ICMA RESPONSE TO THE COMMISSION'S PUBLIC CONSULTATION ON THE OPERATIONS OF THE EUROPEAN SUPERVISORY AUTHORITIES

INTRODUCTION

The International Capital Market Association (ICMA) represents issuers, lead managers, dealers, asset managers, investors and market infrastructure providers in the international capital markets. ICMA has over 500 members. They are based across Europe and globally. ICMA has set standards of good market practice in the international fixed income market for almost 50 years.

ICMA's mission is to promote resilient and well-functioning international debt capital markets, which are necessary for economic growth. Accordingly, ICMA welcomes the Commission's public consultation on the operations of the ESAs, which seeks to (i) see whether they are delivering as expected considering their objectives to protect the public interest by contributing to the short, medium and long-term stability and effectiveness of the financial system, for the Union economy, its citizens and business; (ii) to build a clearer overview of areas where going forward the effectiveness and efficiency of the ESAs can be strengthened and improved.

ICMA has decided that it should at this stage focus its response on selected aspects of the consultation. In reaching this decision ICMA has not simply ignored the rest of the consultation paper, but has rather concluded that it does not have substantive points to raise in response to the other specific questions that have been posed.

RESPONSES TO SPECIFIC CONSULTATION QUESTIONS

Section I – Tasks and powers of the ESAs

A. Optimising existing tasks and powers

1. Supervisory convergence

Question 4: How do you assess the involvement of the ESAs in cross-border cases? To what extent are the current tools sufficient to deal with these cases? Please elaborate on your response and provide examples.

Response: Underlying the work of the ESAs on supervisory convergence is the continued evolution of the Single Rulebook, to which the ESAs contribute through their work to develop draft, Level 2, binding regulatory and implementing technical standards. ICMA considers that, since these standards are essential building blocks upon which supervisory convergence can progress, it would be valuable to take a few steps to further enhance the ESAs ability to manage the operability of these standards.

ICMA believes that the process for arriving at Level 2 binding technical standards would benefit from arrangements being made for the ESA's to observe during trilogue discussion meetings for the formulation of Level 1 legislative text. This should not alter the current political process, but would ensure that the ESAs best understand the meaning and the spirit of agreed wordings which they must act in accordance with; and would helpfully mean that the ESAs technical expertise would be on hand in case any advisory questions might benefit from comment during the discussions.

Also, ICMA considers that it is essential that adequate time be allowed to the ESA's for the preparation of Level 2 technical standards and, subsequent to this, to market participants to prepare for their implementation and compliance. Demonstrably, this requires realistic, relative dates and a degree of flexibility to extend timings in cases of necessity, including to avoid that Level 1 requirements apply without sufficient time having been provided to properly complete these subsequent processes.

Most significantly of all, ICMA sees that a way needs to be found to provide the ESAs with powers which would operate in a manner akin to "no-action letters" (as utilised in countries such as the US), in order to allow for more effective and proportionate supervisory reaction in instances where prompt action needs to be taken to adapt regulation in light of market circumstances. And, since the use of such a mechanism should be temporary and exceptional, there need to be robust processes, including appropriate co-legislator scrutiny, to allow the ESAs to rapidly vary or amend technical standards.

2. Non-binding measures: guidelines and recommendations

Question 5: To what extent are the ESAs tasks and powers in relation to guidelines and recommendations sufficiently well formulated to ensure their proper application? If there are weaknesses, how could those be addressed?

Response: ICMA considers it helpful that the ESAs have the power to issue guidelines and recommendations, with the objective of ensuring consistent and effective supervisory practices and application of the regulatory framework across the Single Market. For this to work well, it is important that the ESAs only produce guidelines that are fully consistent with the relevant Level 1 legislation, underscoring the need for their appropriate engagement in its formulation (as flagged in response to Question 4, above).

It is also important that NCAs then consistently follow applicable ESA guidelines, which may require some refinement of the "comply or explain" mechanism. For instance, it could help to require the publication of reasons for non-compliance, instead of this being optional. In addition, the ESAs should have to monitor progress towards full compliance and, in cases where there is continuing non-compliance, could be required to revisit guidelines, with a view to facilitating the achievement of full compliance, after a maximum period of three years.

ICMA notes that the ESAs continue to try to improve their interpretative powers, as for example evidenced by ESMA's, 9 February 2017, launch of a new Q&A tool. Nevertheless, ICMA believes that there is scope to further improve the way in which the ESAs use the Q&A tool, in particular by instigating best practices to enhance transparency, timeliness and quality. Specifically, there can be a significant number of questions being raised, as for example in the cases of preparing for PRIIPs and MAR. It would be most beneficial to know that questions have been acknowledged, which questions have been submitted, or are being worked on, and to have an indication of any planned timing for the confirmation of answers – whilst understanding that this must inevitably be subject to change in cases where it proves difficult to reach agreement. Absent these sort of process enhancements, the market will continue to struggle with uncertainty regarding if, and when, important questions will be answered; and with knowing whether, or not, further questions need to be raised.

ICMA understands that formal consultation processes for Q&A would impede timeliness, but believes that it must be the case that encouraging more open debate about questions and their potential answers could enhance understanding of the matters at hand and hence improve the robustness of output. And, given the absence of formal prior consultation, it appears reasonable that impacted persons should be afforded a specific right of appeal in case they disagree with an adopted answer. Furthermore, it is important that the ESA's should not be tempted to use Q&A's as a way to avoid having to go through the more formal process of appropriately consulting on guidelines (as was going to happen, in early 2016, in relation to the MiFID target market rules).

3. Consumer and investor protection

Question 6: What is your assessment of the current tasks and powers relating to consumer and investor protection provided for in the ESA Regulations and the role played by the ESAs and their Joint Committee in the area of consumer and investor protection? If you have identified shortcomings, please specify with concrete examples how they could be addressed.

Response: ICMA perceives that investor protection is a field where the joint ESAs Committee shows its relevance. However, the case of the PRIIPs regulation, where the process was slow and unclear, illustrates that this does not always prove able to work efficiently. Accordingly, consideration needs to be given as to whether sufficient time and resource is available to best allow the joint ESAs Committee to conduct its tasks.

More generally, when considering the role played by the ESAs in the area of investor protection, ICMA strongly believes that there are two distinct markets which require different approaches. The first of these involves professional clients engaged in wholesale markets, where there clearly needs to be a standardized, single market approach. Such investors are able to understand instruments and risks, to read documentation written in English and should not be prevented to act because of local barriers. On the other hand, distinctly different from this first case, ICMA sees merits in having NCAs playing a much greater role in the application of strict controls in order to ensure retail investors' protection.

Question 7: What are the possible fields of activity, not yet dealt with by ESAs, in which the ESA's involvement could be beneficial for consumer protection? If you identify specific areas, please list them and provide examples.

Response: A key part of ICMA's work concerns its provision of executive education, with ICMA having been heavily involved in providing technical education in the capital markets for many years. Education is an essential tool to underpin more effective markets and ICMA suggests that it represents a possible field of activity in which the ESAs' might become more actively involved (building on the existing Article 9 powers in the respective ESA Regulations), which could be particularly beneficial for consumer protection. For example, the ESAs could develop open education programmes and investor guides, made readily accessible to all through their respective websites or via a shared portal directly linked to their websites.

5. International aspects of the ESAs' work

Question 9: Should the ESA's role in monitoring and implementation work following an equivalence decision by the Commission be strengthened and if so, how? For example, should the ESAs be empowered to monitor regulatory, supervisory and market developments in third countries and/or to monitor supervisory co-operation involving EU NCAs and third country counterparts?

Response: ICMA sees it to be logical that the ESAs should be required to monitor relevant developments which might impact upon earlier equivalence decisions, whether they were positive or negative at the time, to ensure that such decisions remain valid. Alongside of this, there need to be strong mechanisms to best contribute to the continued development of international standards; and there should a rebuttable presumption that these will be followed. As stated in ICMA's response on the CMU mid-term review, the importance of maintaining the EU's global competitiveness should require intense focus on maintaining effective EU-wide regulation in a manner which is proportionate, and which does not unnecessarily inhibit business flows into or out of the EU. In a globally competitive market place, this will necessitate continued efforts to well balance appropriately determined and applied EU and Member State requirements alongside global standards.

ICMA considers that there should be a move towards a more unified equivalence regime in EU legislation, allowing the possibility to achieve greater consistency and thus simplify the work required in this complex arena. Drawing on their experience to date, the ESAs are well placed to assist the Commission in progressing applicable proposals to achieve this. Naturally ICMA recognises that this needs to accommodate the implications of Brexit, which also creates an imperative to evolve new, strong supervisory arrangements aligned with agreed EU27/UK post-Brexit relationships. It is going to be important to have robust ways for the ESAs to work closely with the relevant UK authorities.

In this context, ICMA draws attention to the, 20 April, speech delivered, in Washington, by the FSB Chairman, Governor Carney, in which he said: "Brexit will be a litmus test of the future of international cooperation. The UK and the rest of the EU have exactly the same rules and the most highly developed frameworks of supervisory cooperation. Their capital and banking markets are already highly integrated. They have the potential to create the template for trade in financial services." And, referring to a post-Brexit environment in which firms need to determine how they serve their clients in the EU27 and the UK, whilst facing partially-differing rules, in a 23 February speech delivered in London, Deutsche Bundesbank Executive Board member, Dr Dombret said: "In such a scenario, close cooperation between supervisors becomes crucial. When regulations differ, it is our responsibility as supervisors to facilitate cross-border activity without imposing undue operational burdens."

ICMA wishes to highlight that inconsistencies and conflicts between regions and jurisdictions is a real issue, with such issues significantly detracting from the overall efficiency of international markets. Enhancing international coordination and cooperation on regulation and supervision can improve this situation. Ways to achieve this should include enhanced international dialogue in advance of proposing regulations; coordination of changes in terms of both effect and timing; early efforts to manage concerns such as extra-territoriality; mechanisms for collaborative efforts to identify and manage conflicts; and meaningful recognition of the existence of rules which achieve suitably equivalent regulatory and supervisory outcomes.

6. Access to data

Question 11: Are there areas where the ESAs should be granted additional powers to require information from market participants?

Response: Given that it would presumably help towards ensuring more consistent supervision, there does appear to be a sound rationale for ESMA's powers of access to data being strengthened; and, in ICMA's view, the current exchange and understanding of data among authorities is insufficient at a European level. Improving the sharing of current market data will facilitate a better and more nuanced understanding of risk and hence should support better supervisory outcomes.

However, before asking market participants to report new types of data, regulators and supervisors should first better transmit, aggregate and use among themselves, at national and European levels, all the data which is already reported to them through various existing legislative requirements (eg UCITS, AIFMD, MiFID, EMIR, SFTR). From this basis, a clear assessment can then be made regarding the need, or not, to require additional data from market participants, which should only occur where there is a justified data need which cannot be otherwise satisfied from existing data. And, careful consideration should be given to where best to source any such additional data, which in some cases might be more efficiently collected direct from market infrastructures, such as CCPs and trading venues, rather than from individual underlying market participants. Where incremental data is required, market participants need to be afforded reasonable periods within which to provide it.

7. Powers in relation to reporting: Streamlining requirements and improving the framework for reporting requirements

Question 12: To what extent would entrusting the ESAs with a coordination role on reporting, including periodic reviews of reporting requirements, lead to reducing and streamlining of reporting requirements?

Response: ICMA observes that the unsatisfactory experience with the establishment of derivatives reporting under EMIR, over the last couple of years, clearly indicates the need to evaluate how to create a more effective data collection and aggregation process. Market participants are of course willing to provide data regarding their activities, but the cost of doing so needs to be justified by ensuring that the process does lead to the authorities obtaining necessary and useful information; and, quite understandably, there is a strong preference to only have to report data once, rather than having multiple different layers of reporting which give rise to complexity and excess cost.

ESMA's proactive stance in arranging that NCA's in effect outsource to it their SFTR data collection roles appears to be a good example of how a better streamlined, more consistent reporting regime can be implemented. Yet this does not seem to be a sufficient step, when what really seems to be needed, in the longer term, is to establish a single EU reporting hub into which all data would flow in accordance with uniform standards. Reports required to be received by national, regional and international authorities would then be delivered from out of the data hub; and applicable market information, such as a single consolidated tape (rather than the less conceptually appealing approach of having multiple consolidated tapes) could also potentially be generated. Inevitably there are significant design challenges to put such an arrangement in place, including data specification and harmonization, data transmission and security, and data privacy considerations. And, there is a major

question regarding who should most appropriately manage and control such a hub. There would be significant investment costs, but the outcome could be far more cost efficient and improve outputs.

ICMA recalls that the Commission's CMU review work has already highlighted opportunities to streamline certain reporting requirements. It seems likely that a focus on what is essential, rather than nice to have, could already identify significant potential cuts. To alleviate unnecessary burdens on both market participants and public authorities, it would seem sensible to task the ESAs with regularly reviewing existing reporting requirements, at both national and EU levels, to assess where simplification might be achieved and monitor the overall scale of reporting burdens. And, they might also be tasked to review all new requirements, to assess if they can already be met from existing data. Furthermore, it would be beneficial to have the ESAs focus on ensuring there is a harmonized approach to reporting requirements among NCAs. Incremental requirements set by NCAs, as for example in the case of the Bank of Italy's Article 129 reporting, create compliance complications in the markets which serve to further increase fragmentation contrary to the CMU objective.

B. New powers for specific prudential tasks in relation to insurers and banks

2. Mitigating disagreements regarding own funds requirements for banks

Question 17: To what extent could the EBA's powers be extended to address problems that come up in cases of disagreement? Should prior consultation of the EBA be mandatory for all new types of capital instruments? Should competent authorities be required to take the EBA's concerns into account? What would be the advantages and disadvantages?

Response: In general terms, it is crucial that investors have absolute clarity and certainty concerning their rights under any form of debt instrument from the outset. In the case of capital instruments, this extends to clarity and certainty surrounding the exact structure of a particular capital instrument, including a holder's position in the subordination hierarchy, in an already complicated balance sheet structure. On the issuer's side, it is critical that the issuer is assured that the capital instruments comply with all eligibility criteria under relevant regulatory and prudential requirements in advance of issuance, and indeed it is a reasonable expectation of an issuer to conclude compliance on the basis that a competent authority has already approved the instruments. Without this certainty, contingencies would need to be included in bond conditions, such that the instruments would be deemed to be compliant unless and until challenged, and while this approach may deal with potential uncertainty, it is not ideal.

Uncertainty caused by any lack of clarity, inconsistency and potential volatility in terms of capital treatment of instruments due to ex-post interventions can not only affect funding spreads and lead to marketing arbitrage as between different types of instruments, but also have a knock-on effect on the confidence in the market (on an individual firm basis as well as on a wider basis). Therefore, in this scenario ICMA considers it is preferable that either: (i) prior consultation in advance of issuance between the competent authority and the EBA is mandatory, thereby giving the EBA the opportunity to challenge the eligibility criteria on an ex-ante basis; or (ii) that the prior consultation option be removed altogether such that competent authorities do not need to take the EBA's concerns into account at all (removing any monitoring function of the EBA and transforming the EBA's role into that of a record-keeper of approved instruments).

C. Direct supervisory powers in certain segments of capital markets

Question 19: In what areas of financial services should an extension of ESMA's direct supervisory powers be considered in order to reap the full benefits of a CMU?

Response: Continuing to evolve ESMA's direct supervisory powers is consistent with the underlying logic of CMU, but this needs to continue to progress only incrementally and where there are demonstrably relevant needs. Meanwhile, continued efforts to drive up levels of supervisory consistency can still deliver meaningful improvements compared to the situation today. As already highlighted in response to Question 6 (above), ICMA sees a significant difference between professional, wholesale markets and retail markets; and notes that the oversight and regulation of these two distinct market segments needs to continue to be appropriately tailored.

Question 20: For each of the areas referred to in response to the previous question, what are the possible advantages and disadvantages?

Response: ICMA has the following observations in respect of the three example cases flagged in the consultation paper:

1) Direct supervision of data providers

ICMA's response to Question 12 (above) highlights the idea of a central data reporting hub to replace existing disparate reporting channels. In case steps are taken to move towards the establishment of such an architecture, it would in ICMA's view be logical to contemplate a single consistent supervision of any data providers involved in intermediating the flow of data from reporting entities into the data hub.

2) Pan-European investment fund schemes

As stated in response to Question 6 (above), NCAs have an important role to play in the context of retail investor protection, which ICMA sees as one of the reasons why ESMA should not be appointed as a central authorisation agency for EU investment funds. Nevertheless, some steps could be taken to streamline the existing processes where funds are to be sold on a cross-border basis. This could cover initial notification and any subsequent amendment or updating. A central register of such funds could be maintained by ESMA, provided the cost of this would not exceed the current cost of making existing Member State level notifications, along with some associated details, such as documentation and payment details.

In case the proposal to establish Pan European Personal Pensions, as discussed in the context of CMU, is taken forward, this could well represent a suitable central authorisation role for ESMA.

3) Post trading market infrastructures

ICMA considers that the appropriate model for the authorisation of EU CCPs is something which should be determined in the context of the current EMIR review and in conjunction with the work underway to put in place the EU CCP Recovery and Resolution Regulation. CSDs have just recently become subject to authorisation in the EU under the CSD Regulation, which should be given the chance to settle into operation ahead of reconsideration of its provisions in accordance with the review clause which CSDR contains.

Section II – Governance of the ESAs

B. Stakeholder groups

Question 26: To what extent are the provisions in the ESA Regulations appropriate for stakeholder groups to be effective? How could the current practices and provisions be improved to address any weaknesses?

Response: ICMA considers that the stakeholder groups are an important source of informed views for the ESAs. It is inherent in the nature of today's financial markets that there is a significant degree of detailed technical knowledge amongst leading market participants, who are thereby uniquely placed to explain why things operate in a certain manner and to assess how things may be affected by any contemplated new or changed requirements. As such, it is essential that stakeholder groups are able to benefit from an appropriate level of informed industry input and is thus important that great care is taken with the composition of stakeholder groups.

ICMA's experience of work relating to the Market Abuse Regulation also prompts us to underscore the importance of having the work of ESA standing committees being supported by consultative working groups, made up of external stakeholder representatives. ESMA claims to have such consultative working groups for all its standing committees, yet it is not evident that there is one related to the ESMA Market Integrity Standing Committee and it appears there may be other such cases. Consultative working groups cannot ensure that all will work smoothly, but their use as sounding boards by standing committees is an important mechanism.

CONCLUDING COMMENTS

ICMA appreciates the valuable contribution made by the Commission's examination of the issues articulated in this public consultation and would like to thank the Commission for its careful consideration of this response. ICMA considers that the points which this response highlights, which have been articulated in response to input drawn from across its broad member constituency, are market-wide views. The ICMA remains at your disposal to discuss any of the above points.

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