

Briefing

November 2017

Capital Markets: Proposal to give ESMA further powers

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The European Commission has proposed that ESMA be given direct supervision powers in certain key capital markets sectors, including prospectuses, market abuse, product intervention and benchmarks. At this stage, the proposal (which includes both a draft directive and a draft regulation) is very much in draft form, and needs to be considered by both the European Parliament and the EU Council. If adopted, the proposal will most likely come into effect in 2019 and apply from 2021. It is possible that the proposal will undergo considerable amendment as it moves through the EU legislative process.

PROPOSED DIRECT SUPERVISION BY ESMA

The Commission has proposed that ESMA be given direct supervision powers in respect of certain elements of the following:

- » The new Prospectus Regulation.
- » The Market Abuse Regulation.
- » MiFID II and MiFIR.
- » The Benchmarks Regulation.
- » Certain collective investment funds (European Venture Capital Funds, European Social Entrepreneurship Funds and European Long-Term Investment Funds).

WHAT WILL NOT CHANGE?

The supervisory responsibilities of national competent authorities (NCAs) in the following areas will not change as part of this proposal:

- » UCITS.
- » Alternative Investment Funds (AIFs).
- » Money Market Funds.
- » Central Securities Depositories.
- » Trading Venues.

CONTEXT FOR THE PROPOSAL

The capital markets areas in which the Commission is proposing direct supervisory powers for ESMA are those where significant cross-border activities are carried out, and which are already subject (for the most part) to directly-effective EU regulations.

The Commission's view is that, in light of Brexit, strengthened supervisory arrangements are needed to ensure a sound and adequate basis for financial markets, and a more centralised supervisory approach will reduce the risk of regulatory arbitrage.

PROSPECTUSES

Under the Commission's proposal, ESMA will be the competent authority for the scrutiny and approval of the following prospectuses:

- » prospectuses for the admission to trading of debt securities on a regulated market (or part thereof), to which only qualified investors have access;
- » prospectuses relating to asset-backed securities;
- » prospectuses from specialist issuers (property companies, mineral companies, scientific research based companies and shipping companies established in the EU); and
- » prospectuses drawn up by third country issuers.

ESMA will also be given the power to approve advertisements in relation to the above prospectuses (if an NCA asks it to formally control the compliance of those advertisements with the new Prospectus Regulation).

As regards the equivalence regime for prospectuses prepared under the laws of a third country, where the

Commission makes an equivalence declaration in respect of those laws, the third country prospectus as approved by the supervisor in that country will only be filed with ESMA, and ESMA will then send a certificate of filing (not a certificate of approval) to the NCA in the relevant EU Member State(s).

MARKET ABUSE REGULATION

Under the proposal, ESMA will:

- » have a right to initiate investigations where certain orders, transactions or behaviour give rise to well-founded suspicion and have cross-border implications for the integrity of financial markets or financial stability in the EU; and
- » in connection with the above, be able to recommend that authorities in the relevant Member States concerned initiate an investigation and exchange relevant information among each other and with ESMA.

MIFID II AND MiFIR

Under MiFIR, ESMA and NCAs can, in specific cases, exercise product intervention powers i.e. they can restrict or ban the marketing, sale or distribution of units or shares in UCITS or AIFs. The Commission proposes to extend these powers to cover the management companies of UCITS and UCITS investment companies, and AIFs.

The authorisation and supervision of data reporting service providers will also, under the Commission's proposal, be moved from NCAs to ESMA.

BENCHMARKS REGULATION

The Commission proposes that ESMA:

- » supervise "critical" benchmarks (such as EURIBOR), with the requirement for colleges of supervisors for those critical benchmarks being abolished;
- » act as the competent authority for recognising third country administrators; and
- » act as the competent authority for endorsing non-EU benchmarks.

COLLECTIVE INVESTMENT SCHEMES

Under the Commission proposal, European Venture Capital Funds, European Social Entrepreneurship Funds and European Long-Term Investment Funds would all be subject to direct supervision by ESMA with a view to reducing costs, streamlining administration, and ensuring a level playing-field.

**PROMOTING SUPERVISORY
CONVERGENCE**

The Commission also proposes that ESMA develop a supervisory handbook, and be given greater powers to promote supervisory convergence.

COMMENT

Aspects of the proposals are likely to prove contentious. Under Article 20 of PD3, it will be possible for the relevant competent authority to take up to 20 working days to approve certain prospectuses. Where ESMA is substituted as the competent authority for certain prospectuses, it is not yet clear whether it will have the resources to approve prospectuses more quickly and in line with current turnaround times in Ireland, or whether issuers may face a longer wait for approval than is currently the case. Much will depend on feedback received by the Commission to its proposals, and how debate progresses at European level.

KEY CONTACTS

If you require advice or further information, please contact any member of our team or your usual Arthur Cox contact.



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