

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 known Level 2 / Level 3 measures which must be developed, the timing of this work (where known) and which document deals with each Level 2 or Level 3 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), a [public consultation](#) on the Commission's review of the EU's macro-prudential policy framework (August 2016) 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 Original Proposal) amending the Regulations which established the three ESAs, together with a number of other Regulations¹, 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.

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 (the Omnibus Directive) and (c) a [proposal for the amendment](#) of the proposed Regulation which would, itself, amend EMIR.

On 12 September 2018, the Commission adopted an [Amended Proposal for a Regulation](#), revising its Original Proposal with a view to strengthening the supervision of EU financial institutions in the fight against money laundering.

The Commission's aim, through its Original and Amended Proposals (together the Proposal), 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

A. Proposal for a Regulation

The key topics contained in the Proposal for a Regulation include

(a) 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.

(b) 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. The EuVECA, EuSEF, ELTIF, Benchmarks and Prospectus Regulations and MiFIR

- **Capital market actors** - ESMA would authorise and supervise certain investment funds with an EU label - European Venture Capital Funds (EuVECFs), 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.

(c) 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.

(d) 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.

B. Proposal for a Directive

The Proposal for an Omnibus Directive would make the following key changes:

(a) MiFID II

MiFID II would be amended by the deletion of provisions in relation to Data Reporting Service Providers (DRSPs) including the authorisation requirements. Powers of authorisation and supervision of DRSPs would be transferred from national regulators to ESMA.

(b) Solvency II

The Commission is concerned that that major inconsistencies remain in competent authorities' requirements for internal models when calculating the solvency capital requirement. The Proposal's provisions on co-operation and information-sharing would enhance EIOPA's role in ensuring supervisory convergence in the application of the internal model and would enable EIOPA to adopt Opinions in this area.

Next steps

The Amended Proposal and the Omnibus Directive Proposal were submitted to the EP and the Council of the EU (the Council). These institutions consider separately the amendments they would wish to see included within the Proposals' texts before joining with the EC in a series of negotiations (trilogues) in order to reach an agreed text for each proposal.

In its [Communication](#), published alongside the Amended Proposal of 12 September 2018, the Commission encouraged the EP and Council to reach quick agreement on the proposals to ensure that they enter into force before the next elections to the European Parliament are held in May 2019.

On 14 January 2019, the EP's Economic and Monetary Affairs Committee's (ECON) [Final Report](#) in respect of the Amended Proposal and a further [Final Report](#) in relation to the Omnibus Directive were put to a plenary session of the EP for endorsement as the EP's opening position for the trilogue negotiations.

On 19 December 2018, the Council's Permanent Representatives Committee (COREPER) agreed the [partial presidency compromise proposal](#) in respect of the anti-money laundering provisions in the Amended Proposal. On 04 February 2019, the working group reached agreement on the presidency's compromise proposals in respect of the (a) [the remainder of the Amended Proposal](#), (b) the [Omnibus Directive Proposal](#) and (c) the [proposed Regulation to amend the ESRB](#).

On 07 February 2019, the working group invited the Council of the EU to agree these documents as its General Approach (i.e., its own opening stance) for the trilogue negotiations.

When a Level 1 text is agreed through the trilogue process, this will then 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

Amended Proposal for a Regulation

Level 1 text	Date
<i>Commission Original Proposal for a Regulation</i>	20 September 2017
<i>Commission Amended Proposal for a Regulation</i>	12 September 2018
<i>European Parliament position</i>	14 January 2019
<i>Council partial General Approach (AML)</i>	19 December 2018
<i>Council General Approach (remainder)</i>	07 February 2019
Political Agreement	TBC
European Parliament adoption	TBC
Council endorsement	TBC
Publication in OJ	TBC
Entry into force	TBC

Proposal for an Omnibus Directive

Level 1 text	Date
<i>Commission Proposal for a Directive</i>	12 September 2018
<i>European Parliament position</i>	14 January 2019
<u>Council General Approach</u>	07 February 2019
Political Agreement	TBC
European Parliament adoption	TBC
Council endorsement	TBC
Publication in OJ	TBC
Entry into force	TBC

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