

The Consumer Voice in Europe

## TARGETED CONSULTATION ON THE SUPERVISORY CONVERGENCE AND THE SINGLE RULEBOOK

BEUC consultation response



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EC register for interest representatives: identification number 9505781573-45



Co-funded by the European Union

Ref: BEUC-X-2021-000 - dd/mm/2021

## Why it matters to consumers

Consumers need to be able to trust that the products that are being offered to them by financial institutions are safe and fair. They expect financial supervisors to closely monitor the market and intervene when financial institutions do not fully comply with legislation. Unfortunately, many national financial supervisors in Europe lack a clear objective for consumer protection or do not possess sufficient resources to perform this task. The EU institutions should harmonise and ensure that the quality of supervision and enforcement is consistent in the EU, to better protect financial services users.

## Summary

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BEUC has submitted a consultation response to the European Commission's 'Targeted consultation on the supervisory convergence and the Single Rulebook: Taking stock of the framework for supervising European capital markets, banks, insurers and pension funds'. For the full comments and answers to all relevant questions (including multiple choice questions), please refer to our full consultation response.

**1.3.3. Do you think mandatory recurring peer reviews, covering also enforcement aspects, could be introduced in some sectoral legislation? If the answer is yes, please specify the piece of legislation and concrete provision under which mandatory peer reviews could be introduced.**

The lack of effective enforcement is a key problem in retail financial markets, as demonstrated by a recent FSUG [study](#), which shows that market supervision and enforcement of consumer law differs significantly between EU Member States. Requiring mandatory recurring peer reviews, including covering enforcement aspects, could help to ensure more consistent enforcement of sectoral legislation across EU Member States.

To give a specific example, BEUC would support a mandatory peer review under MiFID II into the quality enhancement rules under MiFID II, as recently [recommended](#) by the ESMA MSG. Under MiFID II, financial advisers are permitted to continue receiving inducements from product manufacturers, so long as they (a) are designed so as to enhance the quality of the service provided (b) do not impair the firm's duty to act honestly, fairly and professionally towards the client in accordance with their best interest and (c) the inducements are disclosed to clients.

However, supervision and enforcement of the quality enhancement criteria under MiFID II diverges significantly between EU Member States. Studies by several national competent authorities show that many investment firms may not be fully meeting the obligations under the MiFID II quality enhancement rules, and that competent authorities often have differing interpretations of how the quality enhancement criteria should be applied in practice. ESMA's [Technical Advice](#) on inducements also notes that many respondents to its consultation on this topic reported that "competent authorities have differing interpretations of the quality enhancement criteria for acceptable inducements." For instance:

- A recent [Thematic Review](#) by the **Danish Financial Supervisory Authority** found that the quality enhancement rules were in many cases not appropriately applied by investment firms. For instance, Danish financial advisers often regarded certain general services that are widely available to all banking clients (such as general newsletters sent to all clients or access to online banking accounts) as 'quality enhancing'. In addition, some of the quality enhancing services provided to consumers were not considered relevant by the Danish FSA for the purpose of the quality enhancement test (for instance, offering a physical advisory meeting to an execution-only client, who has already chosen to forego advice).
- In **Germany**, according to the [national law that](#) implemented the EU quality enhancement rules, having a "widespread network of branch offices" (including in rural areas) is sufficient to meet the requirements of the quality enhancement test. In 2017, the Bundestag scientific committee came to the conclusion that the German [national law](#) is not in line with the requirements of the European law.
- In **Norway**, the Norwegian supervisor carried out a [survey](#) of how investment firms were complying with the detailed requirements of the quality enhancement rules, and found that many firms were not properly applying the rules. The survey from 2019 showed that the enterprises that receive and retain return commissions to a small extent followed the new rules, which came into force on 1 January 2018. The Norwegian financial supervisor carried out a review vis-à-vis companies who were not complying with the detailed requirements of the rules. Following the conclusion of the review, there were changes in the way financial firms charged clients for advice:

- 70% of investment firms in Norway now charge direct fees to clients (and no longer receive remuneration in the form of inducements from product suppliers).
- Sixteen per cent of investment firms lowered commissions, and 14% continue to receive and retain commissions.

In the absence of a full ban on the payment of inducements under MiFID II (see our [campaign](#) on the Price of Bad Advice), stricter enforcement of the quality enhancement rules under MIFID II is necessary by national competent authorities, and a mandatory peer review should be carried out by ESMA to enhance supervisory convergence in this area.

#### **1.4.6. What are, in your view, the main remaining obstacle(s) to allow for a more effective supervisory convergence?**

Consumers need to be able to trust that the financial products that they are being offered are safe and fair. They expect that supervisory authorities exist to monitor the financial institutions and to intervene when the latter do not comply with legislation. However, many national financial supervisors lack a clear statutory objective to provide consumer protection or do not possess sufficient resources and the capacity to perform this task. As a result, significant consumer detriment occurs in the area of retail banking, payments, investments, insurances, and savings.

There is an urgent need to upgrade the quality of supervision and enforcement everywhere in the EU to achieve supervisory convergence. BEUC [calls](#) for the creation of an EU supervisory authority dedicated only to consumer issues, as the consumer protection mandates of the existing ESAs has been treated as a marginal issue so far. The main task of the ESAs is financial stability which has no direct link with consumer protection, as market conduct supervision is very different from prudential supervision by nature.

The EU should set up a separate EU supervisor that would focus on defending consumer interests in financial services (twin-peak model of supervision). As has been successfully implemented in several Member States following the financial crisis (Belgium, UK) and also before the crisis (e.g. the Netherlands), BEUC favours a twin peak model of supervision i.e. separating market conduct from prudential supervision. We are of the view that supervisory convergence in market conduct supervision would be better achieved by establishing an EU authority for financial consumer protection. We appreciate the work carried out by the ESAs and actively contribute to their work. However, the ESAs deal with both prudential and market conduct supervision, where the main priority and resources are allocated to the prudential oversight. Therefore, we see the need to set up a separate EU supervisor that would focus on defending consumer interests in financial services. One of the main tasks of the new authority should be to achieve supervisory convergence and include ensuring the development, implementation and monitoring of minimum standards of conduct-of business supervision at Member State level. The idea is to develop a 'Single Rulebook for Conduct of Business'.

#### **1.7.2 Do you see a need for greater coordination between the ESAs and/or with other EU and national authorities as regards developing data requirements, data collection and data sharing? If yes, please explain your answer and indicate what changes you propose.**

As the digitalisation of the financial sector continues, there will be a requirement for much more multi-disciplinary cooperation between financial supervisors, data protection authorities and competition authorities. Strong co-operation between sectoral authorities and data protection authorities is crucial for effective and meaningful protection of consumers. Such cooperation could take multiple forms, including for instance, cross-sectoral secondment of officials between data protection authorities and financial

supervisors. Especially in the area of insurances, with the rise of Big Data Analysis and artificial intelligence, insurance supervisors will need to work closely with data protection authorities to ensure adequate enforcement of data protections and privacy rules when selling insurance contracts. Equally, in the area of Open Finance, closer cooperation between ESMA and EBA with data protection authorities will be critical.

### **1.8.1 What are, in your view, the ESAs' main achievements in the consumer and investor protection area?**

The European Supervisory Authorities have played an important role in increasing consumer protection and investor protection. BEUC is supportive of many recent initiatives that the European Supervisory Authorities have taken, including (amongst other initiatives): (a) ESMA and EIOPA studies into cost and performance products under their remit (b) ESMA's final product intervention measures on CFDs and Binary Options (c) EIOPA's thematic review into consumer protection issues in travel insurance (d) EIOPA's ongoing thematic review into mortgage life and other credit protection insurance policies sold through banks.

### **1.8.3 The ESAs can now, where sectoral legislation enables them, use their product intervention powers for practices and products that cause consumer harm and after two prolongations of six months, an automatic one-year prolongation of the prohibition is possible (Article 9.5). In your view, are these powers effective for their intended purpose? Please explain your answer.**

Yes. Consumers should not be exposed to financial products that can cause wide consumer harm, be too complex or overwhelmingly result in losses for consumers. In 2018, we [supported](#) ESMA's decision to use its product intervention powers to restrict the marketing of binary options and contracts for difference to consumers, which were necessary to avoid further consumer detriment following evidence that most retail consumers often losing money when trading such instruments. We believe that these rules are effective for their intended purpose, and urge the European Supervisory Authorities to make active use of its product intervention powers under sectoral legislation to restrict the marketing of harmful financial products to consumers.

### **1.8.6 Please rate the new ESAs task to coordinate mystery shopping activities of competent authorities, if applicable, according to its relevance to promote consumer protection at EU level (1 standing for "less relevant" and 5 for "most relevant"). Please explain your answer and indicate whether you consider enhancing national competencies for conduct supervision may be beneficial for the overall coordination of mystery shopping activities.**

	1	2	3	4	5
EU-level coordination of mystery shopping					<b>X</b>

Mystery shopping exercises are a very useful tool to promote consumer protection at the EU level, and can help supervisors understand what types of financial products are being distributed to consumers, whether firms are complying with conduct of business obligations and help supervisors to measure the quality of customer service that is provided to clients. Mystery shopping exercises can allow NCAs to get better insights into the conduct of financial institutions, in turn encouraging firms to better comply with the application of

requirements under EU and national law, and enhancing the protection of consumers in these markets.

Since the 2019 ESAs reviews, the European Supervisory Authorities have the power to 'coordinate' the mystery shopping exercises of national competent authorities. However, so far these powers have only been used a limited way by the European financial supervisors, focused primarily on assessing how such exercise are used by EU NCAs and developing best practices.

For instance, in 2021, the European Banking Authority (EBA) published a [report](#) on mystery shopping exercises to share experiences and identify good practices for NCAs that intend to use mystery shopping in future. The EBA report notes that at this stage, only a limited number of NCAs carried out such mystery shopping activities in their jurisdictions, and that certain national competent authorities do not currently have the powers to carry out such exercises. In 2020, the European Securities and Markets Authority (ESMA) announced in its [Strategic Orientation](#) that it would coordinate a mystery shopping exercise to assess the types of retail investment products that are distributed to consumers. In its 2020 [Work Programme](#), ESMA sets out that the main purpose of its mystery shopping exercises coordination function would be to learn from other NCA's experiences and to compare the results of individual NCAs.

The European Supervisory Authorities should be given the powers to conduct mystery shopping exercises themselves (without the coordination of NCAs), rather than merely have the powers to coordinate such exercises with NCAs. In addition, we believe that all national competent authorities in Europe should have the power and be encouraged to carry out mystery shopping exercises.

**1.8.7 Does the ESAs' governance allow them to ensure objectivity, independence and efficiency in their work/decision making? Please explain. If you consider that there should be differences in governance between different types of tasks, please indicate.**

No. The governance structure of the ESAs can cause conflicts of interests and reduce the efficiency of decision-making in their work. There is a need to ensure that the European Supervisory Authorities can act in a more independent manner from the national competent authorities in the EU Member States. The ESAs Board of Supervisors are composed by 27 heads of the national competent authorities for the supervision of financial institutions in each of the EU Member States. BEUC continues to support earlier proposals from the European Commission for the establishment of a new governance framework with strong powers for an independent Executive Board.

**3.4 Have you identified any areas where supervision at EU level should be considered?**

Yes.

As sustainable investing gains traction, investors are relying increasingly on ESG ratings when taking investment decisions. However, the market for such ratings is currently largely unregulated and unsupervised in the European Union. ESG ratings often display very low levels of correlation (companies often have widely different ESG ratings depending on the rating provider providing the rating), and there is evidence that companies in highly polluting industries can in some cases obtain high environmental scores from certain ESG rating providers. In 2020, the European Commission published an [external study](#) on the

reliability and quality of ESG ratings, concluding that there is an overall demand for greater transparency about the methodologies for sustainability-related rating providers. The Dutch AFM, [the French AMF](#) and [ESMA](#) have called for ESG ratings to be regulated and supervised at the European level. Rules should be adopted to ensure that ESG rating providers rely on robust data, and that they use sound and transparent methodologies for the calculation of ratings. ESG rating providers should be regulated and supervised by ESMA.