Review of the ESAs Legislative Tracker

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The Simmons & Simmons Review of the ESAs Legislative Tracker

This Legislative Tracker provides you with an update on the review of the European Supervisory Authorities, setting out:

- a high level background to, and summary of the main aims of, the proposed Regulation
- a table of the key dates in the process of agreeing the Level 1 text (with links to the relevant documents)
- a table setting out what is currently known about the consultation process for Level 2/ Level 3 measures and
- an annex setting out the specific Level 2 / Level 3 measures which EC/ ESMA must develop, the timing of ESMA's work (where known) and which ESMA document (discussion paper, consultation paper or Final Report) deals with each measure.

Background

The European Supervisory Authorities (ESAs) – namely, the European Banking Authority (EBA), the European Securities and Markets Authority (ESMA) and the European Insurance and Occupational Pensions Authority (EIOPA) – were established in 2011 as a response to the financial crisis of 2007. Together with the European Systemic Risk Board (ESRB), the Joint Committee of the ESAs and the national supervisory authorities of the EU Member States, they form the European System of Financial Supervision (ESFS).

In March 2014, the European Parliament (EP) published recommendations for the review of the ESFS. This document was followed by the European Commission's (EC) Report on the operation of the ESAs and the ESRB (August 2014), the Five Presidents' Report on Completing Europe's Economic and Monetary Union (June 2015) and the EC's Reflection Paper on the Deepening of the Economic and Monetary Union (31 May 2017).

On 21 March 2017, the EC published a public consultation on the operation of the ESAs in which it noted that, in addition to the challenge of the departure of the United Kingdom from the EU, further progress in supervisory convergence was needed to promote the Capital Markets Union (CMU), to increase integration within the EU's internal market for financial services and to safeguard financial stability.

This consultation was followed by the EC's adoption, on 20 September 2017, of a Proposal for a Regulation (the Proposal) amending the Regulations which established the three ESAs, together with a number of other Regulations[1], with a view to adjusting and upgrading the ESA framework to ensure the ESAs are able to assume an enhanced responsibility for financial market supervision within the EU.

The Proposal's aim is to improve the mandates, governance and funding of the ESAs. In order to ensure uniform application of EU rules and promote the CMU, the Proposal would grant ESMA certain direct supervisory power in specific financial sectors.

The Proposal also introduces changes to the supervisory relations with non-EU countries to ensure proper management of all financial-sector risks.

Summary

The key topics contained in the Proposal include

Stronger coordination of supervision across the EU

Under the Proposal, the ESAs would be empowered to:

- set EU-wide supervisory priorities
- check the consistency of the work programmes of individual supervisory authorities with EU priorities and review their implementation
- monitor authorities' practices in allowing market participants (such as banks, fund managers and investment firms) to delegate and outsource business functions to non-EU countries, to ensure that risks are properly managed and to prevent circumventions of the rules.

In addition, EIOPA would have a stronger role in promoting convergence in the validation of the internal models that some large insurance companies use to calculate requirements on solvency capital. This provision is intended to help overcome fragmentation and ensure better supervision of the large cross-border insurance groups.

Extended direct capital markets supervision by ESMA

The Proposal would make ESMA the direct supervisor over certain sectors of the EU's capital markets:

- **Capital market data -** ESMA would authorise and supervise the EU's critical benchmarks and endorse non-EU benchmarks for use in the EU. This is intended to improve the reliability and harmonisation of supervision of benchmarks, ie the indices or indicators used to price financial instruments and financial contracts or to measure the performance of an investment fund
- **Capital market entry -** to streamline procedures for companies to tap into EU capital markets and attract investment from across the EU, ESMA would take charge of approving certain EU prospectuses and all non-EU prospectuses drawn up under EU rules

[1] On the same day, the EC adopted (a) a proposal for a Regulation amending the Regulation which established the ESRB, (b) a proposal for a Directive amending MiFID2 and Solvency II and (c) a proposal for the amendment of the proposed Regulation which would, itself, amend EMIR

- **Capital market actors -** ESMA would authorise and supervise certain investment funds with an EU label - European Venture Capital Funds (EuVECAs), European Social Entrepreneurship Funds (EuSEFs) and European Long-Term Investment Funds (ELTIFs) - with the aim of creating a genuine single market for these funds

- **Market abuse cases** - ESMA would have an enhanced role in the coordination of market abuse investigations, with the right to act where activity gave rise to suspicion and had cross-border implications for the integrity of the EU's financial markets or financial stability.

Improved governance and funding of the ESAs

Under the proposed governance system, the ESAs would be able to take decisions more independently of national interests. Newly-created Executive Boards with permanent members would lead to quicker, more streamlined and EU-oriented decisions. Where it was felt that an ESA had exceeded its competence when issuing guidelines or recommendations, however, the EC could be asked to intervene. The funding of the ESAs would also be made independent from national supervisors, thereby guaranteeing greater autonomy and independence. The EU budget would continue to contribute a share of the ESAs' funding, with the balance funded by contributions from the financial sector.

Promoting sustainable finance and FinTech

To enable supervision to keep pace with new market developments, notably in light of the development of the CMU, the Proposal requires the ESAs to:

- promote **sustainable finance**, while ensuring financial stability, by taking account of environmental, social and governance-related factors and risks in the tasks they perform

- prioritise **FinTech** and coordinate national initiatives to promote innovation and strengthen cybersecurity, taking account of technological innovation in the tasks they perform.

Next steps

The Proposal - along with the associated proposals – has been submitted to the EP and the Council of the EU (the Council).

The EP and the Council will, separately, consider what amendments they would wish to see included within the Proposal's text and subsequently join with the EC in a series of negotiations (trilogues) in order to reach an agreed text.

That text will, in turn, be formally adopted by the EP in plenary session and endorsed by the Council before being translated into the official languages of the EU and published in the Official Journal.

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Where are we in the process?

Table 1: Key stages in development of Level 1 text

Level 1 text	Date
Commission Proposal	20 September 2017
European Parliament position	TBC
Council General Approach	TBC
Political Agreement	TBC
European Parliament adoption	TBC
Council endorsement	TBC
Publication in OJ	TBC
Entry into force	TBC

Table 2: Development of Level 2/ Level 3 measures

There are no Level 2 or Level 3 measures in the process of development at this stage.

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