The review of the European Securities and Markets Authority (ESMA) in Regulation (EU) 2019/2175. International Bulletin of February 2020.

The review of the European Supervisory Authorities (ESAs) is contained in Regulation 2019/2175, called the omnibus Regulation, because it amends not one but several Regulations, including Regulation 1095/2010 creating the European Securities and Markets Authority (ESMA), Regulation 600/2014 regarding the markets of financial instruments (MiFIR) and Regulation 2016/1011 on the indices used as a benchmark in financial instruments and in financial contracts or to measure the performance of investment funds.

Regulation 2019/2175, which is the result of a long and complex legislative process, reflects a balance between the new direct supervisory powers attributed to ESMA, along with other new functions and capabilities, and those that remain within the remit of the national competent authorities (NCAs) of Member States.

Specifically, the new ESMA Regulation constitutes a significant development by incorporating technological innovation and financial sustainability into the activity and functions of this Authority. It also incorporates reinforcement of investor protection, as well as new tools to achieve greater supervisory convergence of the securities markets in the European Union. All of this is facilitated by a more transparent and effective government that will take the principle of proportionality into account, where appropriate.

The highlights and new aspects contained in Regulation 2019/2175 that affect ESMA are as follows:

1) New direct supervisory powers (authorisation and supervision)

ESMA will exercise new direct supervisory powers over, on the one hand, the critical benchmarks administrators of the European Union and benchmarks administrators of third countries and, on the other, the consolidated tape providers, the approved publication arrangements and the approved reported mechanisms, except in the last two cases if, due to their lack of relevance for the internal market, they are subject to the competence of the corresponding NCA.

2) New functions related to technological innovation and financial sustainability

The following are the new functions attributed to ESMA in this area:

.- promote sustainable business models and integrate environmental, social and governance (ESG) factors into the EU's financial legislation within the framework of its performance or that directly related to it;

.- follow market developments taking into account innovative financial service trends and the development of ESG factors;

.- pay attention to technological innovation, innovative and sustainable business models and the integration of ESG factors;

.- include the potential systemic risk related to the environment in solvency tests to determine the exposure of market participants;

.- promote bilateral and multilateral exchange in cybersecurity and cyberattacks;

.- set up a monitoring system to assess significant ESG risks taking into account the Paris Agreement on climate change;

.- develop sectoral and cross-sector training programmes in relation to technological innovation; and

.- contribute to the establishment of a common European approach in the field of technological innovation,

facilitating the entry into the market of agents or products based on it.

3) New functions and tools to improve investor protection

The new functions, together with changes to existing ones, which seek to reinforce ESMA's role in this area are as follows:

.- promote the protection of consumers and investors regarding the shortcomings that occur in cross-border contexts;

.- analyse the evolution of the costs and expenses of financial products and services for retailers and report on it;

.- carry out comprehensive thematic reviews on market behaviour while establishing a common interpretation of practices;

.- develop risk indicators in retail investment for the quick identification of possible causes of damage for this group of investors;

.- contribute to equal conditions in the internal market (level playing field) so that consumers and other users of financial services have equal access to services and products;

.- coordinate mystery shopping activities of the NCAs where appropriate;

.- carry out research on a particular type of financial activity, product or behaviour to be able to make recommendations to the affected NCAs at the end of the investigation; and

.- establish a new **Committee on Consumer Protection and Innovatio**n consisting of NCAs and consumer protection authorities, where appropriate, to improve consumer protection, to achieve a coordinated approach to the treatment of innovative financial activities and to provide advice to ESMA and the European institutions.

In addition, the period for reviewing decisions taken by ESMA in the exercise of powers of intervention for financial products or activities is extended to six months with two consecutive renewals and a third one-year renewal.

4) New functions and tools to improve supervisory convergence

In this area it should be noted that one of the main purposes of this review is to deepen supervisory convergence in order to accelerate the integration of markets and complete the Capital Markets Union. Therefore, among the objectives of this Authority, the legislator has expressly included '*improve supervisory convergence throughout the internal market*'.

In order to move towards a **common supervisory culture**, ESMA will perform the following activities:

- develop and keep an updated EU supervision manual with best practices and high quality methods and procedures;
- establish up to two priorities of Union-wide relevance at least every three years, which will be taken into account by the NCAs when developing their work programs;
- create coordination groups on defined aspects that may require coordination based on a specific market trend, and its creation is mandatory if requested by at least five members of the Board of Supervisors.

In addition, in order to promote supervisory convergence, ESMA will have a **wide range of tools,** some already existing but improved and others regulated for the first time, although ESMA had been using them in practice.

This review regulates the following **existing** tools in greater detail: i) **guidelines and recommendations**, in relation to which it is made clear that ESMA is obliged to state the reasons for which it has not carried out public consultations or sought the advice of the stakeholder group in its processing; and ii) the **peer reviews** of the NCAs to be carried out by ad hoc peer review committees comprising ESMA and NCAs' staff and chaired by a staff member of the European Authority. In addition, ESMA will prepare a report with the results of the evaluation and a follow-up one two years after the publication of the first one and will publish the main conclusions of both. When these differ from those determined by the peer review committee, ESMA will confidentially forward the latter's conclusions to the European institutions. The Board of Directors will be responsible for preparing the biannual work program for peer reviews.

Although ESMA has already been using them since their creation, the following are the new regulation tools: i) the **Opinions** that this Authority can issue addressed to the European institutions on matters within its competence and ii) the **Questions and Answers documents** that include ESMA's responses to questions from any natural or legal person, including NCAs and European Union bodies on the practical application or implementation of European regulatory provisions, as well as of the guidelines and recommendations. The answers are not binding and ESMA must enable an internet tool for asking questions and publishing questions and answers.

Finally, another innovative coordination function is attributed to ESMA in the area of **suspicious orders, transactions and activities with significant cross-border effects**, when a NCA notifies this Authority that it has clear proof or evidence to suspect that such transactions pose a threat to the orderly functioning and the integrity of the markets or the financial stability of the EU. Specifically, the review empowers ESMA to issue at its discretion an opinion addressed to the NCAs on the appropriate follow-up in the Member States where the alleged activity occurred.

5) Other new ESMA functions and competences

The review attributes other functions and new relevant competences to ESMA, some of which were already partially de facto exercised in practice, but which are included for the first time in the Regulation after the review. These are:

.- contribute to establishing a common financial data strategy in the EU;

.- develop common methodologies to determine which financial market participants should be included in the resilience assessments at EU level, as well as to assess the impact of economic scenarios on the financial situation of the participants, taking into account the risks of an adverse environmental trend;

.- promote supervision plans and joint exams in the colleges of supervisors and convene meetings, if appropriate;

.- issue and publish an opinion and provide advice if requested by the European Parliament, the Commission or the Council concerning the prudential assessment of mergers and acquisitions, if requested by an affected NCA;

.- establish with the European Banking Authority (EBA) and the European Insurance and Occupational Pensions Authority (EIOPA) a system of relevant information exchange relevant to the assessment by NCAs of the fitness and propriety of holders of qualifying holdings directors and key function holders;

.- To inform, in exceptional circumstances, NCAs and the European Commission when it considers that the application of regulatory provisions may pose significant problems by directly conflicting with others or due to the lack of regulatory developments or guidelines that hinder the application of the law and to issue opinions addressed to the European Commission proposing regulatory amendments if necessary or, in the meanwhile, opinions on the uniform application of EU Law and its supervision.

.- in the international sphere, develop a compliance monitoring activity of the criteria based on which the equivalence decisions of third countries were adopted by the Commission, develop administrative agreements and contribute to the representation of the interests of the EU in international fora;

.- have specific notification channels for receiving and processing information provided by natural or legal persons (whistleblowers) who report infringements, abuses of law and omissions of application of EU law; and

.- publish and update the technical standards, guidelines, recommendations and questions and answers on its website.

6) New provisions regarding its governance

The review subjects ESMA's activity to a very detailed accountability obligation that implies a notable **increase in the transparency of its actions**. For example, the annual report includes information on the performance of duties of the Chair who will participate in an annual hearing before the European Parliament and will report to it in writing when requested to do so. In addition, the procedure for processing technical standards requires, at the various stages, information to be sent to the European Parliament and the Council and mandatory public consultations, unless they are highly disproportionate to the scope, impact or urgency. Public consultations carried out within the framework of technical standards, guidelines and opinions will be carried out as widely as possible to ensure an inclusive approach. A period for responses will be granted and a summary of the contributions received and an overview of how the opinions received have been used in the draft technical standards will be published. Finally, it should also be noted that, no later than six weeks after the date of the Board of Supervisors'

meetings, the Authority shall provide the European Parliament with a record of the meetings' proceedings, together with an annotated list of the decisions.

The **Board of Supervisors** may have as invited members the national authorities responsible for consumer protection where this competence does not lie with the NCA members of the Board and theNCAs decide to invite them. The new rules also reinforce the independence of its members and the prevention of conflicts of interest with stricter rules. Specifically, members of the Board of Supervisors may not participate in the debate or in the voting of those items on the agenda that specifically and directly affect the NCA they represent. The review also promotes the transparency of the decision-making process of this body through the obligation to send to the European Parliament a complete and significant record of the proceedings, including an annotated list of the decisions taken.

The **Management Board** has broader powers to examine and formulate an opinion as well as submit proposals on all matters that are decided by the Board of Supervisors, except for peer reviews. In addition, it is authorised to request the creation of internal committees and coordination groups.

The **Chair** also comes away with a strengthened role and new functions from this review. In particular, it should be noted that the Chair acquires the voting right on the Board of Supervisors and the Management Board, except for on the adoption of technical standards, guidelines and the budget. In addition, the Chair is responsible for setting the agenda, convening meetings and presenting points for decision at the Board of Supervisors and the Management Board. The Chair may also invite the latter to study the possibility of creating coordination groups, exercise the initiative to request the creation of internal committees and propose to the chair and members of the peer review committee. Another relevant novelty is that the Chair will publicly announce all meetings held with external stakeholders within two weeks of the meeting as well as any hospitality received.

The **Securities and Markets Stakeholder Group** will be appointed, like the ESMA Chair, in an open and transparent selection procedure and one third of its members shall be permitted to issue separate advice.

The **Joint Committee** of the ESAs has new areas of action such as prudential consolidation, cybersecurity, advice by the Proportionality Committee and the interconnection of centralised automated mechanisms that enable the timely identification of any natural or legal person that holds or controls payment and bank accounts.

In addition, this review creates two **new committees** in ESMA: the **Consumer Protection and Financial Innovation Committee** (see point 3) and the **Proportionality Committee**. The latter will advise ESMA on how, in full compliance with applicable rules, its actions and measures should take into account specific differences that prevail in the sector and which are related to the nature, scale and complexity of the risks, with business models and business practices and with the size of entities and financial markets, to the extent that such factors are relevant.

It is also worth mentioning that Regulation 2019/2099, which amends Regulation 648/2012 as regards the procedures and authorities involved for the authorisation of CCPs and requirements for the recognition of third-country CCPs (EMIR 2.2), includes the creation of a **permanent internal Committee in ESMA for supervision of CCPs** formed by the NCAs with authorised CCPs, 3 independent (Chair and two members) and Central Issuing Banks, if applicable.

Finally, the review of the EBA Regulation, also amended in Regulation 2019/2175, creates a **permanent internal Committee** in this Authority **for anti-money laundering and countering the financing of terrorism**. ESMA representatives can participate in these meetings without the voting right, but with the power to submit written observations in the case of entities subject to its supervision.

7) New provisions on the principle of proportionality and better regulation

In addition, in the performance of its functions, ESMA shall respect the principle of proportionality and the principle of better regulation, where appropriate. Furthermore, the Board of Appeal must provide legal advice on the legality, including proportionality, of ESMA's exercise of its functions. Similarly, any natural or legal person with a vested interest may contact the Commission if it believes that ESMA has exceeded its powers, including not acting in accordance with the principle of proportionality in relation to guidelines and questions and answers.

Link of interest:

Regulation 2019/2175