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From:	Presidency
To:	Working Party on Financial Services and Banking Union (MISP) Financial Services Attachés
Subject:	Market Integration and Supervision Package - Presidency Discussion Paper on ESMA Intervention Powers and Changes in Existing Supervisory Convergence Tools - Working Party meeting on 31.03.2026

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Presidency Discussion Paper
Market Integration and Supervision Package
ESMA Intervention Powers and Changes in Existing Supervisory Convergence Tools

31 March 2026 10:00

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1. General Overview

The Commission proposal aims to introduce three main changes in Regulation (EU) No 1095/2010 ('**ESMAR**') regarding the intervention and convergence tools at the disposal of the European Securities and Markets Authority ('**ESMA**'):

- Amendments to existing powers (no action letters, mediation, breach of Union law, peer reviews)
- New intervention powers to recalibrate ESMA's role
- New decision-making process: The new Executive Board takes supervisory convergence decisions on individual National Competent Authorities ('**NCAs**') (e.g. mediation, breach of Union law, new powers), which are adopted unless the Board of Supervisors ('**BoS**') objects within a period to be defined in the rules of procedures, which shall not exceed 10 working days and in case of emergency 48 hours (Article 44b2).

2. Purpose and Scope of New ESMA intervention Powers and Collaboration Platforms

The new proposed Articles 17aa, 17aaa and 19a, aim to recalibrate ESMA's role by introducing additional intervention and convergence tools for ESMA.

Under the current framework, ESMA's main direct intervention tools are:

i. the Breach of Union law procedure under Article 17, which is designed to address situations where an NCA fails to comply with Union law; and

ii. the settlement of disagreement between competent authorities in cross-border situations under Article 19, which, inter alia, provides a superseding decision-making power to ESMA.

The convergence tools currently available to ESMA under the ESMAR, include Guidelines and Recommendations[1] (Article 16), Opinions (Article 16a), Questions and Answers (Article 16b)[2] and ad-hoc Peer Reviews. Other practical instruments[3] may be also introduced by ESMA to promote common supervisory approaches and practices pursuant to Article 29(2).

The new provisions introduce additional intervention and supervisory convergence tools as follows:

[1] Including Recommendations individually addressed to specific NCAs.
[2] The amendments proposed include the deletion of this tool.
[3] Such as, Public Statements, Supervisory Briefings and the discussion of supervisory cases relating to individual financial market participants (see paragraph 16 of the Terms of Reference of Digital Finance Standing Committee here and paragraphs 8 and 16 of the Terms of Reference of the Investor Protection Standing Committee here).

- *Article 17aa*, aims to introduce a pre-approval oversight mechanism and, if deemed necessary, binding corrective measures in case of supervisory failures in approving financial products, services, activities, or entities.
- *Article 17aaa*, aims to provide an enforcement tool to suspend cross-border services of entities, where ESMA has reasonable grounds to consider that they are committing serious infringements and where national supervisory action is considered to be insufficient.
- *Article 19a*, aims to allow ESMA to set up collaboration platforms where cross-border risks or in case it has reasonable grounds to suspect an issue of compliance with Union law, or the existence of diverging or deficient supervisory practices supervisory divergences arise.

2.1. Failure in Supervision on Approval of Financial Products, Services or Entities

Relevant Article 17aa

The proposed Article 17aa aims to create a graduated supervisory escalation tool involving three steps: first dialogue, second pre-approval oversight and third binding intervention.

This new tool could be used when the following conditions are met:

- a peer review or an Article 22(4) inquiry finds that an NCA may be failing to effectively supervise market participants in the area subject to the peer review or inquiry, and
- the supervisory failure could jeopardise the integrity of financial markets, financial stability or investor protection.

The new proposed mechanism includes the following key elements:

- Pre-approval oversight: ESMA may require the NCA to seek ESMA's opinion before approving new financial products, services, or entities.
- Corrective actions: ESMA may propose (and later impose via decision) corrective actions, including in relation to existing products, services, activities or entities that have been affected by the shortcomings.
- Binding intervention: if corrective actions are not implemented or ESMA's opinion is not followed, ESMA may adopt a binding decision requiring the NCA to revoke or amend an approval decision, or to use its powers under the relevant Union law.
- Cross border effect: ESMA must notify relevant host NCAs; the ESMA decision enables host NCAs to suspend provision of the affected products, services, activities in their territories.

The proposed process is as follows:

- Step 1: ESMA engages first with the NCA to correct shortcoming and seeks a mutually agreed solution.
- Step 2: ESMA may require the NCA to seek its opinion before granting approvals, with a comprehensive reasoning for its decision. The decision can include corrective measures in relation to existing supervisory shortcomings.
- Step 3: following ESMA's decision that the NCA needs to seek its opinion before granting approvals, the following workflow applies:
    - The NCA submits a detailed approval proposal + justification + supporting documents.

- ESMA issues an opinion within 15 working days (including reasons for any objections or concerns).
- If ESMA misses the deadline, the NCA may proceed without the opinion.
- The NCA must respond within 15 working days explaining the steps it has taken or intends to take to implement ESMA opinion.

- Step 4: binding decision if non-compliance by NCA. ESMA may adopt a binding decision pursuant to Article 17aa (4) where corrective actions addressing supervisory shortcomings are not implemented or where the NCA does not implement ESMA's opinion. The decision is binding on the NCA concerned and may require to revoke or amend a decision it has adopted or make use of its powers under Union law. Host NCAs may then take appropriate measures to suspend the provision of such products, services or activities in their territory.

2.1.1. Examples for potential Use Cases for Article 17aa

Example 1

According to Article 110b of Directive 2009/65/EC ('**UCITSD**'), and Article 47a of Directive 2011/61/EU ('**AIFMD**'), as set out in the Commission's proposal, ESMA would conduct annual reviews of large groups. These reviews would assess the supervisory approaches of NCAs in relation to organisational structure and governance, the allocation of resources, including key managerial functions, and its risk management systems. For this purpose, ESMA would consolidate relevant supervisory data and the groups' programmes of activities at EU group level.

By analysing this information, and comparing NCAs approaches, ESMA may identify situations where the supervisory practice of one NCAs depart from other NCAs, where, for example, the relevant persons involved in the compliance function, referred to in Article 10 of Commission Directive 2010/43/EU, within a large UCITS management company are also involved in the performance of services or activities they monitor (e.g. in the management of UCITS).

Article 10(3) prevents, inter alia, management companies from allowing persons involved in the compliance function to participate in the performance of services or activities they monitor, except where the management company can demonstrate that, given the nature, scale, and complexity of its business and the range of its services and activities, such requirements would be disproportionate and the compliance function remains effective (see Article 10(3)(c) in conjunction with the last subparagraph thereof).

The compliance function plays a key and independent role in identifying, preventing, and monitoring breaches of regulatory requirements. Where that function is not effectively and proportionately structured, its ability to detect and address compliance issues in a timely and robust manner may be compromised, thereby weakening the overall system of investor safeguards.

In such circumstances, ESMA may initiate an inquiry pursuant to Article 22(4) ESMAR or a fast track peer review to assess whether the supervisory practice of that NCA and in particular the fact that the management company must be able to demonstrate, having regard to the nature, scale and complexity of its business and to the nature and range of its services and activities, that the requirement for functional separation of

PUBLIC

the compliance function is not proportionate and that the compliance function remains effective (Article 10(3), last subparagraph of Commission Directive 2010/43/EU).

If the conclusion of this inquiry is that such arrangements were not in ESMA's view compliant with the conditions laid down in Article 10(3) of Commission Directive 2010/43/EU, ESMA shall engage with the NCA with a view to ensuring that the situation is remedied. Where the NCA fails to take corrective action deemed appropriate by ESMA, ESMA may activate the procedure under Article 17aa of ESMAR.

Example 2

An NCA observes the provision of services in complex financial instruments in the Union by investment firms based in other MS. The NCA requests ESMA pursuant to Article 22(4) of ESMAR to conduct an inquiry into these products to assess potential threats to the protection of customers or investors.

ESMA decides to initiate an inquiry pursuant to Article 22(4) ESMAR to assess whether the provision of investment services in these financial instruments is in the best interest of the clients.

Investment firms are obliged pursuant to Article 24(1) of MiFID II to act in accordance with the best interest of their clients when providing investment services. The best interest of the client has been interpreted by ESMA[4] as an overarching obligation governing their operation, including to ensure that financial instruments and structured deposits are only manufactured and/or distributed when this is in the best interest of clients.

If the conclusion of this inquiry is that the manufacturing and/or distribution of these financial instruments is not, in ESMA's view, in the best interest of the clients, ESMA shall engage with the NCA with a view to ensuring that the situation is remedied. Where the NCA fails to take corrective action deemed appropriate by ESMA, ESMA may activate the procedure under Article 17aa of ESMAR.

Preliminary Views of the Member States ('MS'):

Some MS were supportive of strengthening ESMA's supervisory convergence tools, while several were critical either in part or fundamentally. Among those supportive, one MS suggested that similar convergence tools should be introduced in the insurance sector under EIOPA.

Several MS questioned the threshold for initiating this article, stressing that ESMA intervention should remain exceptional, proportionate and strictly circumscribed. In this regard, a number of MS referred to the need to respect subsidiarity and proportionality, with some highlighting risks related to Union relevance. Arguments were also raised that intervention should be limited to matters of significant importance and based on clearly established supervisory failures, rather than on suspicion or speculative grounds.

[4] ESMA, *Final Report: Guidelines on MiFID II Product Governance Requirements* (2023), pp. 1, 5, 7, 62, 67, 76 (available here) ESMA, *Public Statement On identifying derivatives within the scope of the national product intervention measures on CFDs*, p. 2 (available here)

PUBLIC

Concerns were also raised regarding the complexity, clarity and workability of the proposed procedure. Some MS described the mechanism as cumbersome, redundant or overly complex and warned that it could jeopardise the timely approval of financial products, services or entities. Several MS raised concerns regarding timelines, including the feasibility of the proposed deadlines, the need for further clarification, and the calculation of working days in view of differing public holidays across MS.

A number of MS also called for stronger safeguards and clearer procedural guarantees. They highlighted the absence of mechanisms allowing NCAs to demonstrate corrective actions, requested clarification on how ESMA decisions would be terminated, stressed that convergence tools must be objective, well-justified and based on thorough assessments, and called for a clear framework for effective challenge and appeal of ESMA decisions.

Concerns were also raised regarding legal responsibility and liability where ESMA interprets or enforces national law, particularly in cases of divergent interpretations between ESMA and NCAs. MS also pointed to potential risks arising from ESMA interpreting national law and/or imposing binding oversight on NCAs without explicit limitations. More specifically, concerns were raised regarding compatibility with EU law and the case-law of the Court of Justice of the European Union (including the Meroni and Romano Doctrines), as well as possible overlap with existing Treaty remedies and the conferral of quasi-judicial powers on ESMA, highlighting risks to the separation of powers and institutional balance.

Overall, while a number of MS supported strengthening ESMA's convergence tools, a significant group called for strict limitation of the mechanism, stronger procedural safeguards, and clearer respect for subsidiarity and proportionality. Legal liability concerns were also raised.

Questions to the MS:

1. ***Do MS believe Article 17aa should be retained without amendments, retained with adjustments, or deleted?***
   Irrespective of your preference, please answer the following questions in case that the article is maintained with adjustments:
2. ***Do MS consider that the thresholds and criteria for ESMA intervention need to be enhanced? If so which conditions, criteria, or evidentiary requirements should be considered to clarify when the tool can be applied?***
3. ***Do MS consider that the current drafting provides sufficient legal certainty regarding the respective roles of ESMA and NCAs?***
4. ***Are additional safeguards needed to clarify responsibilities and address potential risks of divergent interpretations or legal liability? If so, how divergent interpretations should be treated and how legal liability should be allocated?***
5. ***Do MS consider the procedure sufficiently clear and operationally feasible?***
6. ***Should timelines, calculation of working days, or procedural steps be clarified, further elaborated or amended?***
7. ***On the proposed review mechanisms and appeal rights, should additional procedural safeguards and checks and balances be introduced?***

PUBLIC

8. ***Do MS consider the extension of scope of Article 60[5] per the Commission proposal to be sufficient or should independent review mechanisms and independent extrajudicial avenues to appeal or contest ESMA decisions should be prescribed? If so, would the MS consider it appropriate to:***
    a. ***extend the scope of Article 60a[6] (Exceeding of competence by the Authority) of ESMAR to cover any action undertaken by ESMA; or***
    b. ***should a bespoke Article be introduced?***

8a. In case of preference towards option a, do MS consider the content of Article 60a sufficient or specific procedures and criteria for a review by the Commission should be introduced and if so which procedures and criteria?

8b. In case of preference towards option b, which should:

i. ***the review body be,***
ii. ***the scope of this Article (i.e. should it be confined only to actions under Article 17aa or should it include any ESMA superseding power and who may initiate it – NCAs or any affected entity), and***
iii. ***which procedures and criteria should be prescribed?***

2.2. Suspension of rights to provide services on a cross-border basis

Relevant Article 17aaa

Article 17aaa aims to establish a binding power to suspend the rights to provide services on a cross-border basis where there are reasonable suspicions that a serious infringement has been committed aiming to enable rapid action.

This proposed new tool can be used when the following conditions are met:

- ESMA has reasonable grounds to conclude that an entity authorised under Union law has committed a serious infringement of Union law (or national provision adopted pursuant to a Union act referred to in Article 1(2)).
- The infringement could in ESMA's view jeopardize the integrity of financial markets, financial stability or investor protection.
- The entity provides services or activities on a cross-border basis.

The new proposed mechanism includes the following key elements:

- Binding intervention. If the situation is not to ESMA's satisfaction adequately remedied by the home NCA, and ESMA has reasonable grounds to consider that the serious infringement persists, ESMA may require the home NCA to order suspension of cross-border services. If the home NCA fails to comply ESMA may directly require the entity to suspend cross-border services.

[5] The scope of Article 60 per the Commission proposal is extended to cover any decision taken by ESMA in accordance with ESMAR (previously was limited to certain Articles under ESMAR).
[6] The scope of Article 60a is currently confined solely to Guidelines and Recommendations under Article 16 and Questions and Answers under Article 16b (Article 16b is envisaged to be deleted under the Commission's proposal), with other tools utilised by ESMA not being subject to a Commission review.

PUBLIC

- Information requests: ESMA may address a duly justified and reasoned request for information to market participants, NCAs of other relevant persons.
- Union-wide effect: ESMA's informs all relevant host NCAs, which must ensure the suspension is applied in their territories.

The proposed process is as follows:

- Step 1: ESMA identifies a situation which has reasonable grounds to consider that constitutes a serious cross-border infringement and refers findings to the home NCA. The home NCA must respond within the timeline set by ESMA.
- Step 2: If ESMA still has reasonable grounds for considering that the infringement persists, within 10 working days after receiving the requested information, it adopts a decision requiring the home NCA to order suspension of cross-border services.
- Step 3: direct ESMA intervention if home NCA does not comply. If home NCA fails to act within 2 working days, ESMA adopts, within 5 working days, a decision directly requiring the supervised entity to suspend the relevant cross-border services. ESMA informs all relevant NCAs and host NCAs must enforce the suspension in their territories.
- Step 4: corrective measures and the lifting of suspension. The supervised entity must submit evidence that it has adopted corrective measures. Within 15 working days, ESMA in consultation with the home NCA, assesses their effectiveness. If deemed to be sufficient by ESMA, ESMA revokes its suspension decision, and the entity may resume cross-border services.

2.2.1. Potential Use Case for Article 17aaa

Example for Art. 17aaa

In Examples 1 and 2 described above, instead of initiating the procedure under Article 17aa, ESMA may, in cases involving cross-border operations, act on the basis of Article 17aaa. This applies where ESMA reasonably suspects that there are infringements committed by the entities concerned, which are serious and may jeopardise investor protection. In such cases, ESMA refers its findings to the home NCA and sets a specific deadline for a response. If the response provided by the home NCA is not considered satisfactory, ESMA may adopt a decision requiring the home NCA to order the suspension of the relevant cross-border services. In the event of non-compliance, ESMA may subsequently adopt a decision addressed directly to the supervised entity, requiring it to suspend those cross-border services.

ESMA shall inform all relevant NCAs, and host NCAs are required to enforce the suspension within their respective territories. Affected entities must immediately terminate contractual relationships with clients located outside their home MS and unwind their positions in accordance with the applicable terms and conditions.

Preliminary Views of the MS:

MS generally expressed diverging views on the proposed suspension mechanism of cross-border activity under Article 17aaa. While some MS were supportive of the amendment, with one suggesting that similar convergence tools could be introduced in the insurance sector under EIOPA, several others

PUBLIC

expressed serious concerns either in part or fundamentally, with one MS calling for the deletion of this Article.

A number of MS emphasized that ESMA's actions should be clearly justified, strictly necessary, and proportionate. Several highlighted that intervention should be based on objective triggers, robust factual and legal grounds, and only in cases genuinely requiring Union-wide action. Concerns were also raised regarding the complexity and feasibility of the procedure, including the ambitious deadlines and the potential difficulty of implementing the mechanism within the proposed timeframe. Clarification was requested on the calculation of working days and the applicable legal framework across MS with differing public holidays.

Several MS highlighted potential risks to the clarity of supervisory responsibilities. Questions were raised about the competence division between ESMA and NCAs, the instances in which suspension would be enforced, and the availability of review and appeal mechanisms.

Legal concerns were raised regarding the extent of ESMA's powers to unilaterally suspend cross-border activities, particularly where it does not exercise direct supervision. Some MS stressed that granting such powers on broad or vague grounds risks undermining the free movement of services, introducing arbitrary barriers, reinforcing market fragmentation, and reducing legal certainty. References were made to consistency with EU Treaties and Court of Justice case law, emphasizing that restrictions on the freedom to provide services must remain exceptional and proportionate. Some also raised concerns about double jeopardy and compatibility with national law.

Overall, while certain MS welcomed the introduction of a Union-wide tool, a significant number called for strict limitations on the mechanism, robust procedural safeguard (including checks and balances such as a review and appeal mechanism), clear justification of ESMA's actions, clarification of competences between ESMA and NCAs, and protection of fundamental principles such as proportionality, legal certainty, and subsidiarity.

Questions to the MS:

9. ***Do MS believe Article 17aaa should be retained without amendments, retained with adjustments, or deleted?***
   Irrespective of your preference, please answer the following questions in case that the article in maintained with adjustments:
10. ***Do MS consider that the thresholds and criteria for ESMA intervention need to be enhanced? If so which conditions, criteria, or evidentiary requirements should be considered to clarify when the tool can be applied?***
11. ***Is further clarification needed regarding the respective roles of ESMA and NCAs and if so in which parts?***
12. ***Do MS consider the procedure sufficiently clear and operationally feasible?***
13. ***Should timelines, calculation of working days, or procedural steps be clarified, further elaborated or amended?***
14. ***Should additional procedural safeguards and checks and balances be introduced?***
15. ***Do MS consider the extension of scope of Article 60 per the Commission proposal to be sufficient or should independent review mechanisms and independent extrajudicial avenues to appeal or contest ESMA decisions should be prescribed? If so, would the MS consider it appropriate to:***

PUBLIC

a. ***extend the scope of Article 60a (Exceeding of competence by the Authority) of ESMAR to cover any action undertaken by ESMA; or***
b. ***should a bespoke Article be introduced?***

15a. In case of preference towards option a, do MS consider the content of Article 60a sufficient or specific procedures and criteria for a review by the Commission should be introduced and if so which procedures and criteria?

15b. In case of preference towards option b, which should: a. the review body be, b. the scope of this Article (i.e. should it be confined only to actions under Article 17aaa or should it include any ESMA superseding power and who may initiate it – NCAs or any affected entity), and which procedures and criteria should be prescribed?

2.3. Collaboration platforms

Relevant Article 19a

It is the Presidency's understanding that the proposal seeks to establish a mechanism for prevention, early intervention, and information exchange, through which ESMA could coordinate and mandate actions by NCAs. ESMA can set up a collaboration platform on its own initiative or at the request of one or more relevant NCAs when in the case of justified concerns about negative effects on investors, financial stability or in the case it has reasonable grounds to suspect an issue of compliance with Union law, or the existence of diverging or deficient supervisory practices related to the freedom to provide services, to pursue the activities of financial market participants or the freedom of establishment.

ESMA proposed powers:

- Collaboration platforms: ESMA may establish and coordinate a collaboration platform bringing together NCAs deemed by ESMA as relevant.
- Information exchange facilitation: at the request of ESMA or of another NCA, NCAs deemed as relevant must provide all relevant information in a timely manner.
- On-site inspection: in case of disagreement or inaction within the platform and serious concerns, ESMA may call on the home NCA to carry out an on-site inspection. The home NCA shall launch the on-site inspection without delay and shall invite the Authority and other NCAs deemed by ESMA as relevant to participate in it.
- Dispute resolution power: in case of disagreement about the content of an action, inaction or information sharing between two or more NCAs deemed as relevant, ESMA may exercise its biding mediation power.

2.3.1. Example for Article 19a

A host NCA receives a notification that a UCITS authorised in another MS (home MS) is being marketed within its jurisdiction. Based on its supervisory approach, the NCA considers that a certain type of Transferable Securities,namely Exchange Traded Products ('**ETPs**') linked to crypto-assets,are not eligible for investment by UCITS. However, the UCITS is invested in such ETPs. Upon reviewing the UCITS' documentation, the NCA identifies that the UCITS can invest up

to 10% in these instruments . This may raise concerns regarding supervisory convergence, given that UCITS constitute a fully harmonised EU framework intended to ensure consistent application across MS. The host NCA brings this matter to ESMA's attention and requests the establishment of a collaboration platform. ESMA subsequently invites the home NCA of the UCITS to present its supervisory approach at the relevant standing committee, with a view to fostering convergence and clarifying the treatment of such instruments.

In the context of the presentation the home NCA presents its approach, including its reading on UCITSD. The discussions confirm that there are divergent views between these two NCAs regarding the applicable regulatory framework. ESMA sets up a collaboration platform concerning the specific Management Company on the basis of the existence of diverging supervisory practices, in relation to the freedom to provide services and determines the relevant NCAs to be participating. In this case ESMA could also use its binding mediation powers under Article 19(1) to help resolve disputes and ensure appropriate supervisory follow-up.

Preliminary Views of the MS:

MS expressed mixed views on the proposed creation of collaboration platforms under Article 19a. While some saw potential benefits in enhancing supervisory convergence, a number of concerns were raised regarding the scope, authority, and procedural aspects of the mechanism.

Several MS emphasised the importance of preserving the non-hierarchical and collegial nature of relations between competent authorities. It was argued that the platform should serve as a tool for convergence and mutual understanding, rather than as a channel for systematically overriding national supervisory judgments. Related concerns included the potential limitation of NCAs' access to information and the need for transparent procedures and objective assessments.

Questions were raised about the mandate and discretion of ESMA within the platform. Some MS requested that ESMA's role be confined to suggesting on-site inspections, leaving the decision to act with the home NCA and preserving the discretion to invite other authorities. The legitimacy of ESMA acting on its own initiative without a request from NCAs was questioned, and some stressed that decisions by ESMA or other ESAs must not conflict with national law that NCAs are required to apply.

Several MS highlighted the need for clearly defined objectives and timelines for the platform, ensuring that it has a concrete goal and schedule for achieving it. Concerns were also raised regarding the impact of collaboration platforms on financial stability and the particularities of MS that maintain fiscal responsibility.

Views diverged on the scope and application of the tool. While some suggested extending the platform to cover normal supervisory circumstances upon request by the majority of NCAs and ensuring resource provision, others requested limiting ESMA's powers to support and coordination functions rather than direct intervention, particularly concerning on-site inspections.

Overall, while there was no fundamental disagreement, a significant number of MS called for strict limitations on ESMA's powers, preservation of NCA discretion, transparent procedures, clearly defined goals, and safeguards to respect national competences and legal frameworks.

PUBLIC

Questions to the MS:

16. *Do MS consider that the scope and objectives of collaboration platforms are sufficiently defined?*
17. *Should ESMA be able to set-up a collaboration platform on its own initiative?*
18. *How do MS read the scope of Article 19a(1), in particular the reference to "the freedom to provide services... or the freedom of establishment"?*
    a. *Does this reference apply only to "diverging or deficient supervisory practices," or*
    b. *Does it apply to all triggers set out in the provision?*

    18a. Regardless of the response to the previous question do MS consider that collaboration platforms to ensure supervisory convergence should be:

    a. *established only where the issue at hand relates to the freedom to provide services, to pursue the activities of financial market participants, or the freedom of establishment; or*
    b. *possible irrespective of this qualification, in order to ensure convergence in all cases, not only where the issue concerns the freedoms referred to above?*

    18b. Do MS consider that the current drafting is sufficiently clear, or should it be clarified? If so please indicate how this could be achieved.

19. *Should the role of ESMA be confined to coordination and facilitation, or should it include powers to request actions to be taken by home NCAs (such as on-site inspections)?*
20. *Do MS consider the procedures for establishing and operating the platform sufficiently transparent and operationally clear?*
21. *Should additional procedural rules be introduced and if so should the following be addressed and how:*
    a. *Which NCAs must participate;*
    b. *How decisions or proposals are communicated;*
    c. *How disagreements within the platform are addressed.*
22. *Do MS consider the requirements for information exchange sufficient and proportionate?*
23. *Should the article include provisions to clarify the following and if so how:*
    a. *Access to information by NCAs other than the home NCA,*
    b. *Responsibilities to provide timely information, and*
    c. *Allocation of resources to support platform activities?*
24. *Do MS consider that safeguards are sufficient to maintain legal certainty?*
25. *Should mechanisms be introduced to clarify ESMA's mandate in case of disagreements or conflicting legal obligations and if so which those mechanisms should be?*

PUBLIC

3. Targeted Amendments to Existing Powers

3.1. Breach of Union Law

Relevant Article 17

The following changes are proposed to Article 17:

- A more binding trigger for ESMA's intervention. The proposed amendment introduces a morebinding trigger so that where there are reasonable grounds for ESMA to believe that a breach or non-application of Union law has occurred and the competent authority has not taken adequate measures, ESMA is expected to investigate (paragraph 2).
- Extension of the deadline for issuing a recommendation from 2 to 4 months after initiating and investigation. Making the issuance of such recommendation mandatory where the investigation concludes that the competent authority is not complying with Union law. ESMA is required to share promptly its recommendation with the Commission (paragraph 3).
- Obligation for ESMA to adopt an individual decision when the conditions are met by introducing a "shall" provision (paragraph 6);
- The introduction of the phrase "including requirements in national law transposing directives interpreted in a manner consistent with them" clarifies that ESMA decisions should consider not only Union law but also national law that implement directives, and requires that the national transposing law is interpreted consistently with the relevant directives (paragraph 6).
- The new text mandates the provision of necessary information and documents by competent authorities and ESMA to the Commission upon its request, formalising the duty to cooperate with the Commission so that it can carry out its responsibilities effectively (new paragraph 9).

In addition to these proposed changes, the independent panel provided for in Article 41 (which is deleted under the Commission's proposal) to propose decisions under Article 17 has been removed (new Article 46a.5).

Preliminary Views of the MS:

Some MS were supportive of the amendments, while others were critical either partially or entirely. One MS suggested amending the proposed timelines in order to allow more flexible timelines for both ESMA and NCAs when a breach of Union law is initiated. Another MS called for the deletion of the amendments in their entirety. Among those supporting the amendments, one MS suggested expanding the scope of the Breach of Union Law mechanism to also cover non-compliance with ESMA guidelines and recommendations. It was argued that L1 and L2 legislation is often principle-based and further specified through ESMA's tools. Among those critical of the proposal, the call for deletion was based on concerns that the proposed amendments would disproportionately expand ESMA's investigatory prerogatives beyond what the Commission's impact assessment identifies as necessary to address fragmentation in the Single Market. Furthermore, some MS raised legal concerns regarding the

application by an EU institution of national laws, invoking legal considerations (Treaty compatibility and case law considerations) and implication clarifications.

Questions to the MS:

26. ***Do MS believe the amendments to Article 17 should be retained without amendments, retained with adjustments, or deleted?***
    Irrespective of your preference, please answer the following questions if the article is maintained with adjustments:
27. ***Do MS consider that the proposed scope of ESMA's powers under the Breach of Union Law mechanism is appropriate?***
28. ***Do MS consider that the timelines proposed for ESMA and NCAs to act are feasible and operationally workable?***
29. ***Do MS consider that the current drafting provides sufficient legal certainty, including when ESMA will be applying national law?***
30. ***Are additional safeguards needed and if so which safeguards do MS propose?***

3.2. Settlement of Disagreements

Relevant Article 19

Proposed changes to Article 19:

- ESMA's power to conduct mediation is proposed to be made a general power, applicable in all cases where competent authorities disagree, rather than being limited to specific situations prescribed by sectoral legislation. The language changes from "in cases specified in" to "in relation to" the legislative acts referred to in Article 1(2) (paragraph 1).
- ESMA's power to initiate mediation on its own initiative is proposed to be broadened. Instead of requiring an explicit legislative authorization in sector legislation, ESMA can now initiate mediation whenever it determines that there is a disagreement between competent authorities based on objective reasons (paragraph 1.b).
- Proposed mandatory decision after conciliation: ESMA is now required to take a decision if the competent authorities fail to reach an agreement within the conciliation phase, rather than having the option to do so. The language changes from "may take a decision" to "shall take a decision" (paragraph 3).
- Proposed clarification that when taking direct action against market participants if the NCA does not comply with ESMA's binding decision, ESMA must apply Union law, including national laws that implement EU Directives, interpreted in a consistent manner (paragraph 4).

In addition to these proposed changes, the independent panel provided for in Article 41 (which is deleted under the Commission's proposal) to propose decisions under Article 19 has been removed (new Article 46a.5).

Preliminary Views of the MS:

Concerns were raised in relation to the threshold for ESMA to initiate a settlement of disagreement on its own initiative, arguing that ESMA should be able to justify as to why they identify, on their own initiative, that a disagreement between NCAs exists. There were also legal and practical concerns about

allowing ESMA to interpret national laws, without limitation, while not being embedded in the national judicial and administrative environment, with some calling for the deletion of the references to ESMA interpreting national laws.

Questions to the MS:

31. ***Do MS consider that the threshold for ESMA to initiate a settlement of disagreement on its own initiative, should be enhanced? If so should ESMA be explicitly required to provide a reasoned justification demonstrating the existence of a disagreement between NCAs before acting?***
32. ***Do MS see any risks in ESMA interpreting national laws in the context of dispute settlement? If so, what amendments would MS propose to remedy these risks?***

3.3. Peer reviews

Relevant Article 30

It is the PCYs understanding that the proposed amendments to this article do not fundamentally change the peer review mechanism, but the Commission provisions aim to align peer reviews with the new proposed governance framework.

In line with the proposed Executive Board's role in supervisory matters (new Article 46a(5)), the proposed amendments mainly strengthen the management of ESMA's peer review framework by reinforcing the role of the Executive Board, by delegating convergence-related decisions away from the BoS, such as in relation to the approval of the peer committee members, adoption of peer review reports and follow up reports, consistency oversight during drafting and the adoption of the peer review work plan are moved to the Executive Board.

Preliminary Views of the MS:

MS in their written comments, expressed concerns regarding the shift of responsibilities from the BoS to the Executive Board in the peer review framework. In particular, MS questioned the proposal for the Executive Board to approve the composition of peer review committees, adopt peer review and follow-up reports, and adopt the two-year peer review work plan. They emphasised that peer reviews are a supervisory convergence tool based on mutual assessment among NCAs and therefore should remain primarily under the remit of the BoS, in line with the principle that the BoS is ESMA's main body for supervisory convergence. Concerns were also raised that the proposed changes could alter the nature of peer reviews by placing ESMA in a stronger position over NCAs and by reducing the role of national supervisors in the process.

Questions to the MS:

33. ***Do MS agree with the Commission proposal? Please elaborate.***
34. ***Do MS consider that the Executive Board should play a stronger operational role in the peer review process, or should the BoS retain decision making responsibility for approving the composition of peer review committees and adopting peer review and follow-up reports, as well as the work-pan?***

3.4. **No Action Letters**

Relevant Article 9a

It is the PCYs understanding that the proposal seeks to broaden the scope of ESMA's power to issue no action letters to cater for specific circumstances where the application of a legislative act raises significant issues for market participants. The proposed amendments aim to provide clarity and guidance to market participants and reduce the risk of inconsistent application of EU law.

Furthermore, Article 9a proposes to broaden the scope of no-action letters by adding two new points to the list of circumstances in which ESMA can issue a non-action letter:

i. where a temporary exemption or transitional measure would expire before a permanent framework applies; and
ii. where market developments create a disproportionate compliance burden.

In such cases, ESMA may issue a public opinion to the Commission suggesting appropriate legislative or delegated measures and their urgency.

The proposed recital 10 further explains why ESMA should be able to issue "no-action letters" in certain situations by identifying two main scenarios:

i. regulatory gaps during transitions, where a no-action letter allows ESMA to signal that supervisors should not prioritise enforcement of certain requirements during that transition with the objective of preventing legal uncertainty;
ii. exceptional market conditions, if market developments make compliance with existing rules temporarily disproportionate or impractical, ESMA could issue a no-action letter with the objective of avoiding unnecessary disruption while the issue is addressed.

Preliminary Views of the MS:

In their written comments, MS generally acknowledged the usefulness of the proposed amendments to Article 9a and considered that strengthening this tool could help avoid regulatory deadlock and support regulatory continuity, including in situations where provisions of L1 or L2 legislation prove difficult to implement or risk creating competitive disadvantages for EU market participants vis-à-vis third countries.

At the same time, MS underlined the need to ensure appropriate safeguards and legal clarity in the expanded use of no-action letters. Some emphasised the importance of preserving the institutional balance between supervisory flexibility and the legislative framework, including through clearer conditions for their use, appropriate procedural guarantees (such as justification, time limits and consideration of potential impacts on investors), and careful reflection on the proposed extension of the circumstances under which ESMA may issue such letters. Drafting suggestions were also made regarding the triggering conditions for their use, including the removal or reinstatement of certain qualifying terms and clarification of the role of NCAs in requesting ESMA to consider issuing a no-action letter.

Questions to the MS:

35. ***Do MS support the proposed extension of the circumstances under which ESMA may issue no-action letters? If not, which of these situations would MS prefer to adjust or limit? If amendments are preferred, what alternative wording would delegations suggest?***
36. ***Should additional procedural safeguards accompany the expanded use of no-action letters (e.g. time limits, justification requirements, or explicit involvement of NCA)? If so, which safeguards would MS consider most appropriate?***

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