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Presidency Discussion Paper
Market Integration and Supervision Package
Supervisory and Enforcement Powers – Chapter IIa

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Introduction: Horizontal Procedure and Enforcement Framework (Chapter IIa)

On 4 December 2025, the European Commission published the proposal on the Market Integration and Supervision Package ('**MISP**'). Among other elements, the package includes provisions seeking to strengthen the supervisory framework for EU capital markets and enhancing the role of the European Securities and Markets Authority ('**ESMA**'). These elements are set out in the Master Regulation Proposal under Article 1 by amending Regulation (EU) No 1095/2010 (ESMA Regulation, ('**ESMAR**')) and seek to address regulatory and supervisory fragmentation affecting the functioning of EU capital markets.

The Commission proposal introduces a number of changes to the EU supervisory framework with the stated objective of addressing fragmentation in the supervision of capital markets and responding to developments linked to increasing cross-border activities and emerging risks. In this context, the proposal envisages adjustments to the supervisory arrangements applicable to certain significant and cross-border entities in the areas of trading and post-trading, as well as to entities operating in new areas such as crypto-asset service providers. With regard to asset management, the proposal includes measures relating to the supervision of large asset management groups and investment funds, with a view to enhancing supervisory convergence and coordination at EU level. The initiative also proposes amendments aimed at strengthening the supervisory convergence framework of ESMA through the introduction of additional tools within its existing mandate. In particular, it introduces changes to ESMA's internal governance structure, including adjustments to the role and composition of the Executive Board and the allocation of decision-making responsibilities within the Authority.

The MISP was presented by the Commission at the Council Working Party ('**CWP**') kick-off meeting on 15 December 2025, together with references to the accompanying evaluation and IA. Given the extended scope of the MISP, a more detailed technical presentation addressing certain elements of the proposals took place on 15 January 2026. During the aforesaid presentation, MS had the opportunity to express their preliminary views and comments on the proposals. Following these exchanges, MS also had the opportunity to submit their written comments on the proposal to the Presidency ('**PCY**').

The above exchanges indicated that Member States ('**MS**') welcome the Commission's proposal aiming to deepen EU capital market integration, however the discussion revealed diverging views on the means to achieve this objective with the majority of MS broadly acknowledging the objective of strengthening supervisory convergence and addressing fragmentation in the supervision of EU capital markets.

Numerous MS expressed reservations regarding the proposed expansion of ESMA's direct supervisory powers over national competent authorities ('**NCAs**'). These MS generally indicated a preference for strengthening supervisory convergence through existing tools or enhanced coordination tools at ESMA level, rather than through a significant transfer of supervisory competences to ESMA.

Some other MS recognised that some targeted adjustments to ESMA's role could be considered, particularly where cross-border activities for systemic actors are concerned. In this context, some MS referred to the need to ensure that any strengthening of ESMA's role respects the principle of proportionality and preserves the involvement and expertise of NCAs.

Overall, the exchange indicated the need for further technical analysis and discussion regarding the proposed supervisory architecture and the balance between EU-level and national supervision.

Today's CWP provides an opportunity to engage in a constructive technical examination of the proposal and continue the exchange on the key issues raised. The PCY invites MS to provide comments during today's CWP and, to elaborate their positions in the subsequent written procedure in particular with regard to the following topics:

PUBLIC

1. Purpose and Scope of Chapter IIa

1.1. Purpose of Chapter IIa

The proposal introduces a new Chapter IIa in ESMAR, which sets out the procedural powers ESMA would exercise in areas where it is entrusted with direct supervisory responsibilities over certain entities depending on the final scope of the proposal (e.g. significant trading venues, post-trade infrastructures and CASPs). The proposed Chapter IIa aims to establish a cross-sectoral procedural framework by consolidating procedural powers that are currently set out across different sectoral Union acts, for example rules relating to information requests, investigations, on-site inspections, supervisory measures and the imposition of penalties. The proposal makes limited changes to those sectoral powers to adapt them to the horizontal context and use under ESMAR. These provisions are primarily modelled after the CRA Regulation, and in certain instances updated to include supervisory measures from more recent mandates, such as the EU Green Bonds Regulation.

It is the PCY's understanding that the consolidation of these provisions seeks to ensure a more uniform procedural framework applicable to ESMA when exercising direct supervisory responsibilities.

1.2. Scope of Chapter IIa

Relevant Article 39a

The proposal aims to transfer to the ESMAR powers that are currently set out in the sectoral legislation applicable to the entities on which ESMA had been given direct powers over time. This provision sets the perimeter of application of the proposed Chapter IIa, which covers all financial market participants under the Authority's supervision, namely:

- EMIR: CCPs and trade repositories (also SFTR trade repositories);
- MiFIR: some data reporting services providers;
- Credit Rating Agencies Regulation 1060/2009: credit rating agencies;
- Benchmark Regulation 2016/1011: critical benchmarks and third-country benchmarks that are recognised;
- Securitisation Regulation 2017/2402: securitisation repositories;
- Regulation on European Green Bonds (Regulation (EU) 2023/2631): external reviewers of European Green Bonds;

- Regulation on the transparency and integrity of Environmental, Social and Governance (ESG) rating activities (Regulation (EU) 2024/3005 "Regulation on ESG ratings providers");

As a result of the proposed consolidation in ESMAR, ESMA's procedural powers will no longer need to be set out comprehensively in each relevant sectoral act. This aims to justify why the Regulation includes also changes to the Regulations listed above which are not directly covered by the MISP.

The proposed provision also states that Chapter IIa does not apply to third country CCPs recognised by ESMA under *Article 25* of EMIR. The proposed *Article 39a* also aims to clarify the relationship between the horizontal procedural framework and sectoral Union acts granting supervisory powers to ESMA. The proposed Chapter provides that the procedural powers apply without prejudice to more specific provisions contained in sectoral Union legislation That will take precedence acting as lex specialis.

Questions to MS:

1. ***Do MS consider the approach to have a horizontal procedural toolbox in ESMAR to be useful? Please elaborate.***

2. ***To what extent should the exercise of ESMA powers under Chapter IIa be made conditional on, or aligned with, national procedural law?***

2. Specific Provisions in Detail

2.1. Main Procedural Powers

Relevant Articles: 39a to 39e, 39j, 39k, 39m of ESMAR

The proposed provisions are largely aligned in all the pieces of legislation concerned and have not been materially amended upon transfer to the ESMA regulation. These include:

- Requests for information (*39b*)
- Investigations (*39c*)
- On -site inspections (*39d*)
- Procedural rules for supervisory measures and fines(*39e*)
- Hearing of the persons concerned(*39j*)
- Review by the Court of Justice of the European Union(*39m*)

These provisions are already present in sector legislations granting ESMA direct supervisory powers and they provide for standard powers of a competent authority.

In the context of investigations and inspections, the proposed costs incurred by NCAs when carrying out tasks in support of ESMA's supervisory activities are reflected in the proposed supervisory fee framework. *Article 39n* aims to establish the principle that ESMA supervisory fees cover the costs of its supervisory activities, including the reimbursement of costs incurred by NCAs when performing tasks delegated or carried out on behalf of ESMA.

The proposed exercise of investigatory and inspection powers under Chapter IIa is framed by procedural safeguards. These safeguards include procedural rights (hearing, access to the file), the adoption of

formal decisions, the possibility of an internal appeal mechanism, a judicial review before the Court of Justice of the EU, and cooperation with national authorities where national law requires judicial authorisation or enforcement assistance.

On top of the safeguards provided for in the proposed Chapter IIa, the ESMAR also includes two additional tools:

A. **Appeal mechanism :**
Article 60 ESMAR sets out the current administrative appeal mechanism. Any natural or legal person, including competent authorities, may appeal against a decision of the Authority when it is addressed to them or it is of direct and individual concern to them. In that case, the Board of Appeal, a Board composed of 6 independent members, common to the three ESAs, will, within three months of referral, decide on admissible appeals, either by confirming the decision of the Authority or by sending the decision back to the Authority. In this case the Authority is bound by the decision of the Board of Appeal and has to adopt an amended decision. According to *Article 263* TFEU the Court of Justice has the jurisdiction to review the legality of the acts of Union bodies. The proposed *Article 39m* ESMAR specifies further that the Court of Justice has unlimited jurisdiction to review the imposition of fines and penalty payments.

B. **Liability of ESMA staff:**
In the exercise of their tasks, ESMA staff, including the investigating officer, are subject to requirements stemming from the ESMAR (for example confidentiality rules, *Article 70*) and general Union law (for example Staff Regulation, Charter of Fundamental Rights). Furthermore, ESMA is obliged to transfer matters of criminal prosecution to the relevant national authorities (*Article 39e(8)* and Protocol n°7 TEU). Any other prejudice caused by ESMA staff in the execution of their tasks can be brought before the Court of Justice for damages (cf *Articles 340* and *268* TFEU).

It is the PCY's understanding that these rules are already applicable today under the current direct supervisory mandates and are designed based on existing rules at EU level in the area of competition law, trade law and food safety, for example.

In the above listed provisions apart from some slight redrafting and few changes that do not alter the substance of the existing sectoral provisions, the main substantial change viewed by the PCY is that decisions in accordance with proposed Chapter IIa will be taken by the Executive Board and not by the Board of Supervisors ('**BoS**') as is the case now. In light of this, the investigating officer becomes responsible to the Executive Board and no longer to the BoS. The proposal transfers this responsibility to the Executive Board as part of the revised ESMA governance structure.

Preliminary Views of the MS:
MS broadly acknowledged the objective of strengthening ESMA's supervisory toolkit. However, a number of MS underlined the need to ensure clear limits, strong procedural safeguards and an appropriate balance between ESMA and NCAs.
A few MS were open to the proposed framework, subject to clarifications on legal scope, proportionality and operational feasibility. In this context, MS underlined the importance of assessing the interaction of these provisions with national legal frameworks and ensuring sufficient time for such assessment.

More broadly, MS noted that the introduction of Chapter IIa, in combination with the enhanced governance structure, would represent a significant evolution of the Union supervisory framework. While this may support greater consistency and coordination, attention was drawn to the need to ensure a clear delineation of responsibilities between ESMA and NCAs, avoid overlapping or parallel

supervisory actions, and preserve a balanced allocation of powers in line with the principle of subsidiarity. In particular, MS highlighted the importance of avoiding duplication, ensuring legal clarity and maintaining operational coherence, including in view of potential resource implications, especially for smaller markets.

In addition, some MS questioned whether the proposed provisions in Chapter IIa reflect a consolidation of existing powers under sectoral legislation or introduce new or extended powers. In this respect, it was suggested that any consolidation should be further clarified in order to identify any departures from the existing framework.

One MS proposed to delete new Chapter IIa until potential departures from existing legislative acts have been clearly documented. On article 39b, one MS underlined that deadlines for requesting information should be proportionate and allow for extensions where appropriate. Some MS requested clarification regarding the legal basis for penalties, the methodology for calculating fines, and the interaction with existing frameworks and noted that MS should be informed well in advance of the calculation method. In addition, one MS questioned whether ESMA and/or NCAs currently possess the proposed powers.

On Articles 39c and 39d, some MS expressed concerns regarding a possible transfer of core investigatory functions from NCAs to ESMA. One MS asked that the decision to initiative investigation should explicitly state the legal basis for the investigation and the subject matter and scope of the investigation. One MS asked that these powers should only be available only if permitted by national law and specifically in relation to telephone and data traffic records, asked that these should only be limited to cases where there is a reasonable suspicion of an infringement as in Art. 94 MiCAR. In this respect, some MS underlined the need to ensure the right to be heard, access to the file, subject to confidentiality constraints, that findings are based only on facts on which the persons concerned have had the opportunity to comment and a clear separation between investigation and decision-making functions. In addition, MS requested clarification on the extent of NCA's involvement in investigatory and inspection tasks and how it interlinks with national process law. Furthermore, one MS asked that the judicial review of supervisory measure and the cooperation with judicial authorities in the MS needs to be further assessed. Another MS asked to further reflect on the need for appropriate compensation arrangements for the costs incurred and the resources deployed by NCAs. More specifically in relation to art.39d, MS again raised the issue of national law, such as the references to police and enforcement authorities.

On Article 39e, MS emphasised that decisions should be based solely on adversarial findings and the rights of defence must be fully respected. Moreover, it was underlined the need to ensure a clear separation between the investigating officer and the decision-making body. Also, one MS noted that the text does not clarify the responsibility and accountability of the investigating officer during the investigation and asked for procedural safeguards on who bears liability if the investigating officer makes a mistake.

Clarification was requested on the scope of ESMA's powers to impose measures or sanctions, including references to other Union acts. One MS noted that the Commission has chosen a different structure compared to AMLA where joint investigation teams ensure that NCAs are also involved and asked clarifications in this regard.

On Article 39k(3), one MS noted that given the diversity of sanctioning and procedural regimes across MS, this should remain agnostic as to the type of national procedure applicable. A neutral formulation would better accommodate the different civil and administrative enforcement frameworks in place.

PUBLIC

Questions to MS:

3. ***Do MS agree with the main procedural powers granted to ESMA under Chapter IIa?***

4. ***What clarifications are needed regarding:***
   - ***the legal basis for penalties;***
   - ***the methodology for calculating fines and periodic penalty payments;***
   - ***the interaction with existing Union and national frameworks?***

5. ***Do MS consider that the procedural safeguards accompanying ESMA's investigative and on-site inspection powers under Articles 39c and 39d are sufficiently clear to ensure their effective and consistent application across MS? If not, are there any adjustments or clarifications MS may deem necessary?***

6. **Do MS consider that the decision to initiate an investigation is clearly defined in the text or do MS consider that further clarifications and/or adjustments are needed? For example ,do MS believe it is useful to clarify explicitly in the text that the decision to initiate investigative measures or inspections should state the legal basis for the measure in addition to its subject matter and purpose Please elaborate.**

7. ***Does the proposal provide sufficient clarity on the role and level of involvement of NCAs in ESMA-led investigations and inspections? If not, what adjustments or clarifications would MS consider appropriate?***

8. **Do MS believe the appeal mechanism according to Article 60 be a mandatory step before the review of decisions by the Court of Justice (comparable to the appeal mechanism for decisions by ACER[1])?**

9. ***Do MS consider that, regardless of its budgetary impact, a specific Board of Appeal should be established for ESMA, separate from EIOPA and EBA, to cater for ESMA's increased direct supervisory activity?***

2.2. Fines and Periodic Penalty Payments

Relevant Articles : Article 39f, 39g, 39k

Provisions on fines and periodic penalty payments are not fully harmonised across the different regulations concerned. In this respect, the proposal allows additional harmonisation and may result in changes for some of the supervised entities, especially as regards fines.

Fines: *Article 39f*

Article 39f sets out the framework for the level of fines that ESMA may impose where an infringement is established. In particular, paragraph 2 provides that the maximum amount of the fine may reach EUR 1 million or 10% of the total annual turnover of the legal person concerned, whichever is higher. The wording is inspired by a similar provision from MiFIR, however most sector legislative acts specify sector-specific penalties.

[1] Cf. Article 29 Regulation (EU) 2019/942 of the European Parliament and of the Council of 5 June 2019 establishing a European Union Agency for the Cooperation of Energy Regulators

The specific lists of infringements and associated coefficients also remain enshrined in each sectoral legislation.

Preliminary views of the MS:
One MS mentioned that the EUR 1 million cap on fines appears low especially when compared with national sanctioning frameworks. On the enforcement of fines and penalty payments, one MS pointed out that given the diversity of sanctioning and procedural regimes across the MS, the provision should remain agnostic as to the type of national procedure applicable.

Questions for MS:

10. ***Do MS agree with the general definition of the amount of administrative fines in Article 39f (2), i.e. up to EUR 1 million or 10% of the annual turnover of the investigated entity, taking into account that for most sectors legislation lays down sector-specific amounts (higher, for example for MiFIR and EMIR, or lower, for example EU Green Bonds Regulation)?***

2.3. Sanctions and Supervisory Measures

Relevant Articles: Articles 39h and 39i

The proposal introduces a number of additional supervisory and sanctioning powers within the horizontal framework established in Chapter IIa of the ESMA Regulation. In particular, Articles 39h and 39i expand the range of supervisory measures and sanctions that ESMA may adopt when exercising direct supervisory responsibilities under Union law. Certain elements of the proposed framework draw on powers already available to NCAs under existing legislation (i.e. MiFID) or granted to ESMA by recent sectoral legislation.

Article 39h sets out the supervisory measures that ESMA may adopt where it finds that an infringement has occurred several points of Article 39h mirror provisions contained the Regulation on ESG rating providers and the EU Green Bonds Regulation. At the same time, the proposal also introduces additional powers which have been present in one or few sectors and that would apply horizontally across ESMA's direct supervisory mandates.

In addition, Article 39h(3) provides that certain supervisory measures may be adopted where ESMA has reasonable grounds to suspect that a financial market participant may be engaging, or may be about to engage, in conduct that could lead to an infringement. This provision would allow ESMA to take preventive measures in situations where a breach has not yet been formally established but where there are indications that conduct which is potentially contrary to the applicable framework may occur.

The proposal further introduces, in Article 39i, a specific legal basis enabling ESMA to impose administrative sanctions and measures on natural persons responsible for infringements committed by entities under ESMA supervision. The provision extends the scope of potential addressees of administrative sanctions by allowing ESMA to take action not only against supervised legal persons but also against members of the management body, senior managers, key function holders or other natural persons exercising significant influence over the activities or risk profile of the supervised entity. Certain types of sanctions envisaged under this provision – including fines, bans from discharging managerial responsibilities, or public statements identifying the responsible person – are currently provided for in other Union acts, such as MiFID II or MAR. They are typically being exercised by NCAs. Under the new proposal, these powers would be exercised directly by ESMA in the context of its direct supervisory responsibilities.

Taken together, the provisions contained in Articles 39h and 39i would expand the range of supervisory and sanctioning tools available to ESMA compared to the current framework. While some of these powers reflect tools that have already been introduced in certain sectoral acts or are available to NCAs under existing legislation, their application in a horizontal framework across ESMA's direct supervisory mandates would represent a further development of the Authority's supervisory toolkit.

The provisions on withdrawal of registration, authorisation or recognition and on the elements to have regard to when using supervisory powers align with Article 35 of the Regulation on ESG ratings and Article 59 of the EU Green Bonds Regulation.

Preliminary Views of the MS:
One MS highlighted that supervisory this should be discussed in detail as it is important that ESMA's powers are proportionate and effective and asked how they relate to NCA's powers in sectoral legislation.

Questions to MS:

11. ***Do MS agree with the extension of some of the powers currently under MiFID, i.e. sanctions of natural persons, removal of a person from the management board, pre-emptive use of certain supervisory measures to ESMA's supervisory toolkit of Chapter IIa?***

12. ***Do MS have comments on the scope and conditions of application of the relevant Articles, in particular relating to:***
    - ***the category of natural persons concerned***
    - ***the conditions under which responsibility may be established, and***
    - ***the interaction with national regimes concerning administrative or criminal liability of natural persons?***

2.4. Settlement of Enforcement Proceedings

Relevant Article 39l

Article 39l on settlement is the only genuinely new power proposed to be granted to ESMA under the proposal. It is not included in any existing sectoral legislation conferring direct supervisory powers to ESMA or being included in the MISP package. In order to conclude enforcement proceedings, the provision would allow ESMA to settle with persons subject to investigations or enforcement proceedings in a timely and cost-effective manner. ESMA could negotiate with the investigated entity and reward cooperation by imposing lower fees and/or the absence of a formal recognition of the infringement. Importantly, ESMA may offer this opportunity but is not obligated to do so, and the entity has the choice to accept the settlement or pursue a standard enforcement procedure. The provision also provides a legal basis for a delegated act to further set out the details of the settlement procedure.

Based on the received information, this practice is already allowed in several EU MS, such as France, Germany, Italy, Cyprus and Spain. Aligning with objectives of simplification, this approach is expected to benefit both ESMA and those under investigation, promoting procedural efficiency and better resource use. From the perspective of the investigated entity, advantages include a faster resolution of the matter and reduced penalties, while avoiding formal admission of guilt and reputational damage. Although not formal, the entity typically commits to ceasing the questioned behaviour which is crucial to safeguard e.g. market integrity, investor protection etc. The fact that the acceptance of a settlement is voluntary, with the option to await a full investigation, corresponds to a procedural safeguard in this

PUBLIC

context. This flexibility and the potential for shorter proceedings may enhance fairness and efficiency within the regulatory framework.

Preliminary Views of MS:
One MS noted that his provision needs to be thoroughly analysed in accordance with their national law as they do not have an out-court settlement system. One MS mentioned that the investigative officer seems to be allocated a decision-making role which may not be appropriate to exercise alone as such decisions require broader institutional assessment including considerations of constituency, proportionality and precedent which go beyond the remit of an individual investigator.

Question to MS:

13. ***Do MS agree to grant ESMA the power to settle enforcement procedures with the aim of greater procedural efficiency?***
14. ***Do MS want to introduce additional safeguards (or limitations)? If yes, please elaborate.***

2.5. Role of National Authorities and National Courts

Relevant Articles 39b, 39c, 39d, 39e, 39k

Under Chapter IIa, national authorities and national courts become relevant in three main clusters:

1. **Informational and investigative measures**

Requests for information: *Article 39b:* When ESMA issues a request for information by decision (i.e. a binding act), it must transmit a copy "without delay" to the relevant NCA of the MS where the addressed person is established. This is an early "coordination hook" that can facilitate domestic follow-up and situational awareness.

Investigations *Article 39c* **& on-site inspections:** *Article 39d:* ESMA is required to inform NCAs well in advance of investigations or inspections, with NCAs assisting upon request and having the option to attend. Additionally, ESMA can mandate NCAs to carry out specific investigatory tasks on its behalf (*Article 39d(6)*).

Coercive steps requiring judicial authorisation under national law *Article 39c***:** Within MS, national judges serve as gatekeepers for coercive measures, reviewing authenticity rather than EU administrative legality. This mirrors the established EU model used by the Commission/ECB, where national authorities verify enforcement authenticity, and national courts address unlawful enforcement, leaving the assessment of the legality to the jurisdiction of European Courts.

2. **Criminal referrals**

Article 39e(8) provides that ESMA shall refer matters for criminal prosecution to national authorities where it finds serious indications of potential criminal offences and shall refrain from administrative fines or penalties where a prior final criminal judgment exists on identical or substantially same facts. This referral mechanism links EU administrative enforcement with national criminal enforcement, with the sequencing of administrative and criminal proceedings and the application of the *ne bis in idem* principle becoming relevant.

3. Enforcement of pecuniary sanctions

Article 39k(3) provides that decisions imposing fines or periodic penalty payments are enforceable according to the civil procedure rules of the MS where enforcement takes place. The "order for enforcement" is issued by ESMA and annexed to the decision imposing the pecuniary sanction. The national authority can verify its authenticity but cannot check the substance of the enforceable decision. Once this formality has been completed, enforcement of the decision takes place in accordance with the civil procedure rules of the MS where enforcement is carried out. Only the Court of Justice can suspend the enforcement. Complaints about the unlawful execution of the enforcement can be addressed to the national judicial system. This framework is modelled on Article 299 TFEU, utilising similar language for enforceable EU acts imposing pecuniary obligations, with national authority verification and enforcement carried out under national civil procedures.

Overall, these proposed mechanisms seek to ensure an integral role of national bodies in supporting ESMA's supervisory and enforcement functions. It should be noted that the safeguards and mechanisms involving national bodies in supporting ESMA's supervisory and enforcement functions are already present in sectoral legislation where ESMA is attributed direct supervision.

Preliminary Views of the MS:

One MS commented that since the transfer of supervisory responsibility to ESMA has far reaching implications for firms being subject to ESMA supervision in terms of ESMA exercising direct supervisory powers and imposing sanctions, the judicial review of supervisory measures and the cooperation with judicial authorities in the MS these measures need to be further assessed. Another MS mentions that given the diversity of sanctioning and procedural regimes across MS, the enforcement of pecuniary sanctions provision should remain agnostic as to the type of national procedure applicable. A neutral formulation would better accommodate the different civil and administrative enforcement frameworks in place, ensuring compatibility with national legal systems while preserving the effectiveness of Union level enforcement.

Questions to MS:

15. ***Do MS agree with the role of national authorities and the balance proposed in Chapter IIa or do MS consider that additional safeguards should be envisaged****?*

2.6. Supervisory Fees Framework

Relevant Article 39n

Article 39n introduces a horizontal legal basis governing supervisory fees charged by ESMA to entities subject to its direct supervision under Union law. It aims to consolidate and harmonise the main principles currently applicable to supervisory fees charged by ESMA as specified in the relevant sectoral legislation including the full-cost recovery principle, proportionality, reimbursement of costs incurred by NCAs and the possibility to derogate from the proportionality principle, for example for small entities. Under the supervisory fee framework, fees collected in respect of a given supervisory sector should cover the costs of the supervisory activities carried out in that sector. The Commission proposal also includes the specification that fees shall cover the reimbursement of any costs that the NCAs might incur when providing assistance of support to ESMA in its supervisory tasks.

The Commission also proposes that entities may be exempted from the obligation to pay a fee or may be subject to a reduced, fixed, capped, or temporary fee, as appropriate. This seems inspired from Article 66(2) of the Regulation on EU Green Bonds, which provides the possibility to exempt reviewers

under a certain threshold. The Commission proposes to expand the range of possibilities and to remove the notion of a threshold.

Compared to similar provisions in sectoral legislation the Commission introduces a possible innovation relating to the transparency on fees (proposed paragraphs 39n (6) and 39n(7)), ESMA will be required to provide each entity with the information explaining how the fee was calculated and to publish an annual fee transparency report.

This relates in particular to the methodology used to calculate supervisory fees, the information provided to fee-paying entities on the determination of those fees, and the publication of information on ESMA's supervisory fee framework, thereby increasing ESMA's accountability towards both fee-paying entities and the public.

Lastly, a mandate for a Commission delegated act on fees is introduced in ESMA regulation. The introduction of a legal basis in the ESMA Regulation would potentially allow the Commission to replace the currently nine delegated acts on fees with one consolidated delegated act on fees in order to streamline and simplify the fee system while keeping adjustments for sector specificities as set out in sectoral Union law. However, it should be noted that as long as the Commission does not adopt a delegated act based on this legal basis, the sectoral delegated acts on fees will remain in force. It is the PCY's understanding that this is also the reason why mandates in sectoral regulations are maintained, and are proposed to be added wherever new direct powers are proposed for ESMA. This is very likely to preserve the possibility for differentiated rules.

Preliminary Views of the MS:
Many MS provided their comments on this issue. MS mentioned that attention should be paid to ESMA's operational costs, with a view to ensuring that supervisory fees remain proportionate and competitive for market participants. One MS suggested a yearly review conducted by the Commission and benchmarked against international supervisory practices to help ensure cost efficiency, with appropriate safeguards (including expenditure caps where relevant) to limit the financial burden borne by market actors. One MS commented that this provision appears to combine broad discretionary powers, undefined derogations and a reliance on Level 2 regulation, all of which create undesirable uncertainty for supervised entities. As a matter of principle, fees should correspond to a concrete and individualised service, in line with the principles of transparency and the user pays approach that ought to govern administrative charges linked to a specific service or supervisory activity. An excessive degree of discretion, coupled with insufficient clarity regarding the methodology for calculating fees, risks transforming such fees into a quasitax. One MS questioned the rationale of Art. 39n paragraph 2 regarding charging administrative costs regarding "in particular supervisory convergence" and what is meant by supervisory convergence in case of ESMA's direct supervision tasks? One MS requested further clarification to avoid a dual cost burden for supervised entities in the case of ESMA requesting assistance or support in carrying out a supervisory task.

Some MS stated that supervisory fees should be proportionate to the financial capacities of the financial market participant. Some mentioned that using turnover as the sole determinant raises doubts as it fails to capture the risk profile of the entity, the complexity of its activities and the actual intensity of supervision required. MS commented on how proportionality could be applied such as introducing tiering and de minimis fees in order to support innovation, competition and fair treatment of smaller or new market participants. Other MS raised concerns about the absence of objective criteria for granting derogations for the exemption from the obligation to pay a fee since ESMA's supervisory activities give rise to costs that should be recovered through fees, in line with the full cost recovery principle. Instead, a flat fee could be applied to such entities. MS requested clarity on the terms under which exemptions may be granted by ESMA. One MS requested that the methodology, formula or weighting factors, multi-

annual projections or maximum thresholds be clearly set in the provision regarding the annual transparency report.
On the Commission delegated act, MS requested that before adopting any such delegated acts, the Commission should publish in advance the proposed arrangements for the calculation and allocation of fees, conduct open public consultations, and carry out a cost benefit analysis of the envisaged framework. Under this suggested way of proceeding, the Commission could make publicly available the results of both the consultation and the cost benefit analysis.

Questions to MS:

16. ***Do MS agree with the Commission's proposals concerning fees, in particular that turnover be its primary determinant? If not, what alternative or complementary metrics be considered to be better reflect supervisory intensity?***

17. ***Do MS agree with the possibility of exemption or of a reduced, fixed, capped, or temporary fees? Do MS believe that objective criteria are needed to better frame ESMA's discretion and deliver on proportionality, for instance through tiering and a de minimis threshold? Are additional safeguards necessary to prevent disproportionate burdens, including duplicative costs?***

18. ***Do MS agree with the enhanced transparency required from ESMA on the matter of fees? Should ESMA be mandated to include the topic in its annual transparency report?***

19. ***Do MS consider it necessary to set out transitional arrangements for the existing sectoral delegated acts on fees to maximise legal certainty, given the Commission's intention to consolidate them?***