personality)						x

253. Please assess the work of the Joint Committee of the ESAs in the areas below. Please rate each area from 1 to 5 (1 least significant contribution, 5 most significant contribution). If you identify areas for improvement, please explain.

	1	2	3	4	5	No opinion
Consumer Protection and Financial Innovation				x		
Coordination and cooperation for bi-annual Joint Risk Reports, published in spring and autumn			x			
Financial Conglomerates			x			
Securitisation						x
European Forum of Financial Innovators						x

### 3. Direct supervisory powers.

3.1. How do you assess ESMA's direct supervisory powers in the field of:

- Credit Rating Agencies
- Trade Repositories under EMIR
- Trade Repositories under SFTR
- Securitisation Repositories (STS)

Satisfactory.

3.2. Please assess ESMA’s performance as a direct supervisor of the entities referred to in question 3.1 in a scale of 1 to 5 (1 lowest rate, 5 highest rate). If you identify areas for improvement please explain.

	1	2	3	4	5	No opinion
Credit Rating Agencies			X			
Trade Repositories under EMIR			X			
Trade Repositories under SFTR			X			
Securitisation Repositories			X			

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

The ESAs have been established with the primary focus of promoting and facilitating supervisory convergence in their remit and contributing to the single rulebook, also within their remit. From an organisational point of view, direct supervisory powers were not envisaged and put a strain on not only relevant governance structures but also on funding structures. Moreover, the EU financial regulation is based on national competences and national supervisory responsibility with international cooperation which should remain the basis also in the future.

Any consideration of further allocation of direct supervisory competencies with the ESAs should be based on a clear, evidence-based rationale. Relevant criteria would be a thorough analysis, including evidence of significant cross-border activity that cannot be adequately addressed by National Competent Authorities, existence of significant divergent approaches among NCAs and consideration of the ESA's resources to undertake the task. We do not support creating a “supervisor of supervisors” regime.

The Danish FSA notes that with regard to EIOPA there has been reference to a criteria based on the systemic importance of insurance and pension companies. However, there does not seem to be sufficient evidence to support such a criterion at this time. The reasons being there is no common definition of “systemic importance” It is not possible to equate banking and insurance businesses to facilitate this classification due to the diversity in business forms, lack of indication of which companies would be subject to this classification and lack of data on the effect of bankruptcies of the relevant entities.

3.4. Have you identified any areas where supervision at EU level should be

considered? If your answer is yes, please explain.

YES

NO

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

4.1. Please assess the aspects described below regarding the role of each ESA as regards systemic risk in a scale of 1 to 5 (1 lowest rate, 5 highest rate). If you identify room for improvement, please specify how this could be addressed.

	1	2	3	4	5	No opinion
The quality of the analysis of market developments					x	
The quality of the stress test and transparency exercises that were initiated and coordinated by the ESAs				x		



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				x		
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				x		
The broader cooperation between the ESRB and the ESAs within the ESFS					x	
The contribution of the ESAs to facilitating the dialogue between micro- and macro-supervisors						x

The main objective for the ESAs is to ensure that the EU financial sectors are significantly better at withstanding a financial crisis than it was during the last financial crisis. To the extent that it does not conflict with financial stability, the ESAs should also aim to enhance efficiency, e.g. through harmonising rules and practices and thereby ease cross border financial activity. However, when the two goals conflict promoting financial stability should be the main objective of the ESA.

## B. QUESTIONS ON THE SINGLE RULEBOOK

### 5. The ESAs work towards achieving a rulebook

5.1. 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** If you have identified areas for improvement, please explain
- NO Please give reasons.
- Other

We believe the ESA's work have contributed to further harmonise the Single Rulebook.

In general, it is important to ensure sufficient time for preparation and review of the documents accompanying the processes throughout the development phase thus facilitating harmonized approaches and consistent application. This is particularly important when addressing highly technical issues or issues of a significant horizontal nature.

We also see an increased level of detail in these products leaving less room for supervisory discretion and national optional discretions. In general, standards and guidelines should respect of such elements.

The Danish FSA experiences that the ESA's expect full compliance with general application guidelines or recommendations. However, considering the level of granularity of such instruments and the "comply or explain" function, we believe it is important to recognize that partial or non-compliance may be appropriate in some circumstances and legally possible.

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? Please explain your answer. If you identify areas for improvement, please indicate.

- YES**
- NO
- Other

There is still an on-going and crucial challenge in delivering the draft technical standards within the specified legal timeframe in level 1. This is of course not something to be addressed by the ESA's Regulations, but does have a severe impact on the ability to achieve the goal of high quality and timely deliverables at the level of the ESAs. We therefore strongly urge the Commission to consider this from the beginning

in the Commission proposals but also as an honest broker during the political negotiations. Also, we as co-legislators should ensure that timeliness is reviewed during the negotiation process following changes to the tasks and the period of negotiations.

While there are variations across the ESAs, we generally are of the view that the draft technical standards being delivered are of high quality and are for the vast majority delivered within the set timeframe. However, it is always possible to improve. Firstly, more feasible deadlines for delivering in the level 1 text as mentioned. Secondly, on grounds of the huge number of mandates to be fulfilled combined with ever growing granularity of content, it is a very large task for the ESAs to fulfill all the mandates within the set deadlines while still fulfilling their other objectives on e.g. coordination and supervisory convergence at an equally high standard and maintaining high quality deliverables

The changes in the procedures in Articles 10-15 of the ESA's Regulation from the 2019-ESA review have had little time to show their true merit due to the short time of application. We particularly appreciated the obligation for the Commission to provide explanations on proposed amendments when resubmitting a draft technical standard to the ESA for re-evaluation.

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?

The question presupposes that there should not be differences in opinion between the BoS of the three ESAs. We believe that is a flawed assumption. The reason for requiring the approval of two or three of the BoS of the ESAs would be to ensure that the product reflects the interests of all parties concerned. Should that not be the case thus resulting in a blocking minority, it is the task of the ESAs to re-examine the issues and find solutions agreeable to all parties.

5.4. In particular, are stakeholders sufficiently consulted and any potential impacts sufficiently assessed? Please explain your answer. If you identify areas for improvement, please indicate.

YES X – by organizing round tables and consultation procedures.

NO

Other

The processes vary between the ESAs. Generally, the ESAs consult where mandatory and on select issues they supplement stakeholder inclusion through round tables and additional consultation procedures.

However, we do believe that there is room for improvement for broader inclusion of stakeholders, particularly at the EBA, but also more generally, on the assessments of impacts in relation to proposals. This ever so more on areas where a high level of granularity will result in burdens for the stakeholders when they must comply with the rules. However, this also presumes contributions from the stakeholders without which the ESAs cannot adjust the content.

5.5. Can you provide examples where guidelines and recommendations issued by the ESAs have particularly contributed to the establishment of consistent, converging, efficient and effective supervisory practices and to ensuring the common, uniform and consistent application of Union law?

The included information is based experiences from the Danish FSA.

Given the vast amount of issued guidelines and recommendations by the ESAs, the Danish FSA stress that the below mentioned are merely a small sample of examples and there are many more of equally good value contributing to the common understanding and convergence in the on-going supervisory work.

The first example is ESMA guidelines on enforcement of financial and non-financial information in annual and interim financial reports (ref. ESMA32-50-218). The Danish FSA experience that these guidelines have together with the ongoing coordination from ESMA to a high degree ensured consistent, converging, efficient and effective supervisory practices on this financial information. The enforcement has contributed to common, uniform and consistent application of the International Financial Reporting Standards (IFRS) in Europe.

The second and third examples are the guidelines on AML/CFT colleges (ref. JC 2019 81) and the guidelines on ML/TF risk factors (ref. EBA/BL/2021/02). The Danish FSA find they are useful tools that contribute to the establishment of consistent supervisory practices. However, in some instance the Danish FSA would wish more convergence with similar workstreams under the FATF, as to ensure that those different tools complement each other, and that we keep some added value.

A fourth example is the EBA Guidelines on the treatment of structural FX under Article 352(2) of the CRR (ref. EBA/GL/2020/09).

5.6. Would you consider it useful if the ESAs could adopt guidelines in areas that do not fall under the scope of legislation listed in Article 1 (2) of the ESAs founding Regulations and are not necessary to ensure the effective and consistent application of that legislation?

YES Please specify which ones

NO Please give reasons.

We would not consider this useful nor legal. Firstly and generally, we do not believe it is feasible on legal grounds to issue guidelines in areas where the ESA has not been allocated competence, i.e. the legal act is not included in Article 1(2) of the ESAs Regulations. The ESA would be exceeding its competences.

Secondly, guidelines are often considered as a tool to supplement the single rulebook and have an authoritative effect once published. However, they remain a non-binding, convergence tool with a “comply-or-explain” function attached to them and thus do not have any status as legislative acts.

Thirdly, issuance of guidelines must satisfy the test of establishing consistent, efficient and effective supervisory practices and ensure common, uniform and consistent application of the Union law as stated in Article 16(1) of the ESAs Regulations. The reference to Union law is a reference to the legal acts as stated in Article 1(2) of the ESAs Regulations.

Moreover, according to the principle of subsidiarity and proportionality the ESAs can only issue guidelines where it is necessary to ensure an effective and consistent application of the legislation. Therefore, issuance without the necessity to ensure effective and consistent application of that legislation makes the guideline nul and void.

Fourthly, we are aware that the issuance of guidelines in areas (such as accounting in ESMA) that affect undertakings which are not within the scope of the ESA competence is a continuous subject of debate. However, this poses many challenges of ensuring that all of the relevant goals and interests of the rules the guidelines are supplementing are catered for and all the relevant authorities are include in the process. Below we provide you with an example of this based on the accounting area. Listed entities must focus on significant transparency, as they have issued securities that are traded by investors with no direct involvement in the undertakings under the listing rules. This transparency has a direct cost when preparing information. However, the undertakings competitors etc. may also take advantage of this information. For undertakings that are not listed, there is also a vital focus on the costs relating to requiring undertakings to disclose information, and in particular whether these costs are reasonable compared to the benefits.

The NCAs represented in ESMA have a strong focus on investor protection. However, in the Member States different authorities will often regulate and supervise non-listed entities, with a different focus including on the undertaking’s general situations. These other authorities are today not represented in ESMA, but must be in the process of issuing regulation and guidelines covering non-listed undertakings.

[exclusively for ESMA] If you think of the Wirecard case as an example, how could supervision be improved in the field of auditing and financial reporting? Yes, supervision could be improved further by ESMA having a mandate to draft RTS on enforcement of financial reporting.

Including Regulation (EC) No 1606/2002 [IAS Regulation] and Directive 2013/34/EU [Accounting Directive] in Article 1(2) of the ESMA Regulation

Other, please explain

We believe that regulation and the procedures for supervision should not be based on singular cases in individual Member States. The experience from recent cases is useful but should be used together with other factors when developing or adjusting regulation and procedures for supervision.

Therefore, it is necessary to evaluate individual cases, compare it with similar cases and then consider whether the weaknesses in the regulation and supervision that are detected are general or related to the specific cases. If any changes are to be made, it should be carefully evaluated whether the benefits will outweigh the costs and other burdens that will follow from a change.

Audit Committees are playing an important role in the PIE entities corporate reporting and the audit of the financial report. Consequently, it could be considered whether the supervision of audit committees needs to be improved.

We also believe that it has merit to consider whether supervision could be improved further by further rules on the enforcement of financial reporting.

No improvements are needed.

5.7. Do you think that the role of ESMA with regard to Directive 2004/109/EC (Transparency Directive) could be strengthened? For example, by including a mandate for ESMA to draft RTS in order to further harmonize enforcement of financial (and non-financial) information.

YES Please explain and specify how.

We believe it could be relevant and useful to change the nature of the current guidelines on enforcement of financial and non-financial information in annual and interim financial reports. Taking into account the non-binding nature of guidelines as is set out in the legislative acts these could be transferred into a mandate for a draft RTS thus requiring full compliance in all Member States and strengthening as well as facilitating direct enforceability.

NO Please give reasons.

5.8. Do you think that Directive 2004/109/EC (Transparency Directive) should require ESMA to annually report on the supervision and enforcement of financial and non-financial information in the EU on the basis of data provided by the national competent authorities regarding their supervisory and enforcement activities? Please explain your answer.

YES

Transparency is key in ensuring a well-functioning supervision and enforcement of financial and non-financial information. We therefore support continued and enhanced transparency of reporting of data provided by the NCAs regarding their supervisory and enforcement activities.

Moreover, we believe that such reporting from ESMA not only with regard to the enforcement activities on European level but also on national level may be necessary in order to ensure transparency of the enforcement activity in Europe and focus on one single market with harmonized enforcement both on regulation and in practice.

NO

5.9. Do you think that ESMA could have a role with regard to Directive 2006/43/EC (Audit Directive) and Regulation 537/2014/EU (Audit Regulation)?

YES Please explain and specify how.

**NO** Please give reasons.

Recent cases have highlighted that high-quality financial reporting is essential for maintaining investor trust in capital markets, and the need to have consistent and effective enforcement of that reporting across the European Union. Continuous focus on ESMA's contribution to the Audit regulation would enhance quality and uniformity of practice in the European audit and assurance profession, enhancing investor protection and improving listed entities' auditors' report.

However, the Committee of European Auditing Oversight Bodies (CEAOB) has been established in accordance with Article 30 of Regulation 537/2014/EU and comprises the National Supervisory Authorities for auditors and audit firms. The members of CEOB are experts in the audit area, including audit of non-PIE entities, and thereby ensure the necessary expertise in this area. Accordingly, CEOB should continue have the main role with regard to the Audit Directive and the Audit Regulation. Furthermore, ESMA already appoints a member of CEOB and both EBA and EIOPA are invited to attend meetings of CEOB as observers. Therefore, we do not see a need to extend the role of ESMA with regard to the Audit Directive and the Audit Regulation.

5.10. What is your assessment of the work undertaken by each ESA regarding opinions and technical advice?

No comment.

## 6. General questions on the single rulebook

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

As a matter of principle, we believe that maximum harmonisation is not a goal in itself and can be of lesser importance faced with other important objectives such as financial stability. The quest for harmonisation cannot lead to a lower level or less strict regulation in Member States, and it should not remove flexibility where this is needed to address specific circumstances and ensure financial stability or other substantive objectives.

Any consideration of further or maximum harmonisation in any field must take into account the reasons for establishing minimum harmonization, the principles of subsidiarity and proportionality as well as the main objectives of the rules in question. Thereafter, it will be the consistent application across the jurisdictions that will be the real proof of whether the harmonisation has been a success or not.

As an example the main objective for the EBA is to ensure that the EU banking sector is



significantly better at withstanding a financial crisis than it was during the last financial crisis. The EBA should also aim to enhance efficiency, e.g. through harmonising rules by contributing to the single rulebook and practices and thereby ease cross border financial activity. However, should these two goals conflict, we are of the view that promoting financial stability should be the main objective of the EBA.

Considering all of the above we do not believe that an assessment of the level of harmonisation of specific sectoral legislation is appropriate within the context of this public hearing.

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 identify the relevant sectoral legislation, examples of gold plating and give reasons for each.

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

6.3. Do you consider that the single rulebook needs to be further enhanced to reach the uniform application of Union law or rules implementing Union law and efficient convergent supervisory outcomes? Please explain your choice. Where appropriate, please support your response with examples.

YES

NO

The single rulebook is vast and comprises many different aspects and contributions from many sources. We find it challenging to assess it as one product. We will consider all the forthcoming proposals from the Commission in light of strategies, action plans, etc. and assess them on their own merits.

6.4. Questions regarding the appropriate level of regulation.

64.1. 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? 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)?

YES

NO

In general, it is preferable to have as much certainty in the level 1 text as possible, including setting out granular content where necessary to ensure the politically important issues are adequately addressed. Unfortunately, there are many examples of politically important issues that are delegated to regulators in level 2, thereby pushing the responsibility of the legislators is displaced to the regulators in the EU. We strongly favor clear rules in level 1 and when delegating to level 2 and 3, there should be a clear and well-framed mandate for the ESAs and/or Commission.

It is also important to stress that highly detailed level 1 text can also present challenges as this high degree of granularity is not the same as ensuring common understanding or actually conveying precise rules for application. This is true for all levels of EU rules.

An example is the in the area of consumer protection where directives generally contain very detailed rules on consumer protection requirements. In combination with the Commission's approach of national implementation being an almost word by word implementation, this leaves no room for adaptations to national practices in the market. It also leads to national legislation being difficult to understand and apply. We would therefore prefer a solution, where directives are to a larger extent than today based on more general or principal based rules that can be supplemented with level 3

guidance. This would leave room for national adaptations without waiving the objective of a more uniform legislation.

Moreover, the consumer area is subject to a combination of directives and regulations regulating the same issue, which is far from appropriate and creates an overly complex regime without providing a clear picture of rights and obligations with respect to a specific area. As an example the suitability test in MiFID is regulated in MIFID directive as well as in a delegated regulation. It would have been more appropriate if these rules were placed in only one piece of legislation.

A second example is it would be useful for the EBA to develop and publish a guidance on intraday liquidity management in EU, similar to Basel's published guidance in 2013 on monitoring tools for intraday liquidity management.

642. 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

A successful single rulebook is that which regulates where it is necessary and leaves discretion to the relevant authorities to conduct its activity with respect of the circumstances at hand as well as maintaining a holistic view of regulation in order to avoid unnecessary duplication and divergences between different sources of rules, thus mitigating the risk of inconsistencies in dealing with the same issue. Therefore, the answer to this question is "yes".

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

In our view it is an effective combination of all levels that will ensure an effective and consistent single rulebook.

- 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). Please explain and substantiate with examples, where possible.

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)

In our view it is an effective combination of all levels that will ensure an effective and consistent and uniform application starting with as clear rules and principles at level 1.

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?

Please explain

We have been faced with a number of situations where application dates in the level 1 text have been misaligned with dates for mandates in the level 2 and level 3 resulting in periods where the principle based level 1 text would apply without the necessary content to ensure the right information is available to ensure compliance. This creates confusion and adds to the costs of regulators and the stakeholders as they will have to frequently adapt their methods of compliance without necessarily knowing if they are doing it correctly.

We believe it should be one of the primary tasks of the co-legislators as a final element of the negotiation phase combined with checks by the lawyer-linguists to have final checks ensuring there is consistency in the application dates and sequencing of the coming rules.

6.7. Please indicate whether the following factors should be considered when deciding on the need for further harmonisation in rules (attribute 1 to 5 to each factor, 1 being the least important and 5 being the most important):

	1	2	3	4	5	No opinion
Strong interlinkages with areas of law which remain non-harmonised (e.g. CRIM-MAD and national criminal law)	x					
Broad discretion left to national authorities and frequent use of that discretion by these national authorities			x			
High level of gold plating by national rules	x					
High degree to which supervision of the same type of actors and/or activities render divergent outcomes across Member States				x		
All of the above	X					
None of the above						

Other aspects, if so which ones: Please provide concrete examples	x					
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Regarding AML/CFT, we would also mention the cooperation with regard to information sharing, as well as the level of supervisory cooperation. However, this could also be a more general aspect to take into consideration.

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

YES Please specify which one

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

**NO** Please specify which Directives you have in mind and explain your answers

Sector:	Specific piece of legislation	Example	Please explain
Banking	N/A		
Insurance	N/A		

Asset management	N/A		
Market infrastructure (CCPs, CSDs)	N/A		
Market organisation (MiFID, MIFIR, MAR)	N/A		
Other	N/A		

6.9. Do you consider that on the basis of existing mandates, additional/more detailed rules at level 2 should be introduced to provide the supervised entities and their supervisors with more detailed and clearer guidance?

YES Please specify legislation and what these rules at level 2 should regulate

NO

6.10. Against the objective of establishing the single rulebook for financial services, how would you increase the degree of harmonisation of EU financial legislation?

Across the board (e.g., via an Omnibus act which amends multiple sectoral acts at the same time)

Sector:	Specific piece of legislation	Legislative approach (omnibus vs targeted reviews)	Please explain
Banking			
Insurance			
Asset management			
Market infrastructure (CCPs, CSDs)			
Market organisation (MiFID, MIFIR, MAR)			
Other			

In a targeted manner through individual sectoral reviews