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B. Co-operation Arrangements Transitional & Steady-State

B.1 Introduction

Article 8a of the proposed ESMA Regulation establishes a co-operation framework between ESMA and national competent authorities (NCAs) and other national authorities, Union institutions or Union bodies to enable ESMA to exercise its expanded direct supervisory responsibilities effectively. However, Article 8a does not clearly distinguish between co-operation during the initial transfer of supervisory responsibilities and co-operation in steady-state operations, creating uncertainty as to how far NCAs would remain involved in the process, including in relation to decisions affecting the use of their resources, after direct supervision has transferred to ESMA.

This note proposes a revised framework that distinguishes between:

(i) a build-up phase, during which NCAs provide intensive support to help ESMA develop supervisory capacity; and

(ii) a steady-state model, where ESMA has assumed supervisory responsibility and developed supervisory capacity following completion of the build-up phase, under which Member States are invited to choose between Option A (ESMA as responsible supervisor with limited NCA involvement) and Option B (ESMA is the

responsible supervisor but NCAs remain directly involved through sector-specific co-operation arrangements) for each sector.

Questions

Q1: Do Member States agree with the proposed two-phase approach?

B.2 Member State Concerns

Member States are generally concerned that Article 8a may create open-ended and costly co-operation obligations, particularly after the initial build-up stage. Key concerns include:

- Insufficient phase differentiation: Article 8a does not clearly distinguish between capacity-building and steady-state supervision. Without this clarity, Member States cannot predict when their intensive support obligations will end, creating uncertainty about long-term resource planning.

- One-way co-operation and resource burden without equivalent influence: ESMA would direct the practical arrangements for co-operation, while NCAs may be required to commit staff, expertise, systems and supervisory capacity without a corresponding level of input, control or influence over the resources called upon. Member States risk bearing significant costs and operational disruption whilst having limited say in how co-operation is structured or whether their input is actually needed.

- Unclear transition of responsibility during the build-up phase: During the initial transfer of supervisory responsibilities, NCAs are likely to have the institution-specific knowledge, supervisory history and expertise, while

ESMA assumes formal responsibility as the direct supervisor. Article 8a does not clearly explain how responsibility and accountability for supervisory decisions would transition in practice, particularly where ESMA's decisions are heavily reliant on the information, analysis and expertise provided by NCAs.

- Ongoing Accountability gaps: steady-state phase: In the steady-state it may be unclear who is accountable if supervision fails or decisions are challenged if there is insufficient clarity in the legal text as to when NCAs are acting on ESMA's behalf and what responsibility attaches to specific NCA inputs or operational tasks.

- Risk that transitional support becomes permanent: Temporary support arrangements could become embedded as a permanent operating model unless the duration, milestones, exit criteria and any extension process are clearly specified.

- Data and confidentiality risks: Multiple authorities handling information creates confidentiality and data protection concerns.

- Governance concerns: Member States want the Board of Supervisors to have a defined role in approval and oversight. Without appropriate Board oversight, Member States have limited visibility and influence over arrangements that materially affect their resources and supervisory role.

- Cost and resource implications: Reimbursement may not fully reflect wider opportunity costs and unpredictable demands unless the methodology, recoverable cost categories and dispute mechanisms are defined in advance.

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B.3 Proposed Framework

The proposed framework seeks to address these concerns while preserving the flexibility needed for ESMA to assume its expanded supervisory responsibilities. It does so by distinguishing between an agreed time-bound build-up phase and a steady-state supervisory model, supported by governance, accountability and cost safeguards that are intended to match the concerns identified above.

B.4 General Principles

Co-operation arrangements should be established through a two-level framework: first, a general co-operation framework setting out the horizontal principles applicable across all sectors, including governance, accountability, cost recovery, confidentiality, escalation and review arrangements; and second, sectoral co-operation frameworks applying those principles to the specific characteristics and supervisory needs of each relevant sector. These general and sectoral frameworks should be approved by the Board of Supervisors.

Co-operation arrangements should be established only on a sectoral basis, through a common framework applicable to the relevant sector, and shall not take the form of bilateral arrangements between ESMA and individual NCAs. Any variation in NCA involvement should be based on the characteristics and supervisory needs of the sector. Within the approved general and sectoral frameworks, ESMA and the relevant NCA may agree operational implementation arrangements for specific entities or supervisory tasks, provided such arrangements do not alter Member State resource obligations, accountability arrangements or the allocation of responsibilities set out in the approved frameworks. Any continuing NCA involvement after the build-up phase should be clearly defined, legally bounded and subject to appropriate governance, accountability and cost safeguards. Option B should therefore be understood as structured and legally bounded NCA involvement in support of ESMA supervision, not as a transfer back of responsibility

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to NCAs or as permanent outsourcing of ESMA's supervisory function. During the build-up phase, NCAs face a stronger duty to cooperate through flexible, proportionate arrangements. Once the build-up phase ends, the preferred steady-state model applies.

In both phases, ESMA should remain responsible for final supervisory decisions and outcomes, while NCAs should be responsible only for the accurate, complete and timely performance of the specific co-operation tasks assigned to them under the relevant sectoral co-operation framework or arrangement, including the information, analysis and operational support provided within the scope of those tasks.

B.5 Build-Up Phase (Revised Article 8a)

The purpose of the build-up phase is to enable ESMA to develop the staff, systems, expertise and supervisory capacity necessary to perform its supervisory responsibilities independently. During this time-bound phase, NCAs provide intensive support including information-sharing, inspections, joint supervisory teams and operational assistance. The initial duration of the build-up phase should be fixed in advance for each sector, based on objective criteria and subject to Board of Supervisors approval. Any extension should be exceptional, justified by reference to unmet milestones, and limited in duration. To ensure a structured, transparent and time-limited transition, Article 8a should establish the key principles of the build-up phase, with the detailed operational framework to be approved by the Board of Supervisors. Such a framework should include:

- Clear arrangements to establish how and when responsibility and accountability for supervisory decisions transition in practice from NCAs to ESMA during the build-up phase.

- Sector-specific timelines and milestones for ESMA's progression towards independent supervisory capability reflecting complexity and existing supervisory architecture, with any extension limited to justified extension periods subject to Board of Supervisors review.

- Clear criteria for determining when ESMA has acquired sufficient staff, systems, expertise and supervisory capability to perform its responsibilities independently and for concluding the build-up phase.

- Annual resource forecasting by ESMA to NCAs on anticipated support needs.

- Board of Supervisors approval of the general framework, standard templates and minimum content requirements for both the build-up and the steady-state stages.

- Cost reimbursement by ESMA for NCA co-operation, recognising both direct and indirect costs.

- Confidentiality and data protection safeguards for information exchange.

B.6 Steady-State Models (New Article 8b)

Once the build-up phase ends, the steady-state supervisory model should be determined on a sector-by-sector basis through sectoral co-operation frameworks, rather than through bilateral arrangements between ESMA and individual NCAs. A single model need not apply across all sectors. Member States may prefer ESMA to act as the responsible supervisor in some sectors, while retaining more structured NCA involvement in others. Equally, where a sector adopts Option B, the form of co-operation may vary according to the characteristics and supervisory needs of that sector. This allows the supervisory framework to remain flexible and

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proportionate, while ensuring clarity of roles, responsibilities, accountability and costs.

Option A - ESMA as Responsible Supervisor: ESMA becomes the primary supervisory contact point for engagement, data collection, supervisory dialogue, investigations, decisions and enforcement. NCA involvement is limited to clearly defined circumstances where a national element arises. Other than where required under national law or the national regulatory framework, any additional Member State support is voluntary, separately scoped, costed and time-limited.

Option B: NCAs remain directly and structurally involved in supervision through sectoral co-operation frameworks tailored to the characteristics and supervisory needs of the relevant sector. The model should be calibrated having regard to the characteristics of the sector, ESMA's existing expertise, available national expertise, operational efficiency and cost implications. Possible arrangements include Joint Supervisory Teams, Supervisory Liaison Officers, or structured information-sharing, with roles, responsibilities, cost allocation and escalation procedures fixed in Level 1 legislation or in arrangements expressly provided for by Level 1 legislation and approved through the applicable governance process. Option B should not require NCAs to perform core supervisory functions on ESMA's behalf unless such tasks are expressly defined, resourced and subject to clear accountability arrangements.

For the avoidance of doubt, ESMA remains the responsible supervisor and decision-maker in both Option A and Option B models and remains accountable for supervisory outcomes, and this should be reflected in regulation. NCAs remain accountable only for the correct performance of the specific tasks assigned to them under the relevant co-operation arrangements.

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Questions

Q2: In steady state, do Member States prefer Option A or Option B? Please address individually for each sector (CCPs, CSDs, TVs/PEMOs and CASPs) and indicate the factors that support the preferred model for that sector.

Q3: Where Member States consider Option B appropriate for a given sector, what sectoral supervisory arrangements should apply in co-operation with ESMA? Please address individually for each sector (CCPs, CSDs, TVs/PEMOs and CASPs)?

B.7 Governance and Safeguards

The following safeguards are intended to ensure that the co-operation framework remains proportionate, transparent and accountable, and that it does not create open-ended obligations for Member States.

- **Board of Supervisors:** Approves the general and sectoral co-operation frameworks described in Section B.4 and receives annual performance reports.

- **Accountability protection:** NCA co-operation does not make the NCA responsible for ESMA supervisory decisions or outcomes. NCAs are responsible for carrying out correctly the specific tasks that have been assigned to them in the relevant co-operation arrangements. ESMA remains responsible for validating and adopting the supervisory assessment on which its decisions are based.

- **Right to information and to raise concerns:** NCAs should receive timely information on supervisory actions concerning entities in their jurisdiction and be able to raise concerns about entities in their jurisdiction with ESMA. Information rights should be proportionate and focused on material developments rather than all supervisory actions.

- **Time limit for achieving steady-state independence:** Any extension requires Board of Supervisors approval and justification to the European Parliament, Council and Commission. The extension request should explain why the original milestones were not met, what additional support is required, and when the build-up phase will conclude.

- **Cost disputes:** Clear invoicing, reimbursement and dispute resolution mechanisms. The approved framework should define recoverable direct and indirect costs, the evidence required to support claims, timelines for payment, and escalation where ESMA and an NCA disagree. The methodology should be approved in advance by the Board of Supervisors.

- **Sectoral flexibility:** Duration, intensity and form of co-operation may differ by sector and entity category.

- **Co-operation relationship:** Co-operation does not give ESMA a general power of direction over NCAs outside agreed tasks and limits.

- **Separation from convergence:** Article 8a co-operation supports ESMA direct supervision only and is not a general supervisory convergence tool.

Question

Q4: Do Member States consider the proposed governance arrangements and safeguards to be sufficient to ensure appropriate accountability,

transparency, NCA involvement and protection of Member State interests?

Q5: If not, what additional governance arrangements or safeguards should be included?

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