



European Securities and  
Markets Authority

# Report

**on the independence of National Competent Authorities**



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## List of Acronyms and abbreviations

<b>BoS</b>	Board of Supervisors
<b>EC</b>	European Commission
<b>ESAs' Review</b>	Means the review of the 2010 Regulations setting up each of the European Supervisory Authorities that resulted in the entry into force of revised Regulations on 1/1/2020
<b>ESMA Regulation or ESMAR</b>	Regulation (EU) No. 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC
<b>IOSCO</b>	International Organisation of Securities Commissions
<b>IOSCO Methodology</b>	IOSCO Methodology for Assessing Implementation of the IOSCO Objectives and Principles of Securities Regulation
<b>IOSCO Principles</b>	IOSCO Objectives and Principles of Securities Regulation
<b>NCA</b>	National Competent Authority
<b>OECD</b>	Organisation for Economic Cooperation and Development
<b>UNODC</b>	United Nations Office on Drugs and Crime

## Background

### Reasons for publication

1. Following the ESAs' Review, ESMA has a reinforced obligation to foster and monitor NCAs' supervisory independence<sup>1</sup>. This new obligation adds to the already existing assessment of the degree of independence of the NCAs in the peer reviews<sup>2</sup> ESMA conducts.
2. Based on self-assessments provided by NCAs, this report takes stock of the situation on NCAs' independence along key angles, namely operational, financial and personal independence as well as accountability and transparency. This report does not represent an assessment of NCAs' independence, rather it seeks to factually represent the legal and operational position of NCAs under the key angles of independence. It is based on information, with varying degrees of granularity, provided by the NCAs.
3. This report can support NCAs in assessing whether it might be desirable for them to seek any legislative or regulatory amendment to further improve the framework underpinning their independence. Moreover, it can provide valuable information to ESMA for future work in the field of supervisory convergence, including peer reviews.
4. In addition, the report can be used by the European Commission for its report to be issued under the ESMAR review clause by January 2022 evaluating, inter alia, "the independence of the competent authorities and convergence in standards equivalent to corporate governance"<sup>3</sup>.
5. The revised founding Regulations grant all ESAs the same reinforced task to foster and monitor supervisory independence. ESMA has therefore coordinated with both EBA and EIOPA in the preparatory work for this report<sup>4</sup>.

### Content

6. This report contains an executive summary and is divided in two chapters. The first chapter explains the context in which information was gathered from NCAs. The second chapter presents the outcome of the information gathering, structured around four sections, namely operational, financial and personal independence as well as accountability and transparency.

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<sup>1</sup> Article 8.1 (b) of Regulation (EU) N.1095/2010

<sup>2</sup> See Article 30.3 of Regulation (EU) N. 1095/2010

<sup>3</sup> Article 81(1)(a)(i) of Regulation (EU) N.1095/2010

<sup>4</sup> The number of NCAs may not always add up perfectly to 30 and all NCAs may not always be listed under all items. This is due to the different level of details provided by NCAs.

## Executive Summary

7. Independence of NCAs is of paramount importance to support fair, efficient and transparent markets and hence to foster confidence in financial markets and the protection of investors. NCAs' independence is key to achieving effective and efficient supervision as well as the consistent application of EU rules across Member States. NCAs' independence thereby supports ensuring a level playing field of high-quality regulation, supervision, enforcement and hence supervisory convergence.
8. The achievement of NCAs' independence is multi-faceted and is dependent on a number of legal, institutional, operational and cultural factors. Independence is first enshrined in legislation and institutional design, but it is also how NCAs operate on a day-to-day basis through their activities, decision-making and stakeholder engagement, which embeds the culture of independence and the achievement of good regulatory outcomes. Achieving good regulatory outcomes requires that NCAs' decisions are made in an objective, impartial and consistent manner, without conflict of interest or improper influence.
9. Stakeholder engagement and public consultation on key policy proposals are an important part of the regulatory process. NCAs need to understand developments in the market and investor behaviour in order to assess the impact of their decisions. However, conflict of interest is a risk that must be closely monitored, and a balance needs to be struck to avoid any undue influence from interested parties or political interference in the regulatory process and supervisory activities. Similarly, NCAs benefit from a healthy turnover of staff from and to industry but it is important to have a legal framework and internal ethics codes, which promote the standards and behaviours of objectivity and independence. Rules on cooling off periods are also necessary to manage any actual or potential conflict of interests between the NCA and industry. The capacity of the NCA to act independently will be enhanced by adequate legal protection for the NCA and its staff when acting in the bona fide discharge of their functions and powers.
10. NCAs' independence cannot be ensured without financial independence and this requires an appropriate stable source of funding and proper resources including the ability to recruit and retain suitable expertise and qualified staff.
11. Finally, independence can only be conferred on NCAs where this is accompanied by a strong framework of public transparency and accountability. NCAs must be able to communicate and explain their policies and decisions in order to promote public understanding and trust in the regulatory process and there should be a system permitting judicial review of final decisions of the NCA.
12. In this report, NCAs' independence is analysed in consideration of the operational, financial, personnel angles as well as accountability and transparency. Lacking

specific legal requirements in EU legislation in terms of criteria underpinning independence of NCAs<sup>5</sup>, this report builds on experience in using the relevant IOSCO Objectives and Principles of Securities Regulation (“Principles”) and on their interpretation provided in the IOSCO Methodology for Assessing Implementation of the IOSCO Objectives and Principles of Securities Regulation (“Methodology”), in particular, IOSCO Principles 2 and 3.

13. Disclaimer: This report was prepared on the basis of information provided by NCAs reflecting the legal framework as of May 2021<sup>6</sup>.

## **Operational Independence**

14. Independence depends on how NCAs operate on a daily basis in their activities, decision-making and stakeholder engagement. This is the way NCAs operate that embeds the culture of independence and the achievement of good regulatory outcomes.
15. When analysing NCAs’ independence from the operational angle, consideration was given to the absence of interference from governments, authorities and sectoral interests, the adequacy of the legal powers and resources granted to the NCAs to fulfil their missions. Operational independence allows NCAs to operate free of influence from the government and industry on a day-to-day basis. This is important to allow NCAs to carry out their regulatory mandate in a consistent and objective manner and make decisions which are not influenced by short term political interests.
16. Generally, NCAs confirm that they are independent authorities, who operate independently on a day-to-day basis, and are not bound by any instructions from Government or any other body or institution. There are different approaches across NCAs in relation to, on one hand, when consultation is mandatory and, on the other hand, circumstances where NCAs are required to consider requests made by Governments. Approximately half of the NCAs are required to consult when exercising their powers to implement secondary legislation. This includes consultation with Government, Ministry of Finance, other public authorities including when supervisory competences are shared, other bodies or the public<sup>7</sup> in general. Interactions could be desirable<sup>8</sup> but the process for consultation should be transparent and consultation with, or approval by, a Ministry or other authority should not include operational decisions. As part of their daily operations, NCAs cooperate and exchange information with

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<sup>5</sup> Although certain recitals, such as recital 137 of MiFID II, refer to independence of regulators.

<sup>6</sup> Relevant updates since May 2021 are included in a footnote e.g. in Germany some Acts were revised and are applicable since July 2021 (see: <https://www.bafin.de/dok/16457336> ).

<sup>7</sup> The IOSCO Methodology indicates that, subject to supervisory or enforcement concerns, consulting with the public in the formulation of policy as contemplated under IOSCO Principle 4 does not impair independence.

<sup>8</sup> OECD notes that “independence does not imply that regulators are anonymous, silent, or above and beyond the policy arena. Regulators interact with ministries, who are ultimately responsible for developing the policies for the regulated sector; with parliaments, who approve those policies and often evaluate their implementation; with the regulated industry, which needs to comply with the decisions of the regulator; and with citizens, who are the ultimate beneficiaries of the actions of governments and regulators. These interactions are inevitable and desirable. The balance between the appropriate and undue influence that can be exercised through these interactions is at the core of the discussion on the independence of regulators”. (OECD, Being an Independent Regulator, The Governance of Regulators, OECD Publishing - 2016, Paris, <https://doi.org/10.1787/9789264255401-en>)

Government and other relevant bodies. In addition, while the vast majority of NCAs are established as independent bodies, a few are established under the aegis of a Ministry and a limited number are subject to instructions from the Minister in relation to supervisory matters.

17. The vast majority of NCAs report the existence of legal provisions governing the avoidance of conflict of interests. For many NCAs, these legal provisions are supplemented by internal rules, codes of ethics and policies. For instance, the majority of NCAs apply conflict of interest rules during the notice period for their staff while some NCAs do not. In addition, a few NCAs have put in place rules applicable to members of the governing body to manage conflicts of interest that may arise in certain circumstances.
18. Almost all NCAs consider that they have adequate legal powers to meet their regulatory mandate notably supervision, inspections, requests for information and documents as well as ability to impose sanctions, including fines. The distribution of competences among NCAs vary depending on the jurisdiction's supervisory model<sup>9</sup>, but most NCAs have regulatory responsibility over most supervised entities throughout their entire life cycle, from authorisation to the withdrawal of the authorisation. However, it is fair to note, as some NCAs raised, the challenge for legal mandates and powers to adapt and keep pace with the changing financial landscape and the resource demands this creates.
19. Delegation to an external party may have an impact on the independence of NCAs depending on their scope and framework. While the vast majority of NCAs cannot delegate their powers to third parties, a few are permitted to do so. Some of these NCAs are allowed to delegate in full some powers. For the purposes of this report, the following situations would not qualify as external delegation: (1) carrying out individual checks in the limitative scope provided by EU legislation such as MiFID II, (2) delegation of tasks and responsibilities to other competent authorities or ESMA under Article 28 of the ESMA Regulation.
20. Not all NCAs report being in a position to hire staff needed for the fulfilment of their supervisory tasks. In addition, a number of NCAs noted the challenge in recruiting experienced staff, particularly while competing for talent with private industry who offers more attractive remuneration packages. In that respect, some NCAs indicated they are in a position to pay higher salaries compared to other public sector entities or have their level of salaries linked to relevant industries, and/or reported offering adequate training opportunities, including those provided by ESMA, to their staff.

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<sup>9</sup> The IOSCO Methodology relating to Principle 3 notes that, where there is more than one responsible authority, the powers required may be distributed among them, but the powers granted, taken together, should be sufficient to provide the ability to achieve implementation of the IOSCO Principles.

## Financial Independence

21. As per the IOSCO Principles and Methodology<sup>10</sup>, “the regulator should have a stable source of funding sufficient to exercise its powers and responsibilities. [...] A stable source of funding is critical because operational independence can be compromised if funding can be curtailed by external action”. To be independent, NCAs need to have adequate funding and the ability to use it to fulfil their mission. Supervisory effectiveness is dependent on financial independence to ensure that NCAs have the freedom to determine their staffing, training, and remuneration needs. NCAs should have autonomy over budget approval and ongoing management in order to make necessary investment in IT and other infrastructure to ensure that they can maintain operational effectiveness in a changing environment.
22. While almost all NCAs reported adequate funding to discharge their regulatory mandates, a variety of funding models are in operation.
23. As noted by the OECD<sup>11</sup>, regardless of the source of funding for regulators, particular attention should be paid to the way in which funding needs are determined, appropriated and spent. The majority of NCAs are fully financed from revenues received from supervised entities, with no contributions from the State budget.
24. In some cases, industry fees are collected by the Ministry of Finance who allocates an appropriate budget to the NCA. A number of NCAs are financed from a combination of their own revenues and a contribution from the State budget. For the majority of NCAs budgetary approval is required from the Government and/or the Parliament while for some NCAs Board approval is sufficient. Whatever the source of the contribution, it is key that the NCA’s budget is sufficient to fulfil its mission. In this respect, it can be noted that three NCAs have the ability to use surplus to create reserves for the following budgetary year.

## Personal Independence

25. The independence of NCAs implies personal independence which can be analysed at the level of the governing bodies (e.g. their composition, the appointment and revocation/dismissal of members, the duration of their mandate and its potential renewal) and of the staff. Moreover, in order to act independently and avoid undue influence from industry, it is important that supervisors have legal protection in the bona fide execution of their roles.
26. All NCAs stated that legal procedures for the appointment of the members of their governing body have been established. In general, the members of the governing body are appointed by decision of either the executive branch, the legislative branch or the Head of State, with more than one power being involved in the nomination process in

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<sup>10</sup> See Principle 2, key issue 4 and explanatory notes

<sup>11</sup> OECD notes that “Source of funding – fees, general revenues or a mix of the two – vary but the source appear less important than the way in which funding needs are determined, appropriated and ultimately spent to determine the extent to which regulators can act independently”. (OECD, Being an Independent Regulator, The Governance of Regulators, OECD Publishing - 2016, Paris, <https://doi.org/10.1787/9789264255401-en>)

certain jurisdictions. In most cases, members of the governing body are assessed based on requirements including expertise, lack of criminal convictions and the absence of conflicts of interest. Terms of appointment for members of the governing body varied but are generally between 2 and 5 years with renewal of the appointment allowed in the majority of NCAs. The number of members on governing bodies varies considerably from 2 to 16 members while composition is often influenced by the scope of each NCA's regulatory mandate. The vast majority of NCAs report that there are specific legal procedures for the removal of members of the governing body or, at the very least, that the legislation admits it is possible to dismiss a member of the governing body in some circumstances. For the majority of NCAs dismissal of members is only possible in the case of serious infringement, or misconduct, or if the conditions necessary for the appointments are no longer met.

27. Although almost all authorities reported that there is adequate legal protection for staff in the bona fide discharge of the NCA's functions and powers, a few authorities indicated that the legislation in force does not offer legal protections or that it affords only limited legal protections. In addition, there are differences with regard to the type of legal protections afforded to staff. In a number of jurisdictions, liability rests solely with the NCA and there is no personal liability for staff in the exercise of their duties. Other NCAs reported protection for staff in the bona fide discharge of their duties but they remain liable in other circumstances, e.g. misconduct, negligence or fraud. Some NCAs provide financial support to staff, for example insurance contracts, loans/allowances and/or financial guarantees in the context of legal proceedings initiated by third parties against an individual.
28. Cooling-off restrictions are key to avoid conflict of interest when members of the governing bodies and/or staff are leaving their position in the NCA. They signal a clear and useful distinction between the regulator and the regulated industry. While most NCAs have cooling off restrictions in place for former members of the governing bodies and/or staff either in application of national law or internal rules, their scope of application and duration varies significantly as well whether there is a remuneration during the cooling-off period or not. In addition, some NCAs do not impose restrictions on former members of the governing bodies or staff after they have left their position.

### **Accountability and Transparency**

29. NCAs' independence implies adequate accountability and transparency. NCAs have significant powers in regulating and supervising the financial sector. Therefore accountability, transparency, and integrity are a crucial component of effective regulation and supervision. NCAs should be accountable not only to governmental bodies and/or the Parliament but also to the public at large in relation to their activities and decisions.
30. All NCAs responded that they ensure public transparency through the publication of certain documents, usually on their website. The majority of NCAs publish financial statements and budgets, while some explicitly mentioned that they make public also

their strategic plan/objectives. A large number of NCAs also explicitly mentioned that they disclose the sanctions/measures taken. Some NCAs publish documents in English as well as a way to enhance their accountability towards the public including outside their jurisdiction.

31. In general, NCAs have a duty to report on their activities to a Government body or the Parliament. This usually takes the form of an annual report, which is also available on the NCA's website.
32. Several NCAs mention their accountability to the the Parliament in the form of hearings, special committees, parliamentary questions etc. Some NCAs are accountable to the Minister of Finance, but not on their daily operations.
33. All NCAs report being subject to judicial review in relation to their regulatory or supervisory decisions. In addition, a few NCAs also refer to non-judicial review bodies where decisions can be appealed. The majority of NCAs refer to administrative proceedings for judicial review, while other few jurisdictions also refer to their civil proceedings and criminal proceedings when applicable. In all cases, individuals or firms seeking judicial review of NCA decisions are permitted to make representations to the review body.

## 1 The survey

34. In order to compare NCAs across different angles of independence, ESMA used several sources of information provided by NCAs: responses to a survey conducted by IOSCO on some of the Principles relating to the regulator, but also information gathered through the on-going exchanges with NCAs on their organisation, resources and responsibilities, the recent survey on cooling off periods conducted by ESMA and a few additional questions.
35. Concerning the IOSCO survey, NCAs either shared their existing responses related to IOSCO Principles 2 and 3<sup>12</sup> or responded to the same questions and shared those with ESMA. Principle 2 provides that the Regulator should be operationally independent and accountable in the exercise of its functions and powers, and Principle 3 that the Regulator should have adequate powers, proper resources, and the capacity to perform its functions and exercise its powers.
36. Regarding the ESMA survey on cooling off period, it included questions on the management of conflict of interest during the notice period and after leaving the NCA for both staff and the NCA's management, part of which was particularly relevant for this report.
37. Finally, NCAs were asked to respond to three additional questions related to (1) the risk of conflict of interest, (2) the risk of political interference in the management of the NCA, and (3) the risk of political interference in supervisory activities.
38. The report highlights the main observations resulting from the information gathered and uses a factual approach based on the self-assessment provided by NCAs. The report does not provide an assessment of NCAs' independence.
39. The report is made available to the EC that could use it to prepare its general report on the experience acquired as a result of the operation of ESMA and the procedures laid down in the revised ESMAR. Indeed, this EC general report should cover, among other topics, the independence of NCAs.

## 2 NCAs' independence

### 2.1 Operational Independence

40. The operational independence of NCAs is considered taking into account (1) the absence of interference<sup>13</sup> from the Government, the commercial and sectoral interest, (2) the adequacy of the legal powers of NCAs to perform their tasks and fulfil their responsibilities, (3) the adequacy of their operational resources covering their staffing but also their investments on IT software and hardware.

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<sup>12</sup> <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD561.pdf>

<sup>13</sup> According to the IOSCO Methodology (footnote 22 on page 25), the term "interference" means a formal or informal level and method of contact that affects day-to-day decision making and is unsusceptible to review or scrutiny.

### 2.1.1 Absence of interference

41. The ability to operate independently without interference from Government, commercial or sectoral interests should take into account (1) the existence of a clear and transparent process for consultation with Government or other authorities in relation to decisions, and any requirement to consider the requests made from Government on day-to-day technical matters and freedom of NCA to not accept those requests, (2) the management of conflict of interest (including with regard to commercial or sectoral interests).
42. The IOSCO Methodology regarding Principle number 2 defines the regulator's operational independence, by stating the following: "While the regulator should be accountable under a jurisdiction's legal and governing structure, the regulator should also be **operationally independent from external political or commercial interference**. Without such independence investors and other market participants may come to doubt the regulator's objectivity and fairness, with deleterious effects on the market's integrity. Generally, the regulator's independence will be enhanced by a stable source of funding. It also means that the regulator should remain independent from the market participants that it supervises. Independence implies:
- a regulator that operates independently of sectoral interest; and
  - the ability to undertake regulatory measures and enforcement actions without external (political or commercial) interference."
43. Furthermore, the European Parliament and the Council have already taken into account the importance of the absence of interference and since the beginning the Regulations establishing the three ESAs (article 42) foresee that neither public institutions or bodies, nor any other public or private body shall seek to influence the members of the Board of supervisors in their performance. The section of personal independence of this report also approaches this matter from an independence of board members standpoint.

#### 2.1.1.1 Consultation with Government, other authorities and the public

44. As noted in the IOSCO Methodology<sup>14</sup>, "in some jurisdictions, particular matters of regulatory policy require consultation with or even approval by, a government, Minister, or other legislative authority. The circumstances in which such consultation or approval is required or permitted should be clear and the process sufficiently transparent or subject to review to safeguard its integrity. Generally, it is not appropriate for these circumstances to include decision making on day-to-day technical matters".
45. All NCAs confirm that they are independent authorities. The overwhelming majority of NCAs noted they shall not be bound by any instructions, neither from the Government nor any other body or institution. However, the information gathered in this regard

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<sup>14</sup> <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD562.pdf>. See page 25.

show an interesting variety of formal statuses, including on the extent of which consultation is undertaken beyond regulatory issues, also on supervisory matters.

46. Information provided allows to identify twenty-one NCAs<sup>15</sup> that do not need to seek neither Government nor other authorities' consultation in relation to supervisory decisions.
47. Considerable differences among NCAs exist as regards possible mandatory consultation, the extent to which NCAs are obliged to consult and the potential circumstances in which NCAs are required to consider requests made by Governments.
48. Fifteen NCAs<sup>16</sup> are required to consult in the implementation of their empowerment to issue secondary legislation. Some other NCAs conduct public consultation as a good practice<sup>17</sup>. Besides, some NCAs consult either the Government (mostly the Ministry of Finance) and/or other public authorities<sup>18</sup>. Other NCAs have not reported obligatory consultations before adopting secondary legislation. In addition to consultations, a few NCAs need to obtain specific approval from the Ministry<sup>19</sup> or, in very limited cases, an enactment by the Prime Minister or the Minister of Economy and Finance for certain acts<sup>20</sup>.
49. Six NCAs<sup>21</sup> are established as an independent supervisory authority under the aegis of a Ministry. Each of them has its own specific arrangement for its operation (e.g. functionally and operationally separate from the Ministry<sup>22</sup>, assignment through instructions and annual regulation letter by the Government<sup>23</sup>) as well as for the relationship with the Ministry. One of these NCAs indicated it is subject to instructions from the Minister in matters that do not fall within the independent supervisory activity<sup>24</sup>. Two NCAs indicated they are subject to legal and technical oversight of the Ministry which bears the political responsibility for the NCA's activities and are subject to instructions from the Minister<sup>25</sup>, in relation to the general supervision and/or in specific

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<sup>15</sup> AT, CY, CZ, EE, ES, FI, FR, HR, HU, IE, IS, IT (except the Bank of Italy in areas of shared competences), LT, LV, MT (except the Central Bank of Malta on matters of joint supervisory remit), NL, PL, PT, RO, SE, SI

<sup>16</sup> AT, BE, BG, CZ, DE, DK, FI, HR, IE, IT, HU, LU, LV, PT, SK

<sup>17</sup> LT, MT, SI

<sup>18</sup> AT, CZ, HR (consult the MF when defining the format and content of yearly financial reports for regulated entities falling under the provisions of the Accounting Act), IT (the law specifies where Consob and the Bank of Italy are required to issue regulations after consulting each other in areas of shared competences), PT (non-binding consultation of the Portuguese Central Bank when secondary legislation refers to the organizational requirements applicable to banks and investment companies that provide investment services or to the granting of credit or loans to an investor to allow him to carry out a transaction in one or more financial instruments, where the firm granting the credit or loan is involved in the transaction), SK

<sup>19</sup> AT (approval of a secondary legislative act by a Minister only in specific cases where specified by national law), DE (so called authorisation reservation by the Ministry before issuing regulations and other general decrees)

<sup>20</sup> IT: The NCA's resolutions establishing the fees to be paid by supervised entities and market participants, as well as the regulations adopted by the NCA on its internal organization and operation, staff's legal and economic treatment and its financial management, must be submitted to the Prime Minister who, after hearing the Minister for the Economy and Finance, renders the instrument effective (legality check). If no remarks are raised within 20 days, the above-mentioned resolutions become effective.

<sup>21</sup> AT, DE (Ministry of Finance), DK (Ministry of Industry, Business and Financial Affairs), IE, NO (Ministry of Finance), SE

<sup>22</sup> DE

<sup>23</sup> SE

<sup>24</sup> DK: those matters are on good business practice in consumer affairs, preparation of legislation and EU negotiations, where the Minister can instruct regulator both in relation to general supervision and in specific cases. Consultation is not established by law and it is considered on a case by case basis.

<sup>25</sup> DE (<https://www.bafin.de/dok/7859570>), NO

cases. For one NCA<sup>26</sup>, the subject and scope of the legal and technical oversight is the legality and fitness for purpose of this NCA's administrative actions.

50. A few NCAs reported that they are under specific obligation either to inform the Ministry of matters of special importance<sup>27</sup> or on major developments on the markets and the operation of the NCA<sup>28</sup>. In two cases<sup>29</sup>, the authorization of some firms is in the remit of the Minister, responsible for the financial sector, which acts upon advice of the NCA. Other examples of relationship among the NCA and the Government are reflected through demands that the Minister can make on the NCA's personnel and through consultation, approval of, or consent required from the Minister prior to certain action<sup>30</sup>. In another case<sup>31</sup>, the Minister of Economy and Finance can demand from the NCA confidential information, provided that this information is needed in order to perform its statutory functions, but this does not apply to information obtained through international cooperation.
51. Consultative groups exist in a number of NCAs<sup>32</sup> to provide advice. They can be made of supervisor's representatives and heads of organisations, such as professional associations and participants of the financial and capital market<sup>33</sup>, or of academics, industry and investor associations<sup>34</sup>. They usually provide opinions on bills or other draft regulation concerning the financial sector<sup>35</sup>.
52. Five NCAs indicate that it falls within their mandate to propose changes to laws within their scope of competences to the relevant ministries<sup>36</sup>, and two NCAs indicate sending advices and requests to amend or improve regulation<sup>37</sup> to the Minister of Finance.

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<sup>26</sup> DE (in exercising its legal and technical oversight, the Ministry relies on information that is in the public domain and also on sources of knowledge available to the NCA. The Ministry may at any time require the NCA to report on the knowledge available to it or its actions and ask to submit documents. The existing legal provisions regarding the obligation of confidentiality must be observed.)

<sup>27</sup> NO

<sup>28</sup> IT

<sup>29</sup> FI (authorisation of stock exchange and CSD is granted by the Finnish Ministry of Finance which is required to obtain prior advice from the FIN-FSA and the Bank of Finland), LU (authorisation of investment firms and other professionals of the financial sector is in the remit of the Minister responsible for the financial sector following advice from CSSF. This has been changed with the law of 21 July 2021 « loi Agréments », now the CSSF is solely competent to grant, refuse or withdraw the authorisations of all entities under its supervisory remit, except for entities under direct supervision of ECB. See <https://www.cssf.lu/en/2021/08/transfer-to-the-cssf-of-competence-for-authorisation/>)

<sup>30</sup> IE, PT (only possibility of consultation of the CMVM by the Minister)

<sup>31</sup> IT

<sup>32</sup> EL, ES, FI, FR, HR, , IT, LU, LV, PT

<sup>33</sup> LV

<sup>34</sup> IT, PT

<sup>35</sup> FI, IT, LU

<sup>36</sup> CZ, HR, HU, IT (both on its own initiative and after a request from the Ministry), PT

<sup>37</sup> MT (in practice the MFSA propose changes to financial services laws when developing regulatory frameworks), NL (annual letter to the Minister of Finance containing advices and requests to amend or improve regulation)

53. NCAs cooperate and exchange various information and data, important for their operations; cooperation with other authorities or relevant ministries may either be defined by law<sup>38</sup> and/or in an MoU among relevant authorities<sup>39</sup>.

#### 2.1.1.2 Conflict of interest

54. Another aspect of absence of interference relates to conflict of interest, where all NCAs reported independence in performing their regular operations. IOSCO expects in its Methodology for Principle 5 that the staff of the regulator should observe the highest professional standards and be required to follow clear guidance on matters of conduct. This includes for example the avoidance of conflicts of interest, including the conditions under which staff may trade in securities, as well as the appropriate use of information obtained in the course of the exercise of powers and the discharge of duties. Broadly speaking, two categories in relation to how NCAs conflict of interest requirements are defined may be identified:

- Defined by law for twenty-six NCAs<sup>40</sup>, in four of those also defined by the Constitution<sup>41</sup>;
- Defined by internal rules, conflict of interest policies, internal regulations and the statute for three NCAs<sup>42</sup>.

55. It is important to stress that, in addition to the legal provisions defining avoidance of conflict of interest, many of the NCAs from the first group explained that also internal rules, Code of ethics for staff and various internal policies define and require avoidance of conflict of interest. One NCA<sup>43</sup> noted that conflict of interest rules apply for the entire duration of the mandate or employment relationship (including during the notice period) and are accompanied by stringent cooling-off prohibitions applicable to Board members and management after termination of their position. Another NCA<sup>44</sup> noted that a public authority is in charge of controlling the compatibility of the new professional activities carried out by a Board member and staff at the end of the contract with the cooling off duties for a period of three years.

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<sup>38</sup> AT, EE, EL, ES, FI (FIN-FSA shall inform the Ministry of Finance and the Ministry of Social Affairs and Health of legal acts under preparation by the European Supervisory Authorities or ECB or matters under consideration at the ECB, a European Supervisory Authority or the European Systemic Risk Board which the Financial Supervisory Authority assesses may have an effect on the functioning or stability of Finnish financial markets), FR (cooperation with the ACPR in areas of shared responsibilities), HR (cooperation with CNB and Ministry of finance and State Agency for Deposit Insurance and Bank Rehabilitation (DAB), related solely to the provisions of the Financial stability law), IT (cooperation with domestic prudential, insurance and pension funds authorities and with the antitrust authority; cooperation with the Ministry of Economy and Finance; cooperation with the authorities and committees that are part of the European System of Financial Supervision and with the ECB), MT, PT, SI (cooperation with the Central Bank in issues of common supervision, such as investment services performed by banks, supervision over CSD and its tariff where the Central Bank's opinion is required).

<sup>39</sup> EL (MoU between the HCMC and the Bank of Greece and ELTE), ES, IT (MoUs between the NCA, Bank of Italy and/or competent authorities), MT, PT, SI (MoUs between financial sector regulators, the Agency with the Central Bank and the Insurance Supervision Agency, as well as regular cooperation and coordination in common issues).

<sup>40</sup> AT, BE, BG, CY, CZ, DE, DK, EE, EL, ES, FI, FR, HR, HU, IT, IS, LT, LU, LV, MT, NL, NO, PL, PT, SE, SI

<sup>41</sup> AT, CZ, IT, SE

<sup>42</sup> IE, PL, RO

<sup>43</sup> IT

<sup>44</sup> FR (Haute Autorité pour la Transparence de la Vie Publique (HATVP) / High authority of transparency in public life - <https://www.hatvp.fr/en/>)

56. A group of NCAs that reported legal requirements for avoidance of conflict of interest provided additional explanations for their consultations with the financial industry, such as that commercial or sectoral interests are free to lobby and make representations to the NCA while the NCA is under no obligation to act on those<sup>45</sup>, or that NCAs consult<sup>46</sup> in order to collect views in the context of the elaboration and adoption of resolutions or circulars<sup>47</sup> but without interference into daily operations.
57. Regarding the notice period, twenty-four NCAs<sup>48</sup> apply conflict of interest rules for their staff and/or members of the governing bodies when these are not part of staff, while six NCAs<sup>49</sup> do not. Seven NCAs<sup>50</sup> indicated that while they do not have a separate set of rules on notice period, they apply the generic rules on conflicts of interest which cover the entire period of employment. The conflict of interest rules are the result of either a voluntary initiative (11<sup>51</sup>) or were adopted following specific requirements in national laws (15<sup>52</sup>). In the past years, in practice, ten NCAs<sup>53</sup> actually imposed restrictions during a notice period for leaving staff and/or members of the governing bodies. For cooling-off restrictions following departure from the NCA, please see section 2.3.4.

## 2.1.2 Adequacy of legal powers

58. As the IOSCO Methodology for IOSCO Principle 3 states, the regulators should have adequate powers, [...] that should be consistent with the size, complexity, and type of the markets that it oversees and its need to meet its functions. In order to be independent, NCAs need adequate legal powers with regard to its remit and responsibilities, and a system of policies and governance to exercise and delegate these powers. In case of delegation, the NCAs needs adequate control on the delegated body.

### 2.1.2.1 Adequacy of legal powers

59. Almost all NCAs<sup>54</sup> consider having adequate legal powers to meet their mandate throughout their different remits. Overall, those powers encompass in the area of supervision and enforcement the ability, among other, to conduct inspections, require documents, conduct hearings and, if necessary, impose preventive or coercive measures or impose sanctions and fines and other administrative measures.
60. Depending on the organizational structure of financial supervision in the relevant Member State, NCAs may be able to deal on their own with most of their supervised entities throughout their entire life cycle, from licensing to the removal of the license if

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<sup>45</sup> FR, IE, IT

<sup>46</sup> FI, IT, LU, NL

<sup>47</sup> LU

<sup>48</sup> AT, BE, BG, CZ, DE, DK, EE, ES, FI, FR, HR, HU, IT, LI, LT, LU, LV, MT, NL, NO, PL, PT, SE, SI

<sup>49</sup> CY, EL, IE (the CBol manages conflicts of interest during the notice period by transferring the person in a position where there is no conflict. The notice period can be extended upon mutual agreement to manage the conflict), IS, SK, RO

<sup>50</sup> CZ, DK, HU, IT, LT, LV, PL

<sup>51</sup> BG, DE, EE, FI, IE, LT, LU, MT, NL, NO, SE

<sup>52</sup> AT, BE, CZ, ES, FR, HR, HU, IT, LI, LT, LV, MT, PL, PT, SI

<sup>53</sup> BE, EE, ES, FR, IE, MT, NL, NO, SE, SI (only for the director who is also the Chair in application of the individual employment contract).

<sup>54</sup> Except HR

needed, or competences may be shared in some areas with another authority (e.g. the prudential regulator under a functional approach).

61. NCAs<sup>55</sup> stressed the need of constant evolution of powers and resources to adapt to an evolving financial world (e.g. with regard to sustainability or non-financial information), to a crisis, or in response to particular events occurring within the jurisdiction. Notably, the capacity to impose monetary sanction is now considered a needed addition by an NCA<sup>56</sup> to adapt to “various new mandates that the legislator has entrusted it with”.

### 2.1.2.2 Delegation of powers

62. Delegation of power may result from a legitimate need and be an efficient tool. However, it may also have an impact on NCAs’ independence depending on its framework. Indeed, the delegate may not comply with all requirements applicable to the NCA and in particular the rules related to conflict of interests or they may be less stringent. For the purpose of this report, the following situations would not qualify as external delegation: (1) carrying out individual checks in the limitative scope provided by EU legislation such as MiFID II, (2) delegation of tasks and responsibilities to other competent authorities or ESMA under Article 28 of the ESMA Regulation.
63. Fifteen NCAs<sup>57</sup> stated that they are able to delegate their powers externally (i.e. to legal entities or natural persons outside the structure of the NCA). Thirteen of these NCAs provided more information: nine<sup>58</sup> may only delegate externally to private entities or natural persons (not acting in the capacity of public officer), one<sup>59</sup> may only delegate externally to public entities, one<sup>60</sup> can delegate externally to either type of legal entity and two<sup>61</sup> can delegate externally to either type of legal entities or natural persons.
64. The scope of external delegation varies, although in most cases<sup>62</sup> it is limited to information gathering, execution of specific tasks or results from the need for specific expertise which is unattainable within the structure of the NCA. However, two NCAs<sup>63</sup> may, in addition to those situations, delegate actual decision-making powers to external entities. One<sup>64</sup> of these NCAs can delegate to:
- market undertakings, or clearing houses (the supervision of the activity and transactions carried out by the members of a regulated market, or by investment services providers that have transmitted orders on that market),

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<sup>55</sup> DE, HR, IE, IT, LT, NL, SI

<sup>56</sup> HR (see paragraph 57 on that topic)

<sup>57</sup> BE, CY, DE, DK, EE, EL, FI, FR, HR, IS, LT, LU, MT, RO, SI

<sup>58</sup> BE, DK, EL, FI, IS, LT, LU, MT, SI

<sup>59</sup> RO

<sup>60</sup> FR

<sup>61</sup> CY, DE

<sup>62</sup> BE, CY, DE, EL, FI, HR, IS, LT, LU, MT, SI.

<sup>63</sup> FR, RO

<sup>64</sup> FR

- the associations of financial advisors and advisors for crowdfunding investments (the supervision of the activity of their members).

65. When NCAs are able to delegate to external legal or natural persons, the most common use lies in the realm of inspection/enforcement<sup>65</sup>. In those cases, the NCAs<sup>66</sup> made reference to their wish to benefit from precise skills, and also to resolve internal resources constraints. These NCAs stressed that the decision regarding the outcome of the cases remain usually in the hands of the NCAs<sup>67</sup>.

### **2.1.3 Adequacy of operational resources**

66. The adequacy of operational resources includes the autonomy for hiring staff with appropriate skills and expertise and for investing in IT hardware and software.

67. NCAs' ability to discharge their tasks depends on more than just the absence of interference and adequate legal powers, which this report discussed in previous sections. One key element for putting an NCA in a position to fulfil its tasks successfully is ensuring that proper resources are available. At the same time, NCAs are expected to use their limited resources appropriately, for example by following a risk-based supervisory approach and ensuring an efficient and effective discharge of their tasks.

68. Standard setting bodies recognise the importance of adequate resources. IOSCO specifies two key issues in its Methodology for Principle 3 regarding proper resources. Firstly, the level of resources should recognize the difficulty of attracting and retaining experienced and skilled staff. Secondly, the regulator should ensure that its staff receives adequate, ongoing training. Both points are essential and will be analysed in this section.

69. In addition to the ability to hire and retain staff as well as to provide ongoing training for their staff, NCAs might face restrictions when procuring equipment and IT tools. Adequate equipment and tools to categorise and analyse large amounts of data is paramount when fulfilling one's tasks. Digitalisation transforms traditional supervisory approaches, when properly designed and implemented. Any unnecessary impediments to spending available funds on operational resources can be seen as restricting the independence of an NCA. At the same time, it is acknowledged that checks and balances with regard to spending funds need to be in place.

#### **2.1.3.1 Attracting and retaining experienced and skilled staff**

70. Some NCAs<sup>68</sup> report limitations when hiring staff for the fulfilment of their supervisory tasks and functions. One NCA<sup>69</sup> explained that they can only hire new staff when new vacancies are allowed by the Government and published in the National Public Employment Offer on a yearly basis, which lies within the framework of the General State Budget. Hiring of employees and increases in salary must be previously included

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<sup>65</sup> Enforcement as a term is used differently across Member States

<sup>66</sup> CY, DE, EE, MT, SI

<sup>67</sup> DE, EE, MT, SI

<sup>68</sup> E.g. BG, ES

<sup>69</sup> ES

in the annual budget and be approved. This NCA is reliant on the approval by the Remuneration Inter-ministerial Commission's Executive Committee, a governmental agency, and the restrictions they may impose, when hiring and remunerating its employees. The number of middle management positions is also restricted. Another NCA<sup>70</sup> reports – that while operational changes within the approved NCA budget can be made by the NCA on its own discretion – expenses for human resources and the change in the amount of expenditures allocated to it are excluded from that power. Two NCAs<sup>71</sup> are subject to a “staff ceiling rule” imposed by law. For one<sup>72</sup> of these NCAs, the maximum number of full-time equivalent employees for the year is set every year for the year to come. However, these NCAs have total freedom in terms of internal organization.

71. Seven NCAs<sup>73</sup> noted explicitly that recruiting skilled and experienced staff is a challenge. One of the cited reasons is having to compete for talent on an open market, where private companies can outmatch NCAs with regard to remuneration or non-monetary incentives. Some NCAs<sup>74</sup> mentioned they are recruiting predominately staff with a university education which adds to the challenge. That said, one NCA<sup>75</sup> sees no link between the difficulty of attracting and retaining skilled staff and the NCA's level of resources i.e. the remuneration.
72. Three NCAs<sup>76</sup> mentioned that comparably low salaries in the public sector, which apply to those NCAs as well, create difficulties when attracting or retaining staff. In contrast, one NCA<sup>77</sup> finds the wage gap between the public and private sector in the financial market not big and another NCA<sup>78</sup> mentioned that entry-level positions in public service receive a higher salary compared to the industry.
73. Seven NCAs<sup>79</sup> report to be in a position to either pay higher salaries compared to other public sector entities<sup>80</sup> or have their level of salaries linked to relevant industries<sup>81</sup>. As an example, for broader discretion with regard to remuneration, one NCA<sup>82</sup> reports having the autonomy to increase the salary of its staff, through Government standardised benchmarks. Three NCAs report having the autonomy to increase the salary of their staff<sup>83</sup>.

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<sup>70</sup> BG

<sup>71</sup> FR (The “staff ceiling rule” applicable to all independent authorities in France, is established every year in the Annual Finance Law voted by the French Parliament. For 2021, this cap has been set at 500 FTE), IT (the maximum number of NCA's workforce is defined by law and the NCA does not need to obtain the approval of the Government to hire staff)

<sup>72</sup> FR

<sup>73</sup> CZ, EL, ES, HR, LT, MT, PL

<sup>74</sup> BE, CZ, HR, IT, PT

<sup>75</sup> BE

<sup>76</sup> EL, LI, SI

<sup>77</sup> IS

<sup>78</sup> LU

<sup>79</sup> BG, DE, HR, IT, LV, LT, PT

<sup>80</sup> DE, IT (the wages are the same as those of the staff of the national banking authority, higher than those of public administration employees), LT, PT

<sup>81</sup> BG, HR, LV

<sup>82</sup> NL

<sup>83</sup> CZ, FR, LT

74. When looking at the differences, examples of individual practices to overcome the aforementioned challenge are noted. Two NCAs<sup>84</sup> report having launched an employee referral recruitment program. Four NCAs<sup>85</sup> approach selected students in their final years at university as an additional recruitment opportunity. Other NCAs<sup>86</sup> have introduced a graduate program. Likewise, three NCAs<sup>87</sup> award yearly remunerated internships to recent graduates, in order to recruit high-potential reinforcements.
75. One NCA<sup>88</sup> for example offers a position as an officer in the higher intermediate civil service by pursuing an integrated degree program in central banking. The theoretical studies take place at the university and the practical studies generally at the NCA.
76. It is worth to note that among those NCAs that reported on their staff turnover, one<sup>89</sup> indicated staff turnover of more than 10% in recent years while the others<sup>90</sup> indicated a lower turnover, i.e. below 10%.
77. In summary, while NCAs face a challenge in recruiting staff, different solutions are being pursued to overcome this challenge within the specific national frameworks. Remuneration is considered as an important factor when recruiting talent, but other factors, such as work-life-balance, were mentioned as well. It should also be considered that certain NCAs<sup>91</sup> need governmental authorisation to hire and increase salaries.

### 2.1.3.2 Adequate, ongoing training

78. NCAs have not indicated that they are being restricted by external factors or reported restriction for their staff from pursuing professional training in general. Some NCAs indicated that training offered by ESMA for staff of NCAs is widely used. One NCA<sup>92</sup> mentioned its initiative to align learning and development practices with European counterparts.
79. The information received from NCAs show a wide range of training opportunities being provided to staff<sup>93</sup>. There is a spectrum where – on the one end – NCAs offer training that focuses on specific job-related skills, while other NCAs report supporting relevant qualifications more broadly.

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<sup>84</sup> BE, MT

<sup>85</sup> CZ, FR, HR, MT

<sup>86</sup> FI, FR, IE, MT

<sup>87</sup> HR, IT, PT

<sup>88</sup> DE

<sup>89</sup> FR for 2018

<sup>90</sup> AT, BE, CZ, DE, IE, IT, PT, RO

<sup>91</sup> E.g. ES

<sup>92</sup> IE

<sup>93</sup> E.g. four NCAs (BE, HR, IT, LU) note that they provide new employees with dedicated initial training to support their familiarisation with supervisory tasks. Some NCAs (ES, FR, HR, IT, LU) mention that they organise in-house seminars on technical issues (some with senior staff and national and international experts as lecturers) in order to allow participation of a significant number of employees, also on a remote basis. One NCA (IT) reports that an ad hoc portal has been created on the NCA's extranet to facilitate access to training materials (including recording of webinar and other online events). A number of NCAs (CZ, BE, HR, IE, IT, RO) report having a formalised dialogue or a structured approach to reflect on individual trainings received and planned.

80. As an example, eight NCAs<sup>94</sup> report providing various forms of support, including financial support, to staff members for university courses, such as postgraduate studies. Three NCA<sup>95</sup> reports supporting staff to pursue relevant third level, post graduate and approved professional qualifications and providing fee payment as well as study and examination leave where applicable. Six NCAs<sup>96</sup> report supporting staff in their study programs by offering study and examination leave.

### 2.1.3.3 Other operational resources

81. This last section looks at NCAs power to fund and pursue any other operational resources, which are deemed necessary for the successful discharge of tasks. This section focuses in particular on costs of digitalisation, which has a profound impact on supervisory authorities.
82. Supervisory authorities are facing an unprecedented increase in digitalisation and bespoke IT solutions. Yet, NCAs have only indicated sporadic examples of the impact of digitalisation. Where budget depends on external control, it could be explained by the reluctance of third parties to spend what seems like a prohibitive amount on digitalisation, where traditional supervisory approaches were sufficient in the past. Another explanation could be linked to the fact that some NCAs may not be able to create budgetary reserves.
83. Nine NCAs<sup>97</sup> report no impediments to funding and procuring necessary operational resources (further details on funding are included in section 2.2 dedicated to financial independence below). A few NCAs<sup>98</sup> reported that they have sufficient budget to try new IT tools or create IT solutions, with the caveat that projects were included in the budgetary planning process.
84. When procuring operational resources, one NCA<sup>99</sup> for example mentioned that they are not restricted by initial budgetary planning but can instead make to a large extent (subject to some restrictions) use of the resources at their discretion within the framework of the NCA's budget.
85. In summary, a number of NCAs have shared their experiences regarding overcoming constraints with regard to operational resources, while acknowledging that sufficient resources for day-to-day operations are available.

## 2.2 Financial Independence

86. This section provides an overview of aspects related to funding of NCAs. When looking at the financial independence of the NCAs, considerations are given to the sources of funding and, very importantly, where the competence for approving the budget lays,

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<sup>94</sup> AT, EL, ES, HR, HU, MT, PL, SI

<sup>95</sup> HR, IE, MT

<sup>96</sup> HR, IT, LV, MT, PL, SI

<sup>97</sup> CY, CZ, HR, IT, IS, LU, PL, RO, SK

<sup>98</sup> EL, ES, IT

<sup>99</sup> CY

the sufficiency of funding for fulfilling the NCA responsibilities and the extent to which the regulator can manage these funds autonomously<sup>100</sup>.

87. IOSCO Principle 2 and the related IOSCO Methodology specify that the regulator should have a stable source of funding sufficient to exercise its powers and responsibilities as its operational independence can be compromised if funding can be curtailed by external action.
88. The responses of the NCAs reflected a variety of financing models, such as own revenues from fees collected directly from the supervised entities, own revenues combined with funds from the State budget, grants from State budget that are covered fees from the supervised entities collected at State budget and funding from the State budget.
89. Seventeen<sup>101</sup> NCAs are fully financed from their own revenues levied from supervised entities, without contributions from the State budget. Out of these, two NCAs<sup>102</sup> are financed from their own revenues (revenues levied from supervised entities), with the possibility of contribution from the State budget, but have never used the State budget financing option. One NCA<sup>103</sup> is financed by contributions of financial market participants and by own funds of the NCA.
90. Only one NCA<sup>104</sup> reported being funded from its own revenues issued from monetary policy, currency circulation, foreign exchange reserves management. The rest of NCAs reported financing mechanisms combining own revenues and funds or grants from the State budget, reflecting different approaches on the use of the State budget contribution and collection of fees from the market:
  - Three<sup>105</sup> NCAs are financed with fees from authorised entities, but the fees are collected by the Treasury or Ministry of Finance as revenues at the State budget. The Ministry of Finance/Parliament shall, on the basis of an appropriation in the State budget, determine the appropriation for the operation of the NCA;
  - One NCA<sup>106</sup> is financed with revenues levied from supervised entities (95% of the budgeted) and a contribution from the Central Bank (5%). The annual budget is approved by the Financial Supervisory Authority Board and is submitted to the board of the Central Bank for confirmation;

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<sup>100</sup> See OECD, Being an Independent Regulator, The Governance of Regulators, OECD Publishing - 2016, Paris, <https://doi.org/10.1787/9789264255401-en>: "Appropriate funding of the regulator is essential to determine the extent to which the regulator can carry out its mandate and act independently. The source of the funding could be less relevant than the way in which funding needs are determined, funds are decided and the extent to which the regulator can manage these funds autonomously".

<sup>101</sup> BE, DE, EE, EL, ES, FR (a financial resources ceiling applies that was set by the Parliament at €94 million in 2016, and raised to 99 million in 2020, an amount insufficient to meet the various challenges facing it, causing the NCA to be in a deficit situation for several years), HR, HU, IT, LU, LV, NL (except for the islands of BES financed by the Min Fin for 0.4M over a total of 110M), PL, PT, RO, SI, SK

<sup>102</sup> HR, SI

<sup>103</sup> LT

<sup>104</sup> CZ (the Central Bank Board shall approve the budget)

<sup>105</sup> DK, IS, NO

<sup>106</sup> FI

- Six NCAs<sup>107</sup> are financed with revenues levied from supervised entities with a contribution from the State budget.
- One<sup>108</sup> NCA receives a grant from the Government to cover costs for its supervision. It is the Government and the Parliament that decides the level of funding.

91. Most NCAs, except four<sup>109</sup>, responded that the funding is sufficient to permit them to fulfil their responsibilities in an adequate manner. The sufficiency of funding as reported by some of the NCAs reflects a variety of challenges in regard to the adequacy of resources.
92. In terms of the competence for approving the budget, sixteen NCAs<sup>110</sup> responded that their Board is responsible for the approval of the NCAs budget, while for other fourteen the budget is approved by the Ministry of Finance<sup>111</sup> or the Parliament<sup>112</sup>, or both of them<sup>113</sup>. The approach for the budget approval is split among the NCAs and those that declared having challenges in providing an adequate funding for fulfilling all their responsibilities are among the NCAs for which the budget is approved by the Ministry of Finance or the Parliament or both.

## 2.3 Personal Independence

### 2.3.1 Appointment and removal of members of the governing body

93. This section focuses on matters relating to the appointment, renewal of term and removal of the members of the NCA's governing body responsible for day-to-day decisions.
94. Consequently, it does not include information pertaining to other bodies that work closely or jointly with the governing body, namely ones with non-executive functions (ex. supervisory boards or councils that determine the general guidelines to be followed by the governing body) or with specific dedicated functions (ex. determination of the terms of employment of the members of the governing body or responsible for the decision within the context of sanctioning procedures decisions).
95. The answers received from the NCAs clearly indicate that for all of them legal procedures have been established for the appointment of the members of their

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<sup>107</sup> AT, BG, CY, IE, LI, MT

<sup>108</sup> SE

<sup>109</sup> CY, FR, NO, SI

<sup>110</sup> AT, BE, HR, CZ, DE, EE, FI, FR, HU, IE, IT, LT, LV, LU, RO, SK. For a EE, the Supervisory Board approves the budget following proposal by the Management Board. For FI, the budget is approved by the Board but subject to confirmation by the Bank of Finland. For FR, AMF budget is approved by the AMF Board, within the "income cap" set by the Parliament in the annual Finance law. For DE, as from 1 July 2021, the Law on the Strengthening of the Financial Market Integrity provides that BaFin's budget is prepared by the President (instead of the Executive Board) following consultation of the other members of the Executive Board and approved by the Administrative Council (para 12 (2) FinDAG).

<sup>111</sup> LI, MT, NL, PL, SI

<sup>112</sup> BG

<sup>113</sup> CY, DK, EL, ES, IS, NO, PT, SE

governing body. The process may involve different nominating/appointing entities as described below.

96. In general members of the governing body are formally appointed by either the executive branch, the legislative branch or the Head of State, with a few special cases where (i) more than one entity is involved in the decision, (ii) the number of members of the governing body is split between two appointing entities, each of which select only a few or (iii) some or all members are appointed by virtue of another entity. The appointing entities of the NCAs' governing body are the following:
- Executive branch for ten NCAs<sup>114</sup>;
  - Legislative branch for seven NCAs<sup>115</sup>;
  - Head of State for six NCAs<sup>116</sup>;
  - Other for two NCAs<sup>117</sup>; and
  - More than one for five NCAs<sup>118</sup>.
97. In addition, the procedure adopted in some countries <sup>119</sup> includes either (i) the consultation of other entities or (ii) foresees that the proposals of members to be appointed are made by another entity.
98. The majority of NCAs indicated that their legislation foresees appointment requirements that must be complied with for anyone to be appointed as member of the governing body. However, there is a variety of situation reflecting the particularities of each country.
99. Regarding the appointment requirements or suitability criteria applicable to members of the governing body, the following general tendencies were identified:
- Financial expertise;

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<sup>114</sup> CY, DK, ES, IE (for all members except for the CBI Deputy Governors, Governor and the Secretary General of the Department of Finance), IS, LI, MT, PL, PT (Non-binding opinion by special Parliamentary Commission. Although non-binding, in practice the Government conforms with the views of the Parliament and, if those views are not favourable, withdraws the nomination), SE

<sup>115</sup> BG, EL, FI, HR, LV, RO, SI

<sup>116</sup> AT, BE (by Royal Decree), CZ, DE, LU, NL

<sup>117</sup> EE, NO

<sup>118</sup> FR (executive branch, legislative branch, Central Bank, Council of State, Court of Cassation, Court of Auditors, the National Accountancy Council; the President of the Republic, the President of the Senate, the President of the National Assembly and the President of the Economic and Social Council), HU (legislative branch and head of state), IT (members of the Commission are formally appointed by a Decree of the President of the Republic acting on a proposal by the Prime Minister and approved by the Council of Ministers. Special Parliamentary Commissions of the House of Representatives and of the Senate of the Republic are required to issue an opinion on the proposed nominees. The nominees are subject to a hearing which may lead to an unfavourable opinion. This opinion is not legally binding for the Government. However, in practice the Government conforms with the views of the Parliament by withdrawing the nomination), LT (for the Chairman: appointment by the Parliament on the recommendation of the President of the Republic, for the Board members: appointment by the President of the Republic on the recommendation of the Chairperson of the Board of the Bank of Lithuania), SK (executive branch and Head of State)

<sup>119</sup> AT, DE, EL, ES, FI, HR, HU, IT, LT, LU, PT, SI, SK

- Lack of prior criminal convictions, with many countries placing an emphasis on criminal offences related to money laundering and market abuse;
- No history of being active in firms subjected to insolvency proceedings; and
- No interest in a supervised entity.

100. In what regards the duration of the term of members of the governing body, the answers were also varied and should be considered jointly with the information on the possibility of renewal of the mandate:

- between 2 and 4 years for seven NCAs<sup>120</sup> ;
- between 5<sup>121</sup> and 6<sup>122</sup>, years in twenty-one NCAs, non-renewable for two of them<sup>123</sup>;
- between 7<sup>124</sup> and 8<sup>125</sup> years for two NCAs, non-renewable for one<sup>126</sup> of them.

101. As to the renewal of the term:

- Renewal is allowed in twenty-seven NCAs<sup>127</sup> limited to once in ten of them<sup>128</sup>;
- Renewal is not allowed in two NCAs<sup>129</sup>; and
- In one NCA<sup>130</sup>, although renewal of mandate is possible for other members of the governing body, the chairman's mandate is not renewable.

102. Among those NCAs for which renewal is allowed, two NCAs have indicated special regimes:

- In one NCA<sup>131</sup>, renewal is admissible in respect of all members, but where the renewal is in general for equal terms of two years, in the case of the Director General, it is limited to a term of 3 years (following an initial term of 5 years);

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<sup>120</sup> 2 years for DK, 3 years for EE (Management Board members except the Chair), FI (for the Board members but 5 years for the Director General who is not a board member) and 4 years for EE (Chairman of the Management Board), ES, NL, NO

<sup>121</sup> AT, CY, EL, FR, IE (for members but 7 years for the CBI Governor(s)), IS, LI, LT, LU, LV, MT, PL, RO

<sup>122</sup> BE, BG, CZ, HR, HU, LT, PT, SI

<sup>123</sup> IE, PT

<sup>124</sup> IT

<sup>125</sup> DE (As of 1 July 2021 the term of office of members of the Executive Board was reduced to 5 years (para. 9 (1) Sentence 3 FinDAG).

<sup>126</sup> IT

<sup>127</sup> AT, BE, BG, CY, CZ, DE, DK, EE, EL, ES, FI, HR, HU, IE, IS, LI, LT, LU, LV, MT, NL, NO, PL, RO, SE, SI, SK (the same person may be repeatedly appointed as a member of the Board, while the same person may be appointed as Governor only for two terms of office and as Deputy Governor equally for two terms of office.)

<sup>128</sup> CY, CZ, ES, HU, FR, IE, IS, LI, LV, SE. In LI, in justified cases, the Chairman may be re-elected for an extraordinary term of two years after two terms of office have expired. (Art 8 FMA Act)

<sup>129</sup> IT (7 years mandate), PT

<sup>130</sup> FR

<sup>131</sup> DK

- In one NCA<sup>132</sup>, although there are no limits to the renewal of the term of the Chair of the Board, the other members can only serve for two consecutive terms.

103. Some of the NCAs have different mandate durations, depending on the specific member of the governing body in question:

- In one NCA<sup>133</sup>, although the mandate for the members is in general for 2 years, the mandate of the Director General lasts for five years;
- In another NCA<sup>134</sup> the mandate for the members is in general for 3 years, but the chairman's mandate lasts for 4 years;
- In one NCA<sup>135</sup> the mandate for the members is in general for 3 years, but the Director General's mandate lasts for 5 years;
- In another NCA<sup>136</sup> the mandate for the members is in general for 6 years, but the chairperson's mandate lasts for 5 years.

104. The number of Board members (without counting the Chair<sup>137</sup>), which has significance in terms of collegial decisions, also varies greatly among NCAs:

- five NCAs<sup>138</sup> have between 2 and 3 Board members;
- eighteen NCAs<sup>139</sup> have between 4 and 6 Board members;
- seven NCAs<sup>140</sup> have between 7 and 16 Board members.

105. Some NCAs have a floating number of Board members in their legislation:

- one NCA<sup>141</sup> has a maximum of 6 Board members;
- one NCA<sup>142</sup> has between 10 and 12 board members (including 4 ex-officio);
- one NCA<sup>143</sup> has between 10 and 14 Board members; and

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<sup>132</sup> LT

<sup>133</sup> DK

<sup>134</sup> EE

<sup>135</sup> FI

<sup>136</sup> LT

<sup>137</sup> There may be some NCAs where the Chair would not be a member of the Board.

<sup>138</sup> Two Board Members for AT, FI, NL, three Board members for HU (this figure refers to the MNB's Executive Board, however other bodies of the MNB e.g. Financial Stability Council also have supervision related tasks and these bodies have different composition) and LV

<sup>139</sup> Four Board members for eight NCAs (BG, EE, HR, IT, LI, LT, NO, SI), five Board members for four NCAs (DE, IS, LU, PT), six Board members for six NCAs (CY, CZ, ES, EL, MT(actual number), SK). In DE, since July 2021, the number is no longer set by legislation at five plus one president, but left to the discretion of the NCA (which has set it to five plus one president, but can change it by itself).

<sup>140</sup> Respectively, eight Board members for RO, nine for DK, ten for AT, twelve for PL, sixteen for FR, between ten and fourteen for BE and ten to twelve for IE

<sup>141</sup> FI

<sup>142</sup> IE

<sup>143</sup> BE

- one NCA<sup>144</sup> has a minimum of 5 Board members.

106. Generally, NCAs have specific procedures for the removal of members of the governing body. For a large majority of NCAs (25<sup>145</sup> of them), it is the same power which is responsible for nomination and dismissal of Board members and Chairman. For only five NCAs<sup>146</sup>, the authority responsible for dismissal is different. Dismissal is decided by:

- The executive branch in nine NCAs<sup>147</sup>;
- The legislative branch in five NCAs<sup>148</sup>;
- The Head of State in five NCAs<sup>149</sup>; and
- More than one branch in two NCAs<sup>150</sup>.

107. In general, jurisdictions that allow for removal foresee in the applicable law the removal conditions. For the large majority of NCAs (23), the legislation states that the dismissal of Board members / Chair can only be demanded because of serious infringement, or misconduct, or if the conditions necessary for the appointments are no longer met<sup>151</sup>. Those reasons are usually listed in the regulations. For others, the situation is different:

- For three NCA<sup>152</sup>, the regulation does not provide any specific criteria to be met for dismissal;
- For three NCA<sup>153</sup>, the regulation states that “important reasons”, “strict conditions”, or “Good cause” must be met, without elaborating further;
- For one NCA<sup>154</sup>, reasons for dismissal are of disciplinary nature - proven misconduct (not defined) and opportunity to enable the Commission to function effectively.

### 2.3.2 Legal independence for Board members and ex officio members

108. The composition of NCAs’ Boards is a critical factor when exemplifying independence from political and industry influences. Representatives from complementary regulatory national authorities at NCAs’ Boards may be an advantage in encouraging better

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<sup>144</sup> MT (actual number of Board members:6)

<sup>145</sup> BE, BG, CY, CZ, DE, EE, EL, ES, FI, HR, HU, IE, IS, IT, LI, LT, LU, LV, MT, NO, PL, PT, RO, SI, SK

<sup>146</sup> AT, DK, FR, NL, SE

<sup>147</sup> AT, CY, EL, ES, DK, IE, IS, MT, PT

<sup>148</sup> FI, HR, LV, RO, SI

<sup>149</sup> BE, CZ, DE, LU, NL

<sup>150</sup> IT (executive branch, legislative branch and Head of State), LT

<sup>151</sup> E.g. IT: the removal of the Commission is possible only for proven non-functioning or continued inactivity. In addition, a single member must cease its functions when the requirements for appointment are no longer fulfilled or in case of incompatibility due to conflict of interest.

<sup>152</sup> BE, IS, NO

<sup>153</sup> Respectively LI, LV, DE

<sup>154</sup> IE

coordination and smooth cooperation between them. However, it should be considered that conflict of interest may emerge from the different approaches and priorities of such authorities and, in that case, it is important to adopt appropriate protocols to deal with such situations before they arise.

109. In that sense, a parallel can be drawn with the Regulations establishing the three ESAs<sup>155</sup> that foresee the reciprocal presence of representatives from the other ESAs on their own Board, as a way to foster cross-sectoral consistency in their decisions. However, their participation is limited as observers, together with the representatives from the EC and the ESRB.
110. Moreover, the scope of the legal provisions related to the ESAs' governance was extended in the last ESAs' review, fostering a sound independent performance from the voting members of the Board. Specifically, ESMAR<sup>156</sup> provides that Board members shall not be influenced by other institutions as well as the obligation to declare (including the non-voting representatives and observers) the absence or existence of any conflict of interest in relation to any subject discussed at their meetings, respectively.
111. Drawing from the ESAs' example, it is observed that seventeen<sup>157</sup> NCAs are bound to their legal national provisions which forbid influencing Board members in the performance of their tasks. In addition, twenty<sup>158</sup> NCAs indicated that they shall declare, under legal national requirements, any interest which might be considered prejudicial to their independence, regarding the matters dealt with in the meeting sessions.
112. Regarding the NCAs with *ex officio* members within their Boards, nine<sup>159</sup> authorities have reported their presence. It is found that most of the *ex officio* members would be voting members. Only three<sup>160</sup> NCAs with *ex officio* member identified non-voting members.
113. Thirteen<sup>161</sup> NCAs have reported the presence of Board members holding positions in other public institutions:
  - For five<sup>162</sup> NCAs, all board members that have a position in a public company are acting *ex officio*;
  - For three<sup>163</sup> NCAs, all board members hold the position irrespective of their role in the NCA;

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<sup>155</sup> Regulations No 1093/2010, No 1094/2010 and No 1095/2010, of the European Parliament and of the Council

<sup>156</sup> Article 42(2) and Article 42(3) of Regulation No 1095/2010

<sup>157</sup> AT, BG, CY, CZ, EL, ES, FI, FR, HR, HU, IT, LI, LT, MT, NL, PT, SI

<sup>158</sup> AT, BG, CY, CZ, DK, EL, ES, FI, FR, HU, IE, IT, LT, LV, MT, NL, NO, PT, RO, SI

<sup>159</sup> DK, EL, ES, FR, IE, IS, MT, NO, PL

<sup>160</sup> FR, MT, PL

<sup>161</sup> DE, DK, EL, ES, FR, IE, IS, MT, NO, PL, PT, RO, SI

<sup>162</sup> ES, DE, NO, PL, PT

<sup>163</sup> MT, RO, SI

- For five<sup>164</sup> NCAs, some Board members hold the position ex officio but not all of them.

114. Seven<sup>165</sup> NCAs indicated that Board members hold positions in private institutions.
115. It should be noted that it has not been defined whether the appointment of members holding positions in other institutions, different from ex officio members, refers always to the same authorities/institutions, following the tradition in the jurisdiction. Finally, it has also not been defined whether the reference provided to members with positions in private institutions corresponds to companies subject to the supervision (direct or indirect) of the relevant NCAs. However, it should be noted that a few NCAs have put in place rules applicable to members of the governing body to manage conflicts of interest that may arise in certain circumstances<sup>166</sup>.

### 2.3.3 Legal protection of staff

116. As stated in the IOSCO Methodology for Principle 2, “the capacity of the regulator to act independently will be enhanced by adequate legal protection for the regulator and its staff when acting in the bona fide discharge of their functions and powers”. Twenty-six authorities<sup>167</sup> reported that there are adequate legal protections for the bona fide discharge of the authority's functions and powers. Four authorities indicated that the legislation in force does not offer legal protections<sup>168</sup> or that it affords only limited legal protections<sup>169</sup>.
117. Out of the twenty-six authorities that reported that adequate legal protections for the bona fide discharge of the authority's functions and powers are afforded, differences emerge with regard to the type of legal protections (e.g. immunity from personal civil liability toward the injured party and/or financial support by the authority), and to whom and in which cases such legal protections apply.
118. In particular, on the issue of personal liability for damages caused to an injured party, eight authorities<sup>170</sup> reported that a more general discharge than a 'bona fide' discharge applies pursuant to national legislation. Indeed, liability for damages caused in the

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<sup>164</sup> DK, EL, FR, IE, IS

<sup>165</sup> CY, DK, EL, FR, IS, LI, MT

<sup>166</sup> In MT, Article 6(3) of the MFSA Act, provides that a person shall not be eligible to be appointed as Chairman or as a member of the Board of Governors or of any other organ of the Authority, or to hold any office with the Authority, if he is the holder of a licence or other authorisation issued by the Authority or otherwise falls under the regulatory or supervisory functions of the

Authority, or is a director, an officer or employee of such holder or other such person. - In FR, ethical rules applicable to Board members include (1) a ban on sitting or, as the case may be, taking part in a deliberation, verification or audit if the member has an interest or has had an interest during the three years preceding the deliberation, verification or audit; (2) the declaration of their assets and interests to the High authority for transparency in public life (HTVP); (3) the incompatibility of the exercise of the mandate of members with certain electoral mandates and professional functions. It is considered that the collegial nature of the board composition, including through a balanced representation of issuers, investors and intermediaries, helps forming decisions in the general interest.

<sup>167</sup> AT, BE, BG, CY, CZ, DE, DK, EE, EL, ES, FI, HR, HU, IE, IT, LI, LT, LU, LV, MT, NL, NO, PT, SE, SK, SI

<sup>168</sup> FR, IS, RO. In IS, the NCA is liable for loss or damages caused by the bank's employees in the course of their employment but anyone who seeks financial compensation for an alleged infringement caused by the banks employees is not barred from bringing a legal action personally against the bank's employees. Similarly, anyone can file a claim for the bank's employees for alleged criminal infringements to the police. It actually happened and, in neither situation, do the banks employees have any claim against the bank for financial support for legal defense in court or payment of compensation.

<sup>169</sup> PL

<sup>170</sup> BG, CY, CZ, DK, EL, HU, NO, SK

exercise of supervision only lies with the authority whereas the authority's employees or members of the governing body do not bear personal liability<sup>171</sup> (except for cases of criminal liability discussed below).

119. Twelve NCAs<sup>172</sup> stated that, according to national legislation, the members of the governing body (including the chairman) and its staff are not liable for the bona fide discharge of the authority's functions and powers, but they are liable for damages in other circumstances. Namely, they are liable when it is proved that the damages are the consequences of (i) willful misconduct<sup>173</sup>; (ii) gross negligence<sup>174</sup>, (iii) fraud<sup>175</sup>, (iv) bad faith<sup>176</sup>, (v) deceit<sup>177</sup> and/or (vi) when directors or agents have committed an illicit act, exceeded the limits of their functions or acted culpably<sup>178</sup>, (vii) when members of the management caused damages wrongfully by unlawful behavior<sup>179</sup>. One NCA mentioned that immunity would only be lifted and hence liability charges made in cases where significant official duties were violated and (cumulatively) where damages are not attributable to breaches of duty or regulation by a supervised person or entity<sup>180</sup>. Another NCA<sup>181</sup> reported that an official is protected for the discharge of actions taken with due care, applying a standard of reasonable care expected of an official. Five of the said NCAs<sup>182</sup> also reported that the NCA itself is not liable for damages caused by an act or omission in the discharge of the authority's functions and powers save in the event of gross negligence<sup>183</sup>, willful misconduct<sup>184</sup>, fraud<sup>185</sup> and/or bad faith<sup>186</sup> and/or significant violations of official duties<sup>187</sup>. One NCA<sup>188</sup> noted that, although the judicial authority is ultimately responsible to sanction misbehavior and provide for compensation of damages suffered by persons injured by the NCA's staff<sup>189</sup>, the NCA itself can always adopt administrative measures in case of misbehavior of its staff.
120. Two NCAs reported that under national legislation responsibility (addressee for claims brought by the injured party) for the performance of the NCA's official duties rests in the first place with the Federal Government<sup>190</sup> or with the State or the NCA the civil

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<sup>171</sup> NO indicated that the domestic legislation is based on the principle that the State or the public authority concerned may be held responsible for the unlawful or negligent conduct of its civil servant and therefore personal liability for particular civil servants is in practice non-existent. CY further indicated that investigating officers and persons acting as a consultant or by order of the Board do not bear personal responsibility either. LU reported that protection to staff members against lawsuits for actions taken and omissions made during their service is given by the fact that only the governing body representing the authority is responsible for these actions.

<sup>172</sup> BE, EE, HR, IE, IT, LI, LT, LV, MT, NL, PT, SI

<sup>173</sup> HR, IT, LT, MT, NL, SI

<sup>174</sup> BE, HR, IT, LT, NL, SI

<sup>175</sup> BE, IT, MT

<sup>176</sup> IE, LV, MT

<sup>177</sup> IT, MT

<sup>178</sup> PT

<sup>179</sup> EE

<sup>180</sup> LI

<sup>181</sup> FI

<sup>182</sup> BE, IE, LI, LU, NL

<sup>183</sup> BE, LU, NL

<sup>184</sup> NL

<sup>185</sup> BE

<sup>186</sup> IE

<sup>187</sup> LI (a cumulative condition is that damages are not attributable to breaches of duty or regulation by a supervised person or entity)

<sup>188</sup> IT

<sup>189</sup> IT (in the presence of damage to a third party other than a public administration, the ordinary rules of civil law apply and the NCA is jointly and severally liable with the staff involved, but like its staff, in the performance of its supervisory functions the NCA is liable only for the damages caused by wilful acts or conducts or gross negligence).

<sup>190</sup> AT

servant is employed by<sup>191</sup>, which however are entitled to demand reimbursement from the NCA or its employees<sup>192</sup> or to have recourse against the civil servants<sup>193</sup> in cases official duties were breached with gross negligence or intentionally (the two authorities specified, respectively, that liability for the discharging of duties in slight negligence or in good faith is excluded). These NCAs<sup>194</sup> reported that their liability is limited as they perform their functions and exercise their powers exclusively in the public interest.

121. Nine NCAs<sup>195</sup> reported mechanisms – such as for example insurance contracts, loans/allowances and/or financial guarantees – under which financial support is afforded by the NCA to its employees and/or to members of its governing body in the context of proceedings initiated by third parties against them for facts or omissions relating to or arising from the discharge of their duties or functions. Some of those NCAs specified that the NCA is responsible for legal protection and the costs thereof only on certain conditions, e.g. if the act or decision was taken by the staff or board member within the course of their functions and in good faith<sup>196</sup> or unless the official or employee has acted through willful misconduct<sup>197</sup>. One NCA noted that legal expenses are reimbursed after a final verdict exonerating a staff member from liability; an employee may request the NCA to provide monetary advances on such reimbursement but only at the conclusion of each level of the lawsuit and provided that the total absence of his/her liability be ascertained<sup>198</sup>. Interestingly, six NCAs<sup>199</sup> expressly indicated that the NCA can provide support to former employees / officials as well. A few NCAs<sup>200</sup> stated that they reserve the right to take actions deemed necessary, including seeking restitutions of funds, depending on the outcomes of the official liability lawsuit.
122. One NCA<sup>201</sup> reported that a staff member, who would be the victim of any of the penal offences enumerated in the legislation on civil servants, can ask the State for protection, for instance by receiving legal and judicial assistance from the State. Moreover, if a member of the NCA who has the status of civil servant or employee, is personally sued for damages caused while discharging their duties on the basis of the civil code, this member can affect an indictment of the State thus devolve a part of its responsibility onto the State.
123. Only a few NCAs provided specific information on criminal liability. In particular, it was indicated that the NCA's employees and members of the governing body bear pecuniary liability for harm if they have committed a crime<sup>202</sup> or that criminal sanctions apply against the NCA's employees for actions beyond the usual and proper exercise

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<sup>191</sup> DE

<sup>192</sup> AT

<sup>193</sup> DE

<sup>194</sup> AT, DE

<sup>195</sup> AT, CZ, DE, EL, ES, IT, LT, MT, SI

<sup>196</sup> ES

<sup>197</sup> MT

<sup>198</sup> IT

<sup>199</sup> EL, ES, IT, LT, MT, SI

<sup>200</sup> DE, LT, MT

<sup>201</sup> LU

<sup>202</sup> BG

of their profession<sup>203</sup> or in cases of breach of secrecy, market manipulation or abuse of privileged information they hold<sup>204</sup>. Another NCA<sup>205</sup> reported that intentional or negligence misconduct is punishable by the criminal code and that a duty to compensate damages applies only in case of intentional misconduct. One NCA<sup>206</sup> reported that the legal protection of the chair, deputy chairs and staff against criminal charges is very limited (for example they may be subject to private accusation for defamation or insult e.g. in relation to publication of warnings or sanctions). Another NCA<sup>207</sup> indicated that any criminal proceedings against members of the governing body, the chairman or vice-chairman or the staff of the authority can only be commenced by the Attorney General of the Republic or with his consent.

### 2.3.4 Cooling off provisions

124. Cooling-off provisions, intended as restrictions for leaving staff or members of the governing bodies pursuing professional activities in the regulated sector<sup>208</sup>, could contribute to enhance personal independence by reducing the risk of conflict of interests and industry's interference.
125. In particular, OECD noted that "Cooling-off periods can contribute to signaling and promoting a culture of independence and mark a clear boundary between industry and the regulator." At the same time, however, OECD noted cooling-off periods "can also create perverse incentives in limiting the attractiveness of positions for experienced industry experts (or limiting the pool to end-of-career experts)... Some of these perverse incentives can be minimised by having some compensation during the cooling-off period, which is the case for some regulators"<sup>209</sup>.
126. With regard to the duration of cooling-off restrictions, the Good Practices Guide prepared by the World Bank, OECD and UNODC<sup>210</sup> states that, "When considering the length of cooling-off periods, core factors to consider include whether the time lengths are fair, proportionate and reasonable, considering the seriousness of the potential offence. Tailoring the duration of restrictions is also necessary depending on the type of problem area and level of seniority".
127. A variety of approaches to cooling-off periods is observed at national level. Indeed, if most NCAs (but not all), have cooling off rules in place, either in application of national law or further to own initiatives, their scope of application and duration varies significantly.

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<sup>203</sup> DK

<sup>204</sup> EL, FI

<sup>205</sup> FI

<sup>206</sup> PL

<sup>207</sup> CY

<sup>208</sup> NCAs that apply solely restrictions on the use of confidential information after leaving the authority are considered as not having specific cooling-off restrictions on activities for the purposes of the analysis.

<sup>209</sup> OECD, *Being an Independent Regulator, The Governance of Regulators*, OECD Publishing - 2016, Paris, <https://doi.org/10.1787/9789264255401-en>.

<sup>210</sup> *Preventing and Managing Conflicts of Interest in the Public Sector GOOD PRACTICES GUIDE*- Prepared at the request of the G20 Anticorruption Working Group by the World Bank, OECD and UNODC, July 2020.

128. Twenty-two NCAs<sup>211</sup> report applying temporary restrictions on the activities of leaving parties after they have left their position. The temporary restrictions usually take the form of prohibitions to be employed by supervised firms or prohibitions linked to the tasks that the official is allowed to undertake<sup>212</sup>. They may be accompanied by further restrictions, such as legally binding obligation to keep information confidential and restrictions on lobbying or advocacy vis-à-vis former colleagues. Nine NCAs<sup>213</sup> do not foresee any cooling-off restriction on the activities of leaving parties and six<sup>214</sup> of them noted they only apply the confidentiality obligations to leaving parties. Three NCAs<sup>215</sup> stressed that the obligation for the Board members and the staff to maintain the confidentiality of the sensitive information obtained in the course of or as a result of the exercise of their attributions subsists regardless of whether the person is no longer working within the authority. In some jurisdictions, the temporary cooling-off restrictions can be lifted when the new position would not conflict with the position held in the NCA.
129. There is substantial variation in the source of the restrictions, i.e. stemming from law in twelve jurisdictions<sup>216</sup> and extended or applied voluntarily by the NCA in others<sup>217</sup>, and their scope of application, i.e. extended to staff in all roles (head of the NCA, senior management, middle management, other staff) and members of the governing body in eleven NCAs<sup>218</sup> or subject to certain exclusions in the others where one or more categories of functions are excluded from application of such restrictions. For example, nine NCAs<sup>219</sup> apply restrictions only to the head of the NCA (the Chair in most NCAs), to top management or to other staff on a selective basis, and two NCAs<sup>220</sup> do not apply the restrictions in question to members of the governing body.
130. In addition, differences exist with regard to the duration of the cooling-off restrictions whatever the source of the restrictions. Out of the thirteen NCAs that have mandatory cooling-off restrictions in place, six NCAs<sup>221</sup> apply them for maximum one year or less, whereas in seven jurisdictions<sup>222</sup> the maximum duration exceeds one year (two years in most cases). As regards the NCAs that apply cooling-off periods across all staff, the trend is to apply the same duration irrespective the seniority of staff.
131. Only fourteen NCAs provide financial compensation during a cooling-off period. In particular, having regard to those NCAs (12) which have mandatory cooling off

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<sup>211</sup> AT, BE, BG, CY, CZ, DE, DK (In DK new rules providing for cooling-off requirements were issued in December 2020 and entered into force in January 2021), EE, ES, FI (solely for the Director General and its deputy relating to their roles as member and alternate member of the Supervisory Board of the European Central Bank), FR, HR, HU, IT, LT, LU, LV, MT, NO, PT, SI (only for director and defined in individual employment contract), SK.

<sup>212</sup> In PT, restrictions cover all the entities under CMVM supervision and the entities related to them (such as group entities), irrespective of the responsibilities or files treated by the leaving parties.

<sup>213</sup> EL, IE, IS, LI, NL, PL, RO, SE.

<sup>214</sup> EL, IE, IS, NL, PL, SE

<sup>215</sup> IT (criminal sanctions apply in case of breach of such confidentiality obligations), RO, SI

<sup>216</sup> BE, BG, CY, ES, FR, HR, HU, IT, LT, LV, MT (in the Ethics rules before adoption of the law in 2019), PT

<sup>217</sup> AT, CZ, DE, EE, FI (based on Code of Conduct for high-level European Central Bank Officials), LU, NO, SI, SK

<sup>218</sup> BE, EE, ES, FR, HR, LT, LV, MT, NO, SI, SK

<sup>219</sup> BG, CY (only to executive members of the governing body), CZ, DE, FI (only to the Director General, who is not a Board member, and its Deputy), HU, IT, LU, PT (to all members of the board)

<sup>220</sup> AT, FI (Board members)

<sup>221</sup> HU, MT: max.6 months, BE, BG, HR: max. 1 year, and LT.

<sup>222</sup> 3 years in FR- 2 years in CY, ES, FI (for the director general - 1 year for the deputy director general), IT, LV, PT.

provisions in place, six NCAs<sup>223</sup> provide financial compensation whilst six other NCAs<sup>224</sup> do not. As regards those NCAs (9) that apply cooling-off restrictions on a voluntary basis, most of them (7)<sup>225</sup> provide financial compensation.

## 2.4 Accountability and Transparency

132. For supervisory independence, public transparency is critical to promote confidence and trust by other NCAs and the public.

### 2.4.1 Public Transparency

133. All the NCAs responded that they ensure the public transparency through the publication of certain documents such as the annual report, the financial statements.
134. The common practice reflected in the responses received from the NCAs is the publication of the annual report, on their website by twenty-seven<sup>226</sup> NCAs. Seventeen NCAs<sup>227</sup> stated that the annual report is published also in English.
135. Other practice identified among twenty<sup>228</sup> NCAs is to ensure the transparency of the financial statements, and, for five<sup>229</sup> of these NCAs, also the budget, while seventeen<sup>230</sup> NCAs make public their strategic plan/objectives.
136. Twenty-five<sup>231</sup> NCAs indicated that they disclose on their website the sanctions/measures against the supervised entities. Two NCAs<sup>232</sup> noted that some resolutions (such as cease and desist orders, suspensions or prohibitions of public offerings, precautionary bans and short selling prohibitions) are published also in English.
137. Twenty<sup>233</sup> NCAs stressed that they publish on their website information on the regulations they adopt (also in English for at least seven NCAs<sup>234</sup>).

### 2.4.2 Accountability to Government or other authorities

138. Accountability to Government or other authorities is a key in understanding the way of working of a supervision system.
139. In general, NCAs have a duty to report on their activities to a Government entity and/or democratic assembly. This reporting takes frequently the form of the drafting of an

<sup>223</sup> BE, ES (for Board members only), HR (for management board members only), HU, LT (only for Board members and Director of the Financial Market Supervision Service), PT (for board members only).

<sup>224</sup> BG, CY, FR, IT (the commissioners and managers are subject to a 2-year mandatory cooling-off period which is neither remunerated nor compensated), LV, MT

<sup>225</sup> AT, CZ, DE, EE, NO, SI, SK

<sup>226</sup> AT, BE, CY, CZ, DE, DK, EE, EL, ES, FI, FR, HR, HU, IE, IS, IT, LI, LU, LV, MT, NO, PL, PT, RO, SI, SK

<sup>227</sup> AT, CZ, DE, EE, EL, ES, FI, FR, HR, HU, IT, LU, LT, LV, MT (only in English), NO, SI

<sup>228</sup> AT, CY, CZ, DE, DK, EE, EL, ES, FI, FR, HR, HU, IE, IT, LV, LT, MT, NO, PT, SI

<sup>229</sup> DE, ES, FI, HR, IT

<sup>230</sup> AT, CZ, DK, EE, ES, FI, FR, HR, HU, IE, IT, LT, LV, MT, NO, PT, RO

<sup>231</sup> AT, BE, BG, CY, CZ, EE, EL, ES, FI, FR, HR, HU, IE, IS, IT, LI, LU, LT, LV, MT, NO, PL, PT, RO, SI

<sup>232</sup> EL, IT

<sup>233</sup> AT, BE, BG, CY, CZ, DE, EL, ES, FI, FR, HR, HU, IT, LT, LV, MT, NO, PT, RO, SI

<sup>234</sup> AT, DE, FR, HU, IT, LT, MT (only in English)

annual report, that is later submitted either to one or several members of the Government or the Head of State and/or presented to the Parliament.

140. All reporting authorities are requested to publish and make available to other public bodies an annual or bi-annual report. The publication of an annual report is the most common way of reporting to other authorities and also to inform the public about the activities carried out by the NCA during the previous year. The annual report shall be submitted to or approved by Ministries for five NCAs<sup>235</sup> and/or presented to the Parliament for eighteen NCAs<sup>236</sup> and are available on the NCA websites.
141. Some NCAs mention that their annual accounts or their annual report are approved by an independent committee or an external audit<sup>237</sup>. Others indicate that their activities are monitored by a supervisory or audit committee<sup>238</sup> and/or that their annual accounts are subject to the control and/or the approval of the national court of auditors<sup>239</sup>.
142. Regarding the accountability to the Parliament, twenty-two NCAs<sup>240</sup> mention their accountability to the national Parliament - by hearings of the Chairperson or of members of the governing body<sup>241</sup>, by answering questions from the Parliament or special commissions<sup>242</sup> or by submitting reports<sup>243</sup> for information, discussion, or approval.

### 2.4.3 Independent review of regulator's decisions

143. An appropriate scrutiny and review, like those enabling the judicial review of licensing, authorization or enforcement related to authorities' final decisions are examples of authority accountability. In that sense, the following detailed information should be used as a comparison exercise between the information provided by the different authorities participating, without prejudice to the factual existing legal and constitutional reality in the different jurisdictions which de jure foresees mechanisms and structures with greater development and complexity than those discussed here below.
144. In all jurisdictions, national regulations require regulatory authorities to be subject to judicial review. The NCAs indicate that decisions taken by their authorities are subject to judicial procedures with the relevant courts, as appropriate.

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<sup>235</sup> CY (presents the annual report to the President of the Republic and transmits it to the Minister of Finance), IT (Consob transmits the annual report to the Minister of Economy and Finance, who shall forward it to the Parliament with its observations, if any), LU (The annual report is sent to the Minister. No Minister approval is required), MT (The annual report is presented in Parliament through the Minister. No Minister approval is required either), PL (KNF presents the report to the Prime Minister)

<sup>236</sup> AT, BG, CY, CZ, EE, EL, ES, FI, FR, HR, HU, LT (the "Report to the Seimas of the Republic of Lithuania" is presented to the Parliament twice a year), LV, MT, PT, RO, SI, SK

<sup>237</sup> DE, IE, LT, SI

<sup>238</sup> CY, IT, FR, MT

<sup>239</sup> CY, DE, DK, IT, LI, FR

<sup>240</sup> AT, BE, BG, CY, CZ, EE, EL, ES, FI, FR, HR, HU, IE, IS, IT, LT, LV, MT, PT, RO, SI, SK

<sup>241</sup> EE, FR, IE, IT. In addition, in IT the Minister can comment at any time to Parliament about the activities of the NCA.

<sup>242</sup> IE, IT (only in case of special Parliamentary Committees created by law and acting as judicial authorities) FR (eg Commission for finance of the National assembly, Commission for finance of the Senate).

<sup>243</sup> FI (yearly report to the Parliamentary Supervisory Council on the operational objectives of the Financial Supervisory Authority and their achievement, including an assessment of expected changes in supervision, their impact on the accumulation of supervision fees and measures required for such changes.)

145. The vast majority of the NCAs reported that their decisions can be appealed in administrative proceedings. Specifically, twenty-nine<sup>244</sup> NCAs state that NCAs decisions are subject to judicial review by administrative procedures in accordance with their relevant national law.
146. In addition, four authorities<sup>245</sup> mentioned civil proceedings for the review of an authority decision, when applicable. Moreover, three jurisdictions<sup>246</sup> indicated in their responses that certain circumstances are under the remit of criminal courts, e.g. when the investigation or proceeding involves a possible violation of criminal law.
147. Additionally, regarding the body in charge of the dispute:
- Twenty-one authorities<sup>247</sup> refer explicitly to their national administrative courts;
  - Five authorities<sup>248</sup> just mention the courts in a generic way, refraining from introducing in their responses any specific or detailed court;
  - Two authorities<sup>249</sup> mention their Council of State regarding administrative matters and the Court of Appeal for other decisions;
  - One authority<sup>250</sup> refers to its national High Court when seeking judicial review.
148. It should be noted that six NCAs<sup>251</sup> mention an alternative dispute resolution mechanism provided in their jurisdictions. It is observed for two<sup>252</sup> of them, that the decisions issued by such non-mechanisms can be appealed to the judicial courts.
149. Specifically, regarding alternative dispute resolution mechanism, one NCA<sup>253</sup> states that “decisions can be appealed to the Business Appeals Board and/or the judicial courts”. Another NCA<sup>254</sup> specifies that certain of its decisions are subject to review by IFSAT<sup>255</sup> when appealed to that body. Another NCA<sup>256</sup> noted the possibility to file an appeal with the Financial Services Tribunal within 30 days from the receipt of the decision.
150. On the other hand, the accountability structures usually allow the persons affected by NCAs decisions to have a hearing by the authority prior to the decision being taken.

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<sup>244</sup> AT, BE, BG, CY, CZ, DE, DK, EE, EL, ES, FI, FR, HR, HU, IE, IS, IT, LI, LT, LU, LV, MT, NL, NO, PL, PT, SE, SI, SK

<sup>245</sup> BE, DE, IT (in limited circumstances, mainly when persons seek redress or compensation for damages due to decisions taken by the NCA and when they appeal against fines imposed by the NCA), MT

<sup>246</sup> AT, IT, HR

<sup>247</sup> AT, BG, CY, CZ, DE, EL, ES, FI, HR, IT, LI, LT, LU, LV, NL, PL, PT, RO, SE, SI, SK,

<sup>248</sup> DK, EE, HU, IS, NO

<sup>249</sup> BE, FR

<sup>250</sup> IE

<sup>251</sup> DK, IE, HU, IT (the procedure at the Italian Arbitrator for Financial Disputes does not preclude the investor of seeking redress through court proceedings), MT, RO

<sup>252</sup> DK, IE

<sup>253</sup> DK

<sup>254</sup> IE

<sup>255</sup> Irish Financial Services Appeals Tribunal

<sup>256</sup> MT

151. In that respect, NCAs indicated that they allow representations before they make a decision. Representations could be made by formal allegations formulated either orally, in written or both and, means of defense which may influence such decision can be used. The legal basis for representations differs depending on jurisdictions as illustrated in the table below.

Legal reference for making representations	AT	BE	BG	CY	CZ	DE	DK	EE	EL	ES	FI	FR	HR	HU	IS	IE	IT	LI	LT	LU	LV	MT	NL	NO	PL	PT	RO	SI	SK	SE
Administrative law	✓	✓	✓		✓	✓	✓	✓	✓		✓		✓	✓	✓	✓		✓		✓	✓		✓	✓		✓		✓		✓
Sectorial law/rule				✓					✓	✓		✓	✓	✓		✓	✓					✓					✓	✓		
Internal rules																														
No law / rule mentioned																														✓

- Twenty-two authorities refer to the general proceeding foreseen in each national administrative procedure act;
- Thirteen authorities mention their provisions in this regard contained in the pertinent sectoral regulations.

152. Lastly, it is found that one authority does not mention any legal or official specific reference.

### 3 Conclusion

153. In considering independence under the four key angles, namely operational, financial, personal independence as well as accountability and transparency, NCAs broadly report a high level of independence. However, there are specific areas where practices and approaches differ due, in some cases, to legal structures and frameworks. Key areas where divergence has been identified include:

- Governing body composition
- Rules on conflict of interest, cooling off periods
- Consultation with Government or other entities
- Funding models
- Delegation to external party

These differing approaches and practices can help inform NCAs in considering any changes to structures or procedures to enhance independence.