

Bloomberg L.P. comments - European Commission targeted consultation on the supervisory convergence and the single rulebook

Bloomberg L.P. welcomes the opportunity to provide its comments to the European Commission's targeted consultation on the supervisory convergence and the single rulebook, to feed into its stocktaking exercise as planned in Action 16 of the CMU Action Plan and the upcoming ESAs review. We have focused our comments on the work of ESMA and identified our suggestions around the key topics of the consultation as listed below.

Overview - assessment of ESMA role

- We fully support ESMA's objective of promoting the stability and transparency of financial markets in the EU and the development of a single EU rulebook.
- We recognise how ESMA effectively responded to the challenges created by the COVID-19 crisis, providing pragmatic solutions in terms of guidance and forbearance, and ensuring market participants were given some additional time and flexibility across a range of issues e.g. the temporary delay to the start of SFTR.
- While there is still much to achieve - and lessons have been learnt along the way - ESMA has accomplished a substantial amount in its first ten years of operation. The Regulatory Technical Standards are its most concrete contribution to the single rulebook and ESMA will play a crucial role in the next decade with regards to regulatory priorities around sustainability, digitalisation and the construction of the EU's Capital Markets Union.

ESMA transparency and consultation with stakeholders and market participants

- We have found that ESMA is normally a transparent institution and we have greatly appreciated the accessibility of many of ESMA's experts across a range of issues. In general, there is adequate consultation by ESMA, but we do think there should be greater dialogue and engagement with stakeholders around Opinions and Q&As. These can often have important impacts for market participants and sometimes they can even verge on being Level 1 or Level 2 type issues. Full transparency around the use of these tools is therefore critical - both for market participants themselves so that they have the opportunity to contribute to the development of the guidance and also for assuring the democratic oversight of the EU institutions.
- We would also encourage ESMA to increase its dialogue with industry stakeholders in a more direct way. While there are no shortage of consultations and even consultative groups with industry representation, engaging with the market primarily by means of written consultations does not allow an interactive two-way exchange of ideas. Context is often the key to grasping and responding to policy challenges and 2-D questionnaires are usually not the best way of extracting it from subject matter experts. Instead, greater use should be made of deep-dive workshops and informal roundtables with key industry experts as they can often be far better at problem solving. This would not only benefit the market, it would help ensure ESMA's resources are efficiently deployed.

ESMA supervisory convergence tasks

- Overall, we think that ESMA is making appropriate use of the 'forbearance' and 'no action letter' tools, which it has at its disposal. They seem to be working reasonably

well as demonstrated by the approach taken to SFTR go-live and we also welcome the improvements which ESMA is putting in place around Q&A submission. It is key however that ESMA deploys its forbearance and no-action tools in a timely manner. These should not be tools, which are deployed at the last moment to prevent imminent disruption, rather they should keep the pathway towards implementation smooth and clear at all times.

International alignment

- ESMA should be aiming to minimise unnecessary divergence from agreed global standards, to avoid significant reporting deltas between EU reporting and equivalent reporting in other jurisdictions. For example, it is concerning that recent EU consultations on data and reporting standards relating to the EMIR Refit and the MiFID II/MiFIR review have indicated a willingness by EU authorities to depart from international standardisation initiatives. In particular, ESMA recently confirmed its plans to deviate from the international approach to OTC derivatives product identification by failing to prioritise the use of the Unique Product Identifier (UPI) for reporting under the EMIR Refit.

ESMA role in achieving a single rulebook

- There does continue to be significant issues which ESMA needs to do more on e.g. data challenges around the MiFID transparency regime and the inappropriate use of ISIN as an instrument identifier in RTS despite ongoing concerns about its limitations for certain instruments and persistent complaints from industry about how this is working in practice. Vast quantities of ISINs have served only to confuse the data around OTC derivatives, with negative impacts for the transparency regime. To avoid such outcomes, ESMA could be more open to drawing on the experience of data experts when it comes to the development of data standards. Furthermore, ESMA should make full use of the extensive data already provided to it by market participants. Often, the solutions to the data problems, which ESMA and the market are aiming to address, are to be found within ESMA already.
- We also think that maintenance of the level playing field in EU needs a stronger focus by ESMA e.g. ESMA rules on allocations under MiFIR transaction reporting requirements create an unlevel playing field between trading venues and SIs. This is contrary to the policy goal of promoting trading on transparent EU venues.
- We do recognise that ESMA is often constrained by the inconsistent or delayed application of rules in EU Member States, which hampers its effectiveness around supervisory and enforcement work. Insufficient harmonisation across the EU of MiFID II deferrals is a good example of a sub-optimal outcome as a result of divergence across the Union that has frustrated the transparency goals of the legislation.
- The style of level 1 itself is often a brake on ESMA's effectiveness, i.e. it is overly prescriptive. We would argue that in general 20% of the depth of the requirements is valuable to 80% of the market, while 80% of the depth is only valuable to a small part of financial market participants. The result of chasing the 80% rather than focusing on the 20% is a dilution of supervisory effort and an overly complex and burdensome rulebook e.g. in an attempt to tackle both pre and post trade transparency requirements under MiFID II simultaneously, results on both fronts have been disappointing. The remedy to this challenge, at both Level 1 and 2, would be to not over-engineer new rules, but to strive instead to have clear and reasonable goals focusing on the areas which are most relevant for the markets.

- In this regard, we think that ESMA could be given additional competences in terms of advising the Commission and co-legislators on policy formulation to make sure its expertise is tapped while options are being considered during the actual legislative process. This should build up the review reports which ESMA already undertakes to advise the Commission ahead of adoption of legislative proposals. ESMA could also be more involved in assessing the application and implementation deadlines for Level 1 to make sure unrealistic delivery timelines are not set e.g. MiFID II, SFDR.
- There has often been a tendency to view markets policy through an equities lens with insufficient consideration or knowledge for how fixed income markets operate. The MiFID transparency regime around non-equities is a good example of the potential for policy disappointment where this is the case. Greater effort must be made to understand the art of FI trading and avoid relying on equity concepts when designing standards and guidance that impact FI markets.

Potential for increased ESMA supervisory powers

- As ESMA prepares to take on further direct supervisory responsibilities it is important that it operates a regime that aims to assure strong stability at a system level, with a pragmatic and risk based approach to day-to-day supervision rather than a tick-box approach to rules on a line by line basis. We also recommend that ESMA focuses on existing market experience rather than previous regulatory requirements when defining new its rules, as many of existing regulations may not fully apply to new issues.
- In terms of whether any further areas of supervision should be moved to EU level, it is important that any such move would be supported by compelling justifications so that the principle of subsidiarity is upheld and the valuable local knowledge of NCAs is recognised. It would also appear prudent to evaluate how the new round of supervisory powers for ESMA works in practice before considering additional supervision at EU level.
- Finally, we would support ESMA acquiring greater powers over equivalence determinations. The interests of the EU's market participants and end users would be best served if these determinations were outcomes focused and de-politicised to the greatest extent possible. We see this as essential to the successful development of the CMU in the EU. In many cases ESMA is the best-placed to make such decisions as it develops and maintains close relations with its international supervisory peers.