UK Finance response to the European Commission Review of the European Supervisory Authorities

Introduction

UK Finance is a new trade association which was formed on 1 July 2017 to represent the finance and banking industry operating in the UK. It represents around 300 firms in the UK providing credit, banking, markets and payment-related services. The new organisation brings together most of the activities previously carried out by the Asset Based Finance Association, the British Bankers' Association, the Council of Mortgage Lenders, Financial Fraud Action UK, Payments UK and the UK Cards Association.

UK Finance is pleased to respond to the European Commission Review of the European Supervisory Authorities.

Key messages

UK Finance supports the objectives of the proposals

UK Finance would like to thank the ESAs for their work during a very challenging period of regulatory reform. We fully support the main objectives of the proposal. Increasing the integration of financial markets, market integrity, and safeguarding financial stability are among the key objectives the industry should strive to achieve. Greater supervisory convergence will deliver substantial benefits including reducing market fragmentation and supporting a level playing field.

There are a number of issues arising from these proposals that need further consideration. While we acknowledge the ESAs may need to play a greater role in the supervisory process in order to achieve convergence, awarding them further powers will in certain circumstances significantly change business practices, and any unintended consequences need to be identified and addressed.

Equivalence

Given the critical nature of any equivalence decision, it is critical that the ESAs develop strong relationships and dialogue with third country NCAs. Decisions be based on an "outcomes" rather than on a "line-by-line" basis, and be taken under an open and transparent framework.

Division of responsibilities between NCAs and ESAs

It is very important that a balance is achieved between the responsibilities of the ESAs and the NCAs. Where decision-making powers are to be awarded to the ESAs, they need to be confident they will be able to sufficiently replicate the NCAs local market knowledge. For example, we are unsure whether ESMA will have the necessary depth of knowledge to directly supervise funds such as European Long-Term Investment Funds (ELTIFs), European Social Entrepreneurship Funds (EUSEFs), and European Venture Capital Funds (EUVECAs). Even with extra resources, we are unconvinced that ESMA will realistically be able to fulfil the role currently fulfilled by the NCAs.

We also strongly disagree with the proposals for delegation, which will increase the burden on ESMAs resources, have an unfavourable impact on business models, and could place the EU at a competitive disadvantage. The supervision of funds is an example of where the Commission should achieve supervisory convergence without necessarily giving further powers to the ESAs.

Industry engagement

There is a wealth of industry knowledge which could be considerably better utilised in the rule-making process. The Q&As are a particularly critical tool in the rule-making process, and we strongly encourage the ESAs to take advantage of industry expertise in the development of these requirements. The ESAs should also ensure Stakeholder Groups are staffed by appropriate representatives, and there is a transparent process governing their membership.

Scope of NCAs future powers

There is a lack of clarity as to the precise division of the respective responsibilities of the ESAs and the NCAs. For example, the scope of the Strategic Supervisory Plan, which effectively defines the priorities against which NCAs will be judged, is undefined. The metrics that have been provided are very high level, and are open to wide interpretation. We are concerned that the Plan, without clearly defined boundaries, could raise considerable uncertainty for both the NCAs and for other industry stakeholders, particularly given the Plan is to be updated on an annual basis.

Please find below our more detailed comments on the proposals. UK Finance would be pleased to provide any further assistance on the matters below.

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UK Finance comments on the Review of the ESAs

1. Equivalence decisions

Given the significance of any equivalence decision, there needs to be a clear and transparent framework guiding the decision-making process.

The Review sets out that the ESAs shall develop administrative arrangements with third countries to monitor regulatory developments and enforcement practices, which will be central to any equivalence decision. For the avoidance of doubt, we strongly recommend that the ESAs develop a close working relationship with third country NCAs that are to be assessed. Regulatory dialogue and international supervisory cooperation will be critical for ensuring equivalence decisions are based on all the information available. Such communications would also ensure the relevant third countries have full clarity and sufficient notice of any potential changes that may trigger reassessments of their equivalence.

Assessments should be conducted on an "outcomes" basis, rather than a "line-by-line" analysis. Deciding equivalence on an outcomes basis will allow for the consideration of all relevant factors (for example, the sophistication and depth of liquidity of local markets, and the activities of the local regulators in ensuring the stability of the financial system). Due consideration will need to be given to the treatment of legacy positions in the case of any change in equivalence determination.

The European Commission needs to be able to demonstrate a fully transparent and equitable framework that will be the basis of the decision. Bearing this in mind, we do not agree that the annual reports should be submitted to the European Commission on a confidential basis. Such an approach does not support transparency, and we do not believe such an approach is justifiable.

2. Funds

(i) Supervision and authorisation of ELTIFs, EUSEFs, and EUVECAs

UK Finance believes the current approach of supervision (i.e. led by individual NCAs) is the best approach for authorising and supervising ELTIFs, EUSEFs, and EUVECAs. The proximity and understanding of the regulator to the local markets are key when supervising funds, and it is unclear as to whether ESMA would be able to replicate an equivalent depth and breadth of local knowledge.

We are therefore unconvinced awarding ESMA new powers to authorise or supervise ELTIFs, EUSEFs, and EUVECAs will result in any benefits to the issuer, consumer, or end-investor. On the contrary, dealing with a remotely located, centralised supervisor rather than a local NCA would add cost, delay and complexity (for example, the large number of applications in different languages and the resulting follow up actions) to the process.

The proposal could hamper the competitiveness of the fund industry, and create a barrier to entry by increasing complexity and associated costs. We therefore recommend the Commission reconsiders the proposal for ESMA to supervise these funds.

(ii) Product intervention for Undertakings in Collective Investments (UCITS) and Alternative Investment Funds (AIFs)

UK Finance does not agree with the Commission's proposal to extend product intervention powers under MiFIR to managers of UCITS and AIFs. Temporarily banning the ability of fund managers to sell their products would lead to a publicly imposed 'gate' on new subscriptions. The result could be to impact the ability of fund managers to manage liquidity, price products, and have negative implications for existing investors in the fund. Fund managers already have tools (for example, gates) to manage fund liquidity, and we recommend ESMAs initial approach is to further develop the utility of the current range of tools before extending the product intervention powers.

(iii) Delegation, outsourcing of activities, and risk transfers

Delegation is a well-established and common practice in financial services, and is an integral element of the provision of services to customers. UK Finance is concerned the proposals will place significant burden on ESMA and have a negative impact on current business practices (for example, increased costs and inefficiency) with no tangible benefits for either the ESAs or the industry.

UCITS, and increasingly AIFs, are widely regarded as the global gold standard of investment products. One of the key pillars of UCITS and AIFMD's success is their ability to delegate important functions such as custody and portfolio management under strict controls and oversight. The proposal could put the EU at risk of operating on an unlevel playing field in what is becoming an increasingly competitive global environment.

Identifying third country delegation as an activity that needs enhanced scrutiny and oversight may also send a negative message to third country jurisdictions and operators about the openness of Europe's financial markets, a highly undesirable unintended consequence.

ESMA currently possesses tools to support supervisory convergence for delegation; these include issuing guidelines and recommendations, providing additional opinions to NCAs, and conducting peer reviews. The potential utility of these tools is yet to be fully tested. For example, ESMA has recently created a new Supervisory Coordination Network to discuss cases of relocating UK market participants and promote consistent decisions by NCAs. The Network will be able to provide a clear steer as to the approach Member States should take with respect to third countries.

We are unconvinced that ESMA has fully explored and exhausted its current suite of tools for achieving supervisory convergence, and strongly recommend ESMA does so before taking any further actions on delegation.

3. Industry engagement

(i) Enhanced supervisory role of the ESAs

Granting the ESAs an increased role in market supervision will create a significant responsibility for the ESAs to provide sufficient engagement with the industry, and to develop an enhanced and robust engagement structure. The ESAs should identify best practices from the existing NCA industry engagement frameworks and apply them at EU level. We would cite the current UK FCA governance frameworks with respect to the use of practitioner panels as a good example of how this might be achieved. Supervisors should be independent, and ensure an objective approach to adopted to supervisory activities.

(ii) Stakeholder feedback

It would greatly benefit both ESAs and the industry to increase the dialogue between the Authorities and industry experts. The opportunity to provide feedback is currently only provided to those who are members of the Stakeholder Groups, and is unavailable to other interested parties. Consequently, it is essential that the membership of the Stakeholders Groups is appropriately balanced, represents all the key constituencies concerned, and is governed by a transparent process.

We also believe that the Commission should have the authority to withdraw guidelines or recommendations irrespective of whether their assessment is the result from an opinion issued by the Stakeholder Group. The Commission should also require the ESAs to withdraw guidelines or recommendations where it considers that the ESA has exceeded its competence.

(iii) Level 3 consultation

The proposal does not include changes to improve stakeholder engagement in the ESA level 3 Q&A process. The Q&As are key policy tools used to clarify any uncertainties arising from level 1 or level 2 rule making, and not binding, in practice they provide a very strong steer to the industry. Due to the emphasis placed on Q&As for regulatory compliance, we strongly recommend that industry stakeholders are provided with an opportunity to provide input into the development of Q&As. Such input could range from informal discussions with technical experts through to a formal consultation, depending on the nature and impact of the issue in question. The process needs to be transparent, and provide a considerably increased opportunity for the industry to participate in the development of Q&As. We also believe the Q&A process should be covered by the proposed cost-benefit analysis requirements.

4. Strategic Supervisory Plan

The proposals outline the requirement for ESAs to set EU-wide priorities for supervision in the form of a "Strategic Supervisory Plan" (SSP). The SSP essentially sets the criteria against which the NCAs will be assessed. We are concerned that the SSP is very high level, and has the potential to be interpreted and applied very widely. For example, the proposal states the SSP should take into account considerations including "*general economic and regulatory orientations*", "*relevant micro-prudential trends*", and "*vulnerabilities identified by the ESAs*". We acknowledge that the scope of the SSP needs to be wide enough to allow the capacity for the Plan to include key issues, but we are concerned that the absence of a clear scope could lead to the SSP encroaching into supervisory issues that should be the responsibility of the NCAs.

In this response we have objected to the increased supervisory role of ESMA in the supervision of ELTIFs, EUSEFs, and EUVECAs, and also of delegation and outsourcing. The absence of a clearly defined scope for the SSP could lead to uncertainty for the NCAs, and we recommend further clarity is provided on the scope of the SSP to address this issue.

5. No action relief powers

In circumstances where the industry may be unlikely (for justifiable reasons) to meet regulatory deadlines, there needs to be a mechanism where regulatory authorities are able to provide firms with formal assurance that they will not be subject to enforcement procedures due to a lack of compliance for a defined period.

The EU legislative framework does not currently provide for such powers, and where such a scenario occurs, the typical course of action is to change the legislation and amend application dates. The consequences of this approach include creating industry uncertainty, and placing undue pressure on rule makers to facilitate legislative change. While the EU can encourage NCAs to formally announce forbearance, in practice this is likely to lead to inconsistency and an unlevel playing field.

We recommend that the ESAs are formally empowered to direct NCAs to exercise regulatory forbearance in respect of those persons the NCAs directly supervise now and in the future. UK Finance, through its membership of the European Banking Federation, has participated in the development of a cross trade association initiative to develop legal analysis to identify how the ESAs could be appropriately empowered to exercise regulatory forbearance in the future, and how NCAs could be facilitated to exercise such forbearance. Please find the analysis attached in the Annex of this response.

6. Consumer Credit Directive

UK Finance does not support the proposal to extend the scope of the EBA in respect of the Consumer Credit Directive (CCD). Consumer credit remains a primarily domestic sector and, compared to the quantity of business conducted cross-border by markets focused businesses, the nature of the retail customer base means there is little consumer credit lending across borders.

In addition, most of the consumer protection regulation does not derive solely from the CCD in a number of Member States. While the UK is often cited as the prime example, other EU members have sophisticated and complex consumer credit rules over and above those in the CCD. We are therefore unconvinced centralising supervisory power in this area of business will be of any tangible benefit to industry stakeholders. Indeed, given that a number of Member States take different approaches to the Directive, such proposals could give rise to unintended consequences including a significant increase in duplication and complexity.

7. Prospectus regulation

UK Finance does not support the Commission's proposals for ESMA to become the direct supervisor of certain prospectuses. We believe that the current approach of NCA supervision is appropriate. For example, if SMEs prospectuses are to be reviewed by ESMA, it will create a disproportionately high cost to SMEs, place further demands on ESMAs resources, and hinder market efficiency. While we support ESMA's objectives of addressing regulatory arbitrage, we are unconvinced that prospectus regulation should be an area of focus.

8. Requests of information from ESAs

The proposals include granting powers for ESAs to request information directly from industry participants in order for the ESAs to execute their new supervisory duties. We are concerned that the requests will duplicate the data firms currently (and will presumably continue to) provide to their respective NCAs.

Given the significant resources that firms are already dedicating to meeting their various reporting obligations (for example COREP, FINREP, and MiFID II transaction reporting), there must be co-ordination between NCAs and ESMA, and a framework needs to be developed so as not to increase the (already very significant) reporting requirements. We suggest the ESAs view this as an opportunity to streamline the various data requirements, and increase the efficiency of the process.

9. Sustainable finance

We note the relevance of the (interim) recommendations of the European Commission High Level Expert Group on Sustainable Finance, and believe that the EBA should make explicit reference to acting upon EU sustainability policy imperatives.

Annex – Legal analysis accompanying joint trade association submission on ESAs review proposal

1 Introduction

1.1 On 20 September 2017, the European Commission ("the Commission") published a legislative proposal to amend *inter alia* the regulations establishing each of the European supervisory authorities (**ESAs**) - the European Banking Authority (**EBA**), the European Insurance and Occupational Pensions Authority (**EIOPA**) and the European Securities and Markets Authority (**ESMA**).[1] The ESAs review proposal follows the Five Presidents' Report on Completing Europe's Economic and Monetary Union in 2015 and is aimed at reforming the funding and governance of the ESAs and legislating additional powers to each of the ESAs, including specific powers for ESMA to directly supervise certain investment funds, data reporting services providers, so-called "critical benchmarks" and certain wholesale market prospectuses. The proposal is in legislative review and will be scrutinised by the Council of the European Union and the European Parliament (collectively "the co-legislators") in 2018 and 2019.

1.2 The International Swaps and Derivatives Association, Inc. (**ISDA**), the Association for Financial Markets in Europe (**AFME**), the European Banking Federation (**EBF**), the European Fund and Asset Management Association (**EFAMA**) and Futures Industry Association (**FIA**) (hereafter "the associations") note that, despite industry concerns voiced frequently and for many years, the Commission's proposal does not include amendments to empower the ESAs to defer the application of certain legislative and regulatory requirements in exceptional circumstances. Such "regulatory forbearance" powers are standard tools at disposal of regulators in third country jurisdictions, most notably the United States of America (**US**) and the "no-action" powers of federal financial markets regulators.[2]

1.3 The associations advocate amendments to each of Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority), Regulation (EU) No 1094/2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), and Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority) (collectively "the ESA Regulations") to grant the ESAs specific, limited powers of regulatory forbearance and to facilitate the prompt adoption of amendments to technical standards. The associations also advocate amendments to

[1] European Commission: Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority); Regulation (EU) No 1094/2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority); Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority); Regulation (EU) No 345/2013 on European venture capital funds; Regulation (EU) No 346/2013 on European social entrepreneurship funds; Regulation (EU) No 600/2014 on markets in financial instruments; Regulation (EU) 2015/760 on European long-term investment funds; Regulation (EU) 2016/1011 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds; and Regulation (EU) 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market [COM(2017)563] (20 September 2017) (hereinafter "ESAs review proposal").

[2] The US Commodity Futures Trading Commission (**CFTC**) and the US Securities and Exchange Commission may both issue so-called "no-action" letters at the request of market participants. These letters are a commitment on the part of the regulator not to enforce market participant non-compliance with the provisions of US federal law, Commission rules, regulations or orders. These letters may be issued by the regulator on the application of one or more market participants where market participants are unable to comply with relevant law, rules, regulations or orders for specific reasons. The letters are addressed to subject market participants and time-limited. A recent and notable example of such letters was the CFTC no-action letter to the European Stability Mechanism providing the latter with no-action relief in respect of its non-compliance with section 2(h)(1) of the US Commodities Exchange Act. See CFTC: Letter No. 17-58 (No-Action Relief for the European Stability Mechanism from the Swap Clearing Requirement in Section 2(h)(1) of the Commodity Exchange Act and Commodity Futures Trading Commission Regulations 50.2 and 50.4) (07 November 2017) [link].

the 2016 Interinstitutional Agreement on Better Law-Making (**IIA**) to facilitate faster change to primary and second legislation where appropriate and necessary.[3] The associations encourage debate on these amendments, which they believe would provide for more flexibility and responsiveness in the EU legislative process to the benefit of all stakeholders including national competent authorities (**NCAs**) and market participants.

1.4 The associations recognise the legal and procedural constraints to the ESAs exercising regulatory forbearance. Accordingly, they have instructed Norton Rose Fulbright LLP (**NRFLLP**) to prepare legal analysis in support of their submission, which considers these constraints, how European Union (**EU**) agencies exercise regulatory forbearance today and recommends how the ESAs could be appropriately empowered to exercise regulatory forbearance in the future and to facilitate regulatory forbearance by NCAs. The submission also recommends changes to both primary and secondary legislation and the IIA to hasten amendments to EU legislation and minimise recourse to regulatory forbearance.

2 Legal constraints to ESA regulatory forbearance

2.1 EU decentralised agencies, including the ESAs, are designed and empowered to assist the EU institutions with the implementation of Union law as decided by the EU institutions. The powers of the decentralised agencies are usually specified in one or more legal instruments adopted by the EU institutions. The decentralised agencies are also subject to Union law. Indeed, Court of Justice of the EU (**CJEU**) case law has since 1958 shaped the development of the decentralised agencies, and constrained their actions.

2.2 The seminal case on the powers of EU agencies remains *Meroni v High Authority*.[4] In its judgment the CJEU considered the powers delegated to EU agencies by the EU institutions and how EU agencies exercise these powers. The court distinguished the delegation of "clearly defined executive powers" and the delegation of "a discretionary power, implying the wide margin of discretion which may, according to the use which is made of it, make possible the execution of actual economic policy"[5]. The court considered that the latter "replaces the choices of the delegator by the choice of the delegate" and as such "brings about an actual transfer of responsibilities".[6] The court believed that such delegation would render the guarantees of the Treaties ineffective and was thus unlawful. According to the judgment, the EU institutions cannot delegate any form of discretionary powers to an EU agency.

2.3 The court followed *Meroni* in its 1981 judgment in *Romano* v *Institut national d'assurance maladie-invalidité*.[7] In this judgment the court determined that it was also unlawful for the EU institutions to delegate to an agency any power to "adopt acts having the force of law".[8]

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[3] Council of the European Union, European Commission and European Parliament: Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission of 13 April 2016 on Better Law-Making *OJ L 123* (12 May 2016) [link].

[4] Judgment of the Court of 13 June 1958 in *Meroni & Co., Industrie Metallurgiche, SpA* v *High Authority of the European Coal and Steel Community*, Case 9-56, EU:C:1958:7 [link].

[5] *Ibid.* page 152.

[6] *Ibid.* page 152.

[7] Judgment of the Court of 14 May 1981 in *Giuseppe Romano* v *Institut national d'assurance maladie-invalidité*, Case 98-80, EU:C:1981:104 [link].

[8] *Ibid.* paragraph 20.

2.4 The EU's constitutional framework has changed significantly in the 60 years since *Meroni*. The most significant changes to this framework followed the amendments to the Treaty on European Union and the Treaty Establishing the European Community set out in the Lisbon Treaty. The resulting Treaty on the Functioning of the European Union (**TFEU**) provided legal bases for the delegation of powers from the co-legislators to the Commission. TFEU provisions expressly extended CJEU jurisdiction to review the legality of the acts of EU agencies "intended to produce legal effects vis-à-vis third parties" and recognised acts of general application adopted by EU agencies.[9] The Commission used these new powers to implement the recommendations of the High-Level Group on Financial Supervision in the EU chaired by former *Banque de France* governor Jacques de Larosière. This included the proposals for regulations establishing the European Systemic Risk Board and the three ESAs, which with NCAs constitute the European System of Financial Supervision (**ESFS**).

2.5 The powers of the ESAs were subsequently challenged on the bases of *Meroni* and *Romano* by the British government in *United Kingdom v the European Parliament and the Council*.[10] The British government challenged the legality of powers delegated to ESMA under Article 28 of Regulation (EU) 236/2012 on short selling and certain aspects of credit default swaps (**SSR**). It argued that, in the alternative, the provision was inconsistent with the court's judgment in *Meroni* as to powers that could be delegated to an EU agency, the provision was inconsistent with the court's judgment in *Romano* as to powers that could be delegated to an EU agency, and the delegation of powers was incompatible with any of Articles 114, 290 and 291 TFEU. Relevant to this analysis the British government argued that, contra *Meroni*, Article 28(2) SSR granted ESMA "a very large measure of discretion" in deciding what constitutes a threat to the orderly functioning and integrity of financial markets such as to warrant ESMA restricting short sales by market participants.

2.6 Advocate General Jääskinen and the court disagreed. The court's judgment did not distinguish *Meroni*. Rather it considered that the powers delegated to ESMA under Article 28 SSR were sufficiently conditional and prescribed such that the provision did not amount to an effort to "confer any autonomous power on that entity that goes beyond the bounds of the regulatory framework established by the ESMA Regulation".[11] The court stated that the ESMA powers in question were "precisely delineated and amenable to judicial review in light of the objectives established by the delegating authority" and thus compatible with the requirements of *Meroni*.[12]

2.7 The Advocate General went further in his opinion. He suggested that the amendments to the Treaties included in the Lisbon Treaty, in particular the express extension of the court's jurisdiction over the acts of EU agencies, meant that "the *Romano* and *Meroni* case law needs to be re-positioned into the contemporary fabric of EU constitutional law". The Advocate General pointed to "the fundamental differences in the factual and legal context between the agencies considered by the Court in 1958 in *Meroni* and the way in which the agencies operate today".[13]

2.8 The court's judgment in *SSR* did not abandon *Meroni* but it did loosen the constraints imposed on the delegation of powers to EU agencies and how agencies may exercise those powers. The judgement confirms that Union law will permit the EU institutions to

[9] See Articles 263 and 277 TFEU.

[10] Judgment of the Court of 22 January 2014 in *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union*, Case 270-12, EU:C:2014:18 [link].

[11] *Ibid.* paragraph 44.

[12] *Ibid.* paragraph 53.

[13] See paragraph 69 of Opinion of the Advocate General Jääskinen of 12 September 2013, Case c-270/12, EU:C:2013:562 [link].

delegate a wide range of powers to EU agencies including the ESAs and will permit EU agencies to exercise such powers with discretion if the delegation is sufficiently prescriptive. However, the judgment also makes clear that Union law will not permit the EU institutions to delegate powers without limitation or a prescribed basis in legislation.

3 Procedural constraints to ESA regulatory forbearance

3.1 In addition to the legal constraints summarised above, there are procedural constraints to the ESAs exercising regulatory forbearance. These procedural constraints originate in the Treaties and prescribe how the EU institutions make law.

3.2 Article 288 TFEU sets out the types of legal acts that can be adopted by the EU institutions (i.e. regulations, directives, decisions, recommendations and opinions). However, the provision does not provide the authority for the EU institutions to adopt any specific legal act. The power of the Commission to adopt legal acts under Article 288 TFEU must be read in conjunction with the powers granted to it for specific legal acts in accordance with the provisions of Articles 290 and Article 291 TFEU. These articles provide the legal bases for the delegation of certain normative and implementing powers to the Commission by co-legislators. While the former provides the basis for the co-legislators to delegate to the Commission power to adopt non-legislative acts of general application that supplement or amend select non-essential elements of legislative acts ("delegated acts"), the latter deals with assistance provided by the Commission to Member States in the area of implementation of European legislation ("implementing acts").

3.3 The Commission's decision-making powers deriving from Articles 290 and 291 TFEU are further specified in the IIA. Section V IIA addresses cooperation between the co-legislators and the Commission on delegated and implementing acts, and annexed to the IIA is the Common Understanding between the European Parliament, the Council of European Union and the European Commission on Delegated Acts ("the Common Understanding"). The Common Understanding sets out a procedural framework for the exercise by the Commission of powers delegated pursuant to Article 290 TFEU, including co-legislator scrutiny and no-objection powers in respect of proposed delegated acts.

3.4 The corresponding framework for the adoption of implementing acts is set out in Regulation (EU) 182/2011 on rules and general principles concerning the mechanisms for control by Member States of the Commission's exercise of implementing powers ("the Implementing Powers Regulation"). The Commission's decision-making powers are constrained by the requirement that proposed implementing acts receive a positive opinion adopted by a qualified majority by the relevant comitology committee – for financial services legislation this being any of the European Securities Committee, the European Banking Committee or the European Insurance and Occupational Pensions Committee.[14]

3.5 The ESAs are similarly constrained in their exercise of delegated powers. Each must act in accordance with the provisions of the relevant ESA Regulation in exercising its powers to investigate breaches of Union law or conducting binding mediation. Each may draft regulatory technical standards (**RTS**) and implementing technical standards (**ITS**) where mandated by provisions in a legal instrument adopted by the co-legislators but these draft technical standards must be adopted by the Commission and are subject to scrutiny thereafter by the co-legislators. In all cases, the implied discretion

[14] Of note, both the Common Understanding and the Comitology Regulation include "urgency procedures" for the adoption of delegated and implementing acts respectively. These procedures are considered in more detail in section 6 of this analysis.

for the ESAs is limited and must be used according to the letter of the ESAs Regulations.

3.6 Whilst the procedures above seem complex and inefficient to the layman, they are not in our view examples of "procedures for procedure's sake". Rather, these procedures and the constraints therein give effect to a balance of political power between the EU institutions. This balance of political power limits the executive powers of the Commission and provide the co-legislators with the means to control how the Commission exercises these powers.

4 Regulatory forbearance under current powers

4.1 Despite these legal and procedural constraints, the ESAs can and do exercise some degree of regulatory forbearance in the absence of, or pending amendments to, primary or secondary legislation. In some cases they do so comfortably within the existing framework. In other cases the ESAs act at the very edge of legal and procedural constraints, and beyond. Arguably, the lack of a structured legal and procedural approach to the use of such powers adds to the uncertainty of the applicability and enforceability of the EU legislative and regulatory framework.

4.2 A recent such example of such regulatory forbearance came with the Joint Committee of ESAs proposal to amend Commission Delegated Regulation (EU) 2016/2251 on margin requirements for non-centrally cleared over-the-counter derivatives (**CDR 2016/2251**). Responding to fears of a significant divergence between EU legislation and that in key third countries, the joint committee proposed amendments to CDR 2016/2251 to exempt counterparties that are not "Institutions" within the meaning of Article 4(1)(3) of Regulation (EU) 575/2013 on prudential requirements for credit institutions and investment firms (**CRR**) from collecting and posting variation margin (**VM**) for certain foreign exchange derivative transactions. Recognising that such amendments would be subject to adoption by the Commission and scrutiny by the co-legislators, and could take considerable time to be applied, the joint committee stated publically that it would expect NCAs "to generally apply their risk-based supervisory powers in their day-to-day enforcement of applicable legislation in a proportionate manner".[15] This statement did not relieve NCAs of their responsibilities to enforce Union law but it did give confidence to NCAs to advise counterparties, publicly or privately, that in appropriate circumstances the exchange of VM would not be required, the requirements in law notwithstanding. To date, the ESAs statement has already prompted at least one NCA to announce that it will not require counterparties to exchange VM for the relevant contracts.

4.3 ESMA's statements respectively of 20 December 2017 in relation to requirements for legal entity identifiers (**LEIs**) for transaction reporting and 09 January 2018 regarding a delay of the publication of "double volume cap" data are further examples of regulatory forbearance in practice, albeit ones stretching the legal and procedural constraints.[16] These statements were conventionally viewed as the authority trying to grant some relief respectively to investment firms struggling to collect LEIs from non-EU counterparties and clients and trading venues and NCAs struggling equally to comply with the complex calculations of Article 5 of Regulation (EU) 600/2014 on markets in financial instruments (**MiFIR**). ESMA's statements had no basis in either the ESMA Regulation or MiFIR but they provided and continue to provide some comfort to NCAs

[15] Joint Committee of ESAs: Variation Margin exchange for physically-settled FX forwards under EMIR (24 November 2017) [link].

[16] ESMA: "ESMA statement to support the smooth introduction of the LEI requirements" [ESMA 70-145-401] (20 December 2017) [link] and Press Release "ESMA delays publication of double volume cap data" [ESMA 71-99-925] (09 January 2018) [link]. The latter is, in our opinion, perhaps the most striking recent example of ESMA's exercise of regulatory forbearance.

and market participants struggling with MiFIR requirements. However, as a result of the non-binding nature of the public statements it cannot be guaranteed that the NCAs will act in a harmonised way in relation to the enforcement of the rules, which can be detrimental to the perception of the EU as a stable and predictable market for financial services.

4.4 The Commission and the ESAs may act in other ways to effect regulatory forbearance, in some cases stretching the legal and procedural constraints discussed in sections 2 and 3. Examples of this include the Commission's now-regular proposals to roll-over the transitional periods related to own funds requirements for exposures to central counterparties set out in Article 497(3) CRR. Intended by the co-legislators as a one-use mechanism to accommodate prospective delays in early stages of granting authorisation and equivalence to EU and third country CCPs respectively, the extension has become a mechanism for dealing with regulatory and practical shortcomings of the "qualified central counterparty" (**QCCP**) designation procedure.

4.5 Practices beyond the ESFS can be more aggressive. The Agency for the Cooperation of Energy Regulators (**ACER**), another decentralised EU agency, vigorously exercises regulatory forbearance with no apparent legal basis. It has since 2015 issued no less than three "no-action relief letters" in respect of the application of provisions set out in Commission Implementing Regulation (EU) 1348/2014 on data reporting implementing Article 8(2) and Article 8(6) of Regulation (EU) No 1227/2011 of the European Parliament and of the Council on wholesale energy market integrity and transparency (**REMIT**) (**CIR 1348/2014**). ACER has no formal powers to grant no-action relief or to direct national regulators tasked with the enforcement of Union law to ignore non-compliance by market participants. Yet the agency considers its "no-action letters" to be guidelines for national regulators and thus within its competence under REMIT.

5 Empowering the ESAs to exercise regulatory forbearance

5.1 Such ESA exercises of regulatory forbearance does not provide the NCAs and the industry legal certain and meaningful solutions. NCAs are not in a position to consider themselves relieved from enforcing Union law and market participants must continue to comply with Union law. The associations consider that, in order to safeguard the ESFS, the ESAs require clearly-defined, limited powers to exercise regulatory forbearance in respect of persons they supervise directly.

Persons subject to direct ESAs supervision

5.2 Currently, ESMA directly supervises credit rating agencies authorised under Regulation (EU) 1060/2009 on credit rating agencies and trade repositories authorised under Regulation (EU) 648/2012 on OTC derivatives, central counterparties and trade repositories (**EMIR**). Pursuant to EMIR, ESMA is also part of CCPs college of supervisors. The ESAs review proposal would, if adopted, extend ESMA's direct supervision powers to *inter alia* European venture capital funds, European social entrepreneurship funds, data reporting services providers and European long-term investment funds.

5.3 The associations believe that ESMA should be formally empowered to exercise regulatory forbearance with and for those persons it directly supervises both now and in the future. This power should permit ESMA to defer the application of any directly applicable provisions of Union law to persons it directly supervises. The power should be used by ESMA where persons subject to direct supervision cannot reasonably

comply with such provisions of Union law or where compliance would place these persons in breach of other legal and regulatory requirements, distort competition or be detrimental to financial stability or the regular functioning of EU financial markets. The power should be exercised by ESMA whilst it, the Commission and the co-legislators consider, prepare, adopt and/or scrutinise changes to primary or secondary legislation to address the challenges faced by directly-supervised persons. Application of the power should be time-limited, subject to review and renewal once. The power should be codified in a new provision to be added to the ESMA Regulation and exercised as a general power irrespective of a specific reference in existing or future legislation.

Persons subject to indirect ESAs supervision

5.4 The associations also believe that the ESAs should be formally empowered to direct NCAs to exercise regulatory forbearance with and for those persons the NCAs directly supervise both now and in the future. This power should permit any ESA to decide, on its own initiative or on the application of one or more member NCAs, that NCA enforcement of, or market participant compliance with, a provision in Union law is not possible, creates a conflict of laws, would distort competition and/or risks a divergence in the application of international standards that may jeopardise equivalence decisions, formal arrangements for third country persons to undertake regulated activities in the EU, be detrimental to financial stability or the regular functioning of EU financial markets. The power should bind NCAs, protecting them from third party claims, breach of Union law actions or infringement proceedings. The power should be exercised by the ESA whilst it, the Commission and the co-legislators consider, prepare, adopt and/or scrutinise changes to primary or secondary legislation to address the challenges faced by NCAs and market participants. Application of the power should be time-limited, subject to review and renewal once. The power should be codified in a new provision to be added to the ESMA Regulation and exercised as a general power irrespective of a specific reference in existing or in future legislation.

5.5 The associations consider these powers appropriate and proportionate. Properly codified, both powers could be exercised by the ESAs within the bounds of the legal and procedural constraints described above. The former is an emergency power, limited and justiciable by the CJEU. It would be used infrequently to defer the application of directly applicable regulation to a small number of regulated persons pending review and possible changes to that regulation. The latter is also an emergency power, to be used infrequently to coordinate the deferred application of regulation by NCAs pending review and possible changes to that regulation. The former power is designed to enhance ESA direct supervision powers. The latter power is designed to facilitate joint NCA action and safeguard the ESFS.

6 Facilitating faster change to primary and secondary legislation

6.1 Regulatory forbearance is not required where the EU institutions, with the support of the ESAs, can address conflicts of laws or the unintended consequences of new laws through review and amendments to either primary or secondary legislation. Regulatory forbearance is required because the review and amendment of legislation takes time. Yet the procedures for both primary and secondary legislation can be hastened or curtailed with the agreement of the EU institutions involved and without undermining these procedures.

Amending primary legislation

6.2 There is no emergency mechanism or ‘fast track’ procedure for the ordinary legislative procedure set out in Article 294 TFEU. The treaty requires first and second reading,

conciliation and third reading where required. Today, legislative proposals rarely proceed through all these steps and are typically adopted at first reading following informal "trilogue" negotiations – a process that still usually takes an average of 14 to 18 months. The EU institutions can affect changes to primary legislation relatively quickly where and when necessary. Notable examples of this include the 2016 legislative proposal to amend CRR to extend the expiry of derogations for so-called "commodities dealers" and the Commission's amendments to MiFID II and MiFIR to delay application of the substantive provisions of these legal instruments by 12 months ("the MiFID Quick Fix proposals"). In both cases the co-legislators adopted the amendments proposed by the Commission within six months.

6.3 The EU institutions would be more likely to review and amend primary legislation faster and more predictably were they to formalise when and how this should be done and to agree conditions to ensure the process was not abused or unnecessarily delayed. Article 295 TFEU provides a mechanism to do so. The associations consider that the IIA is amended to specify circumstances in which the Commission may propose minor amendments to primary legislation, which should be agreed and adopted by the co-legislators without delay. The IIA should specify a target timeframe of six months for this expedited legislative review procedure.

Amending delegated acts and implementing acts

6.4 Interestingly, there are formalised arrangements that permit the Commission to adopt delegated acts and implementing acts that may apply immediately.[17] The urgency procedure for delegated acts permits the Commission to adopt a delegated act and for that delegated act to apply "without delay" on the condition that neither of the co-legislators formally objects to the delegated act.[18] Article 8 of the Implementing Powers Regulation permits the Commission to adopt an implementing act that may apply immediately without prior submission to the relevant comitology committee. Such implementing acts may only remain in force for six months, and must be repealed should the relevant comitology committee later adopt a negative opinion in respect of the implementing act.

6.5 These arrangements are helpful and use of the arrangements may make regulatory forbearance unnecessary. However, the arrangements may only be used if there is express reference in the relevant primary legislation. The IIA also restricts the use of the urgency procedure to "exceptional cases, such as security and safety matters, the protection of health and safety, or external relations, including humanitarian crises". There is no record of the Commission using the urgency procedure to date.

6.6 The associations support use of these arrangements to adopt and amend delegated acts and implementing acts. The group considers safeguarding financial stability and the approximation of laws in the Single Market sufficiently important policy objectives to warrant use of the urgency procedure for delegated acts. The associations advocate including the standard clauses on the urgency procedure and express reference to Article 8 of the Implementing Powers Regulation in all future financial services legislative proposals.[19]

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[17] These are the "urgency procedure" set out in Part VI of the IIA Annex on the Common Understanding between the European Parliament, the Council and the Commission on Delegated Acts and Article 8 on immediately applicable implementing acts in the Implementing Powers Regulation.

[18] The description of the urgency procedure does not address amendments to existing delegated acts. However, the conditions on use of the procedure do not appear to preclude the Commission amending a delegated act using the urgency procedure.

[19] See Article 1(19a) of the Council General Approach on Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 648/2012 as regards the clearing obligation, the suspension of the clearing obligation,

Amending technical standards

6.7 There are no such arrangements for the expedited adoption of RTS, ITS or amendments to either, although the co-legislators may curtail their scrutiny of technical standards adopted by the Commission. The associations propose an amendment to each ESA Regulation prescribing circumstances in which the ESAs may propose draft technical standards or amendments to adopted technical standards to be adopted by the Commission, which would apply immediately. Such technical standards would be subject to scrutiny by the co-legislators after application. The Commission would immediately repeal any technical standard adopted under this urgency procedure if either co-legislator were to reject the technical standard per current requirements in the ESA Regulations.

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the reporting requirements, the risk-mitigation techniques for OTC derivatives contracts not cleared by a central counterparty, the registration and supervision of trade repositories and the requirements for trade repositories [15626/17] (11 December 2017) [link].