

General remarks by the Ministry of Finance of The Netherlands

Targeted consultation on the supervisory convergence and the single rulebook

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As European financial markets become more and more integrated, a single rulebook accompanied by a strong European supervisory framework is essential to promote confidence in the financial system and to guarantee consistent supervisory outcomes. This is of essential importance in achieving a real and well-functioning Capital Markets Union (CMU). In order to strengthen and deepen the CMU both more supervisory convergence among national supervisors and strong European Supervisory Authorities (ESA's) with clear powers and responsibilities are a prerequisite. When it comes to the CMU, this is especially the case for the European Securities and Markets Authority (ESMA). While considerable steps have already been taken on supervisory convergence and the enhancement of the single rulebook, the Netherlands agrees with the Commission that continued efforts for improvement are necessary. In this respect, the Netherlands supports the action that was included by the Commission on enhancing the single rulebook and strengthening supervisory convergence in the 2020 CMU Action Plan.

In general, the Netherlands highly appreciates the work of the ESA's and believes they have positively contributed to supervisory convergence. The Review of the European System of Financial Supervision (ESFS-review) strengthened to the indirect convergence powers of the ESA's and some aspects of the governance of the ESA's. Considering that the amendments of the ESA-regulations have been in force since the beginning of 2020, it may be too soon to already come to decisive conclusions on the updated powers and governance structure. Nevertheless, the Netherlands still holds the position that was taken during negotiations that a more independent chairperson that has a certain degree of autonomy in relation to indirect supervisory convergence powers is important. Thus, the steps already taken during the ESFS-review should not be reversed, but further steps should be taken. The Netherlands also considers that the governance structure of the ESA's and their tasks and powers are clearly linked: changes in the governance structure should flow from changes in tasks and powers.

Supervisory convergence begins with a consistent legal framework concerning exchange of information between national supervisors and an effective set of supervisory and sanctioning powers for national supervisors. Currently, the rules governing exchange of information and powers are set by sectoral legal acts. As such, there is no consistent supervisory toolbox for national supervisors concerning the financial markets and its participants and this may hamper effective (cross-border) supervision. The Netherlands therefore calls upon the Commission to assess whether a horizontally harmonised legal framework concerning exchange of information and supervisory and sanctioning powers is feasible.

The Netherlands would furthermore recommend the ESA's to invest in behavioural knowledge to further improve understanding of the markets, and as a result improve supervision and advices of the ESA's to the European Commission. Behavioural research shows that consumers are boundedly rational, and behave systematically different than the homo economicus. This knowledge can for instance be used to improve consumer protection. It has become clear that providing all the necessary information does not lead to better choices, but can instead lead to information overload

and consumers being put off reading it. As regulators and supervisors we have to extend our view on consumer protection by better understanding how the immediate choice environment is impacting on consumers' choices. The choice environment being the way in which financial institutions present choices to consumers, and the way in which they frame and structure information. The ESA's could take a leading role in exploring how financial institutions possibly steer consumers' decisions in ways that are not in their interest, and consider if requirements to design and standard options are necessary. Also, the ESA's could explore how the impact of legally required information provision on consumers' choices could be improved by making it a more salient part of the choice architecture. We believe convergence in assumptions about consumers' behaviour based on recent empirical behavioural research is highly desirable and the ESA's could lead the way.

The Netherlands has always considered that a successful CMU ultimately needs a single European capital markets supervisor. Naturally, this "dot on the horizon" will not be realized in the short term, but given the ambitious goals of the CMU Action Plan, it is our view that actions undertaken in the short run should contribute to the long term goal of supervisory convergence. The Netherlands would therefore encourage the Commission to further explore which supervisory tasks and fields could be organized more effectively on a European level and, if so, which ESA would be best placed to perform these tasks. In the box below, we propose our suggested blueprint for such a framework.

A starting point to assess at which level supervisory tasks are best organized would be – as previously suggested by the NextCMU High-Level Group – to develop a framework of criteria to help with that assessment. This framework could be used when a new directive or regulation is prepared or when an existing directive or regulation is reviewed. The following criteria should in our view at the least be part of the aforementioned framework.

- Firstly, the level of integration is an important factor. Market segments where business is principally European and of a cross border nature are most likely to benefit from more centralised European supervision. In these market segments, more centralised supervision can help reduce market fragmentation and contribute to a better functioning and more integrated European capital market.
- Secondly, the level or harmonisation of rules should be looked at. There must be clear and unambiguous rules that ensure that the regulator remains responsible for rule setting and the relevant ESA would not, at the same time, set rules and act as a supervisor.
- The third criterion would be the type of market participant. Where a market segment is characterized by a large amount of retail participants and financial supervision is therefore intertwined with aspects of consumer protection, supervision would probably be better organised at the local (Member State) level, while wholesale markets where predominantly professional participants operate would be better suited for centralised supervision.
- Finally, the capacity of the ESA's to perform new direct supervision tasks ought to be taken into account. A big bang of new powers will undoubtedly cause severe transitional issues; a gradual, segment by segment, transition is needed in order for the organization to be able to adapt.

While such a framework would be relevant for all ESA's, the Netherlands acknowledges that the level of integration of markets and supervision is at a different stage in the areas of banking (EBA) and insurance and pensions (EIOPA) in comparison to capital markets (ESMA). In practice, the Netherlands does not immediately see the need for fundamental change in the tasks and powers of

EBA and EIOPA; we are supportive to continue these organizations in their current form with their current mandate. Considering the CMU Action Plan and its goals, changes in mandate could be envisaged for ESMA. The Netherlands would be open for the Commission to explore whether ESMA should have a broader mandate concerning supervision for instance on post-trade infrastructure.

Lastly, the Netherlands would like to point out that one of the consequences of better integrated capital markets is that national supervisors are increasingly confronted with cross-border activities where – per the EU passport system – the home supervisor is responsible for the market participant that engages in cross-border activities. This raises the question whether national regulators have the capacity to address the risks created by entities under their supervision that engage in activities outside their jurisdiction, in other EU member states. There have been cases where entities engaged in cross border activities that were deemed to be not appropriate by the host Member State, but where it has been difficult to get a satisfactory supervisory outcome. In order to address this issue we should prevent a tendency to lower standards and instead focus on promoting supervisory convergence and enhancing the single rulebook. Ultimately, host Member States should be able to effectively protect investors and the proper functioning of their markets. In that regard, we call upon the Commission to review whether powers such as described in article 86 of MiFID II need strengthening and if these provisions would be suited for horizontal harmonisation.