

## REVIEW OF THE EUROPEAN SUPERVISORY AUTHORITIES

### AMAFI'S COMMENTS & PROPOSED AMENDMENTS

**Association française des marchés financiers (AMAFI)** is the trade organisation working at national, European and international levels to represent financial market participants in France. It acts on behalf of credit institutions, investment firms and trading and post-trade infrastructures, regardless of where they operate or where their clients or counterparties are located. AMAFI's members operate for their own account or for clients in different segments, particularly organised and over-the-counter markets for equities, fixed-income products and derivatives, including commodities. Nearly one-third of members are subsidiaries or branches of non-French institutions.

AMAFI has always paid close attention to discussions about Europe's supervisory framework for financial activities, starting with the creation of the original Forum of European Securities Commissions (FESCO), which went on to become the Committee of European Securities Regulators (CESR). Thereafter it kept abreast of the work leading up to the establishment in 2010 of the European System of Financial Supervision.

AMAFI is keen to provide its input once more to the debates being held around the European Commission's (EC) review of the legal framework within which the European Supervisory Authorities (ESAs) operate. Reflecting the activities of its membership, AMAFI concentrates its feedback mainly on the European Securities and Markets Authority (ESMA).

#### Summary:

Overall, **AMAFI supports the general principles set out in the EC's proposal** as they concur with a number of wishes expressed by AMAFI in its answer to the EC's consultation in the first half of 2017. Nevertheless, AMAFI would like to stress the following points which are of key concerns for its members:

- **Supervisory convergence – Improve the convergence of national authorities' supervisory practices and the implementation of EU legislations. Questions and Answers (Q&As) are a key element to achieve this objective and as such should be subject to open public consultations. Still, convergence and harmonization efforts must be focused on pan-European markets, and ensure not to hamper the ability for national markets to answer local needs.**
- **Governance – Better reflect national competent authorities' (NCAs) interest and expertise in qualified majority votes of the Board of Supervisors (BOS). Abstention should not count as a vote in favour.**
- **Funding – Maintain existing mechanism with financing originating from the EU budget, national competent authorities and directly supervised entities.**
- **Equivalence process – Strengthen ESMA's role in the capital market equivalence process.**
- **Outsourcing and delegation – Reinforce ESMA's powers vis-à-vis EU regulated firms' outsourcing and delegation in third countries.**

❖ **Supervisory convergence : improve the convergence of national authorities' supervisory practices and the implementation of EU legislations**

AMAFI would like to stress it is vital to ensure convergence in the supervisory practices of national authorities and in the implementation of EU legislations in areas where the market in question is truly pan-European. The frequently observed discrepancies represent a serious source of market fragmentation, which is all the more inappropriate since the regulatory foundations are now extensively harmonised.

Yet, convergence must take place only where there is a genuine pan-European issue of market structure or competition. In such cases, every effort should aim at making convergence effective. In this respect, AMAFI is supportive of the following approach proposed by the EC:

- Article 17 (*Regulation N° 1095/2010*), the proposed amendment would enable ESMA to pursue an alleged breach or non-application of Union law;
- Article 30 (*Regulation N° 1095/2010*), the proposed amendment would improve the value added of "peer reviews" by strengthening their independence under the responsibility of the new Executive Board;
- Articles 29 and 29(a) (*Regulation N° 1095/2010*), the proposed amendment would result in the creation of an up to date supervisory handbook and a "Strategic Supervisory Plan" aiming at developing a common supervisory culture amongst supervisory authorities.

In order to facilitate supervisory convergence, AMAFI would like to emphasize the need for technical standards to be better defined in level 1 texts to avoid critical elements are added in level 2 or 3 texts. Specifically, AMAFI considers Q&As as a key supervisory convergence tool and therefore welcomes the co-rapporteurs' proposition to require ESMA to consult stakeholders group for the elaboration of Q&As. Additionally, AMAFI believes that in order to further increase transparency in their elaboration, Q&As should be subject to open public consultations depending on their scope, nature and impact (*see proposed amendment in annexe p.5*).

This is especially important in the context of Brexit, given the desire of some Member States to persuade financial activities to relocate within their territory, which could lead them to take liberties with convergence. The aim should be to avoid a race to the bottom that would be detrimental to the EU financial market integrity and competitiveness in the long run.

Still, convergence and uniformity of the proposed solutions should not be the absolute priority in every case. The national particularities of market, credit and insurance activities are not inherently bad, far from it: harmonisation is required only when a market is truly pan-European. In the case of other markets, what matters above all is the ability of local ecosystems and markets to ensure that companies financing needs (in terms of capital and debt) are properly answered and that savings are properly allocated. The subsidiarity principle must apply in full.

❖ **Governance : better reflect national competent authorities' interest and expertise in qualified majority votes of the Board of Supervisors**

Strategic decisions adopted by the BOS of ESMA are taken by qualified majority votes and other decisions are taken by simple majority votes. While the split of voting modes appears globally relevant, AMAFI considers that there is a serious issue in the way abstentions are taken into account. Specifically, while for single majority votes abstentions are neither counted as approvals nor as objections and are not taken into account when calculating the number of votes cast, they are considered as votes in favour for qualified majority votes.

Given the strategic implications of these votes, it is crucial that NCAs' interest and expertise are reflected as much as possible. Therefore, AMAFI considers that for qualified majority votes, abstention should not be considered as a vote in favour when calculating the number of votes cast (*see proposed amendment in annexe p.7*).

Besides, AMAFI is also very supportive of the creation of an Executive Board – replacing the existing Management Board – which will be responsible for the breach of Union law and play a central role in ensuring supervisory convergence as it would notably be in charge of peer reviews. This would reduce conflicts of interest inherent to the current organization and contribute to the current efforts of convergence.

In AMAFI's view, two points are vital with regard to the composition and tasks of the Executive Board:

- Its composition should reflect the actual situation of domestic financial markets in terms of their development and relative importance especially in light of Brexit and the build up of Capital Markets Union;
- the Board should have broad autonomy to take the initiative and make decisions on anything relating to questions of convergence and supervision of member entity practices.

#### ❖ Funding : maintain existing financing mechanism

The question of funding is important as it will shape the ability of the ESAs to obtain the human and technical resources needed to discharge their tasks with maximum effectiveness.

AMAFI very much supports the approach taken by the co-rapporteurs stressing that direct annual contributions to the European Supervisory Authorities' budget from the financial services industry should come from directly supervised entities. AMAFI also agrees with the proposition from the co-rapporteurs' to introduce a floor for the EU budget and to cap contributions from the NCAs which would prevent a strong increase in the ESAs' budgets financed by NCAs. AMAFI also considers it is particularly important the European institutions maintain close scrutiny over the building-up and approval of the ESAs' budgets.

AMAFI is therefore in favour of maintaining the current financing arrangements from the EU budget and NCAs as they currently stand.

Funding must be capable of continuing through the phases of the business cycle, to which financial activities are highly sensitive, as this is the only way to ensure longevity of the actions conducted by the ESAs without placing an unacceptable burden on supervised entities when they are at their weakest.

#### ❖ Equivalence process : strengthen ESMA's role in the capital market equivalence process

AMAFI agrees on the need to strengthen ESMA's role with regard to the capital market equivalence process. It appears logical given ESMA's expertise of financial markets, regulations and practices that it plays a key role in leading on the equivalence monitoring and in supporting the EC's equivalence decision. Consequently, AMAFI supports the co-rapporteur's amendment providing for the ESAs to review an equivalence decision at their own initiative. Similarly, AMAFI agrees with the co-rapporteur's amendment giving ESMA the power to monitor developments in third countries with whom international agreements have been concluded.

However, a review every three years does not seem sufficient even though the ESAs are entitled to lead on this analysis when necessary. AMAFI is rather supportive of the EC's initial proposal suggesting a yearly assessment. Moreover, AMAFI considers such assessment should not be limited to the regulation review and has to take into account implemented practices.

❖ Outsourcing and delegation : reinforce ESMA's powers vis-à-vis EU regulated firms' outsourcing and delegation in third countries

AMAFI strongly supports the EC's proposal aiming at reinforcing the coordination function of the ESAs and hence ESMA when it comes to the supervision of firms' outsourcing, delegation and material risk transfer arrangements to entities based in third countries. It very much concurs to supervisory convergence, financial stability, financial integration, market integrity and protection of consumers and investors.

While in the context of Brexit a number of UK entities will relocate to the EU to keep the benefit of passporting rights, AMAFI welcomes this proposal as it would contribute to preventing letterbox entities in the EU. Nevertheless, AMAFI believes that ESMA should be empowered to avoid potential situations where financial bodies would relocate to the EU and keep their core business and main activities in the UK. This could go against the objective to build a CMU post-Brexit and threaten market integrity.

Consequently, AMAFI is in favour of keeping the EC's proposal as it currently stands and is not supportive of the co-rapporteurs' amendments.



## Annexe – Proposed amendments

### *Supervisory convergence*

Regulation N° 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority)	
Proposal from the European Commission	Amendment
<p><b>Article 16 – Guidelines and recommendations</b></p> <p>1. The Authority shall with a view to establishing consistent, efficient and effective supervisory practices within the ESFS, and to ensuring the common, uniform and consistent application of Union law, issue guidelines and recommendations addressed to competent authorities of financial market participant.</p> <p>The Authority may also address guidelines and recommendations to the authorities of Member States that are not defined as competent authorities under this Regulation but that are empowered to ensure the application of the acts referred to in Article 1(2).</p> <p>2. The Authority shall, save in exceptional circumstances, conduct open public consultations regarding the guidelines and recommendations which it issues and shall analyse the related potential costs and benefits of issuing such guidelines and recommendations. Those consultations and analyses shall be proportionate in relation to the scope, nature and impact of the guidelines or recommendations. The Authority shall, save in exceptional circumstances, also request opinions, or advice from the Securities and Markets Stakeholder Group referred to in Article 37.</p> <p>3. The competent authorities and financial market participants shall make every effort to comply with those guidelines, and recommendations.</p> <p>Within 2 months of the issuance of a guideline, recommendation, each competent authority shall confirm whether it complies or intends to comply</p>	<p><b>Article 16 - Guidelines <del>and</del>, recommendations and questions &amp; answers</b></p> <p>1. The Authority shall with a view to establishing consistent, efficient and effective supervisory practices within the ESFS, and to ensuring the common, uniform and consistent application of Union law, issue guidelines <del>and</del> recommendations, <del>and questions and answers</del> addressed to competent authorities of financial market participant.</p> <p>The Authority may also address guidelines, <del>and</del> recommendations <del>and questions and answers</del> to the authorities of Member States that are not defined as competent authorities under this Regulation but that are empowered to ensure the application of the acts referred to in Article 1(2).</p> <p>2. The Authority shall, save in exceptional circumstances, conduct open public consultations regarding the guidelines, <del>and</del> recommendations <del>and questions and answers</del> which it issues and shall analyse the related potential costs and benefits of issuing such guidelines, <del>and</del> recommendations <del>and questions and answers</del>. Those consultations and analyses shall be proportionate in relation to the scope, nature and impact of the guidelines, <del>or</del> recommendations or <del>questions and answers</del>. The Authority shall, save in exceptional circumstances, also request opinions, or advice from the Securities and Markets Stakeholder Group referred to in Article 37.</p> <p>3. The competent authorities and financial market participants shall make every effort to comply with those guidelines, and recommendations.</p> <p>Within 2 months of the issuance of a guideline, or recommendation, each competent authority shall confirm whether it complies or intends to comply</p>

with that guidelines or recommendation. In the event that a competent authority does not comply or does not intend to comply, it shall inform the Authority, stating its reasons.

The Authority shall publish the fact that a competent authority does not comply or does not intend to comply with that guideline or recommendation. The Authority may also decide, on a case by case basis, to publish the reasons provided by the competent authority for not complying with that guideline or recommendation. The competent authority shall receive advance notice of such publication.

If required by that guideline or recommendation, financial market participants shall report, in a clear and detailed way, whether they comply with that guideline or recommendation.

4. In the report referred in Article 43(5) the Authority shall inform the European Parliament, the Council and the Commission of the guidelines and recommendations that have been issued, stating which competent authority has not complied with them, and outlining how the Authority intends to ensure that the competent authority concerned follow its recommendations and guidelines in the future.

The report shall also explain how the Authority has justified the issue of its guidelines and recommendations and summarise the feedback from public consultations on issued guidelines and recommendations.

5. The Commission shall request an explanation justifying the issuance of the guidelines or recommendations concerned from the Authority. The Commission shall, on receipt of the explanation from the Authority, assess the scope of the guidelines or recommendations in view of the Authority's competence. Where the Commission considers that the Authority has exceeded its competence, and after having given the Authority the opportunity to state its views, the Commission may adopt an implementing decision requiring the Authority to withdraw the guidelines or recommendations concerned. The decision of the Commission shall be made public.

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*Justification*

Given Q&As play a key role as a guidance and supervisory convergence tool, they should be subject to open public consultations – similarly to guidelines and recommendations – that would increase transparency in their elaboration.

*Governance*

Regulation N° 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority)	
Proposal from the European Commission	Amendment
<p><b>Article 44 – Decision making</b></p> <p>1. Decisions of the Board of Supervisors shall be taken by a simple majority of its members. Each member shall have one vote.</p> <p>With regard to the acts specified in Articles 10 to 16 and measures and decisions adopted under the third subparagraph of Article 9(5) and Chapter VI and by way of derogation from the first subparagraph of this paragraph, the Board of Supervisors shall take decisions on the basis of a qualified majority of its members, as defined in Article 16(4) of the Treaty on European Union and in Article 3 of the Protocole (N°36) on transitional provisions.</p>	<p><b>Article 44 – Decision making</b></p> <p>1. Decisions of the Board of Supervisors shall be taken by a simple majority of its members. Each member shall have one vote.</p> <p>With regard to the acts specified in Articles 10 to 16 and measures and decisions adopted under the third subparagraph of Article 9(5) and Chapter VI and by way of derogation from the first subparagraph of this paragraph, the Board of Supervisors shall take decisions on the basis of a qualified majority of its members, as defined in Article 16(4) of the Treaty on European Union and in Article 3 of the Protocole (N°36) on transitional provisions.</p> <p><b>Abstentions for simple majority votes and qualified majority votes shall not be counted as approvals or as objections, and shall not be considered when calculating the number of votes cast.</b></p>

*Justification*

When decisions of the BOS are taken by a simple majority of its voting members, abstention is not counted as approval or as objection and is not taken into account when casting the vote. The rule should therefore apply similarly for qualified majority votes in order to better reflect NCAs interest and expertise in the Board of Supervisors' decision making process given its strategic implications.

