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BANKING AND FINANCE

Public consultation on the operations of the European Supervisory Authorities

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Introduction

Since their establishment, the European Supervisory Authorities have carried out remarkable work contributing to the building of the Single Rulebook, to ensure a robust financial framework for the Single Market and to underpin the building of the Banking Union as part of the EMU. However further progress in relation to especially supervisory convergence is needed to promote the Capital Markets Union (CMU) for all EU Member States, integration within the EU's internal market for financial services and to safeguard financial stability. While the ESAs have started to shift attention and resources to analyse risks to consumers and investors and undertake more work to increase supervisory convergence, work in this area must be accelerated. It will be important to also capture the ever growing benefits from technological developments such as FinTech, whilst addressing any possible risks arising in this context. ESAs have an important role to play in this respect.

A reflection is needed on what possible changes to the current legal framework are needed to optimise the rules within which the ESAs operate in order to increase their ability to deliver on their mandates. In particular, it is necessary to examine which changes to ESAs' existing powers and governance system are needed to increase the effectiveness of supervision (giving due consideration to the principle on the delegation of powers) and to design a funding system which would enable the ESAs to deliver fully on their mandates. In addition, a reflection is needed on the supervisory architecture to assess its effectiveness in the light of increasing complexity and interconnectedness of financial markets, and the need to ensure effective micro-prudential oversight to face the future challenges of the EU financial markets.

This consultation is designed to gather evidence on the operations of the ESAs focusing on a number of issues in the following broad areas: (1) tasks and powers; (2) governance; (3) supervisory architecture; and (4) funding. The aim is to identify areas where the effectiveness and efficiency of the ESAs can be strengthened and improved, while respecting the legal limitations imposed by the EU Treaties. The results should provide a basis for concrete and coherent action by way of a legislative initiative, if required.

Please note: In order to ensure a fair and transparent consultation process **only responses received through our online questionnaire will be taken into account** and included in the report summarising the responses. Should you have a problem completing this questionnaire or if you require particular assistance, please contact fisma-esas-consultation@ec.europa.eu.

More information:

- on this consultation
- on the protection of personal data regime for this consultation

1. Information about you

*Are you replying as:

- ( ) a private individual
- (•) an organisation or a company
- ( ) a public authority or an international organisation

*Name of your organisation:

German Banking Industry Committee

Contact email address:

The information you provide here is for administrative purposes only and will not be published

o.achtelik@bvr.de

*Is your organisation included in the Transparency Register?
(If your organisation is not registered, we invite you to register here, although it is not compulsory to be registered to reply to this consultation. Why a transparency register?)

- (•) Yes
- ( ) No

*If so, please indicate your Register ID number:

52646912360-95

*Type of organisation:

- ( ) Academic institution
- ( ) Consultancy, law firm
- (•) Industry association
- ( ) Non-governmental organisation
- ( ) Trade union
- ( ) Company, SME, micro-enterprise, sole trader
- ( ) Consumer organisation
- ( ) Media
- ( ) Think tank
- ( ) Other

*Where are you based and/or where do you carry out your activity?

Germany

*Field of activity or sector (*if applicable*):

at least 1 choice(s)

- [ ] Accounting
- [ ] Auditing
- [x] Banking
- [ ] Credit rating agencies
- [ ] Insurance
- [ ] Pension provision
- [ ] Investment management (e.g. hedge funds, private equity funds, venture capital funds, money market funds, securities)
- [ ] Listed companies
- [ ] Market infrastructure operation (e.g. CCPs, CSDs, Stock exchanges)
- [ ] Other financial services (e.g. advice, brokerage)
- [ ] Trade repositories
- [ ] Other
- [ ] Not applicable

Important notice on the publication of responses

*Contributions received are intended for publication on the Commission's website. Do you agree to your contribution being published?

(see specific privacy statement)

- (•) Yes, I agree to my response being published under the name I indicate (*name of your organisation /company/public authority or your name if your reply as an individual*)
- ( ) No, I do not want my response to be published

2. Your opinion

I. Tasks and powers of the ESAs

A. Optimising existing tasks and powers

I. A. 1. Supervisory convergence

Please refer to the corresponding section of the consultation document to read some contextual information before answering the questions.

Question 1: In general, how do you assess the work carried out by the ESAs so far in promoting a common supervisory culture and fostering supervisory convergence, and how could any weaknesses be addressed?

Please elaborate on your response and provide examples.

With regard to Question 1 we refer to our additional document "Public consultation on the operations of the European Supervisory Authorities – Comments with regard to Questions 1, 5 and 32".

Question 2: With respect to each of the following tools and powers at the disposal of the ESAs:

- peer reviews (Article 30 of the ESA Regulations);
- binding mediation and more broadly the settlement of disagreements between competent authorities in cross-border situations or cross-sectorial situations (Articles 19 and 20 of the ESA Regulations);
- supervisory colleges (Article 21 of the ESA Regulations);

To what extent:

a) have these tools and powers been effective for the ESAs to foster supervisory convergence and supervisory cooperation across borders and achieve the objective of having a level playing field in the area of supervision?

Please elaborate on questions and, importantly, explain how any weaknesses could be addressed.

The ESAs' existing toolbox and powers have contributed to a significantly improved coordination between national supervisory authorities.

In particular, peer reviews and supervisory colleges are adequate tools for monitoring supervisory practices and for enhancing supervisory convergence where necessary. However, we suggest reflecting on whether the power of binding mediation is adequately aligned with the division of powers and the specific allocation of competencies in financial supervision. Since, for example, the EBA is generally not vested with direct supervisory competencies, it is at least legitimate to question whether it should be provided with the power to make binding decisions in cases where there are disagreements.

b) has a potential lack of an EU interest orientation in the decision making process in the Boards of Supervisors impacted on the ESAs use of these tools and powers?

Please elaborate on questions and, importantly, explain how any weaknesses could be addressed.

We do not share the assessment that the ESAs' Boards of Supervisors would not sufficiently incorporate broader EU interests in their decision-making processes.

Question 3: To what extent should other tools be available to the ESAs to assess independently supervisory practices with the aim to ensure consistent application of EU law as well as ensuring converging supervisory practices? Please elaborate on your response and provide examples.

Please elaborate on your response and provide examples.

In our view, no further tools are necessary. Rather, the existing tools appear to suffice in every respect. The uniform supervision must evolve step by step/organically anyway, and further review tools make it unnecessarily complicated, without resulting in any compellingly evident benefit. One should give the ESAs more time and first wait and see whether they can carry out their mandates with the tools that they already have at their disposal.

Against the background of the increasing use of convergence tools there arises the question of establishing control mechanisms (complaint/control instance).

Specific comments relating to ESMA:
In view of the myriad publications of guidelines and Q&As, we are against further tools and powers for ESMA. Rather, the existing tools should be used in moderation. With the establishment of Level 3 measures in particular, compliance with the concrete legal basis at Level 1/Level 2 should be observed (cf. also our answer to Question 1).

Question 4: How do you assess the involvement of the ESAs in cross-border cases? To what extent are the current tools sufficient to deal with these cases?

Please elaborate on your response and provide examples.

No comments.

I. A. 2. Non-binding measures: guidelines and recommendations

Please refer to the corresponding section of the consultation document to read some contextual information before answering the questions.

Question 5: To what extent are the ESAs tasks and powers in relation to guidelines and recommendations sufficiently well formulated to ensure their proper application? If there are weaknesses, how could those be addressed?

Please elaborate and provide examples.

With regard to Question 5 we refer to our additional document "Public consultation on the operations of the European Supervisory Authorities – Comments with regard to Questions 1, 5 and 32".

I. A. 3. Consumer and investor protection

Please refer to the corresponding section of the consultation document to read some contextual information before answering the questions.

Question 6: What is your assessment of the current tasks and powers relating to consumer and investor protection provided for in the ESA Regulations and the role played by the ESAs and their Joint Committee in the area of consumer and investor protection? If you have identified shortcomings, please specify with concrete examples how they could be addressed.

Generally in relation to the ESAs:
We agree with the assessment in the consultation paper, according to which consumer protection matters fall within the common responsibility of the EU and Member States. For this reason, the subsidiarity principle should be followed too. A general observation: the ESAs already have a great number of competencies in the area of consumer and investor protection. We have therefore not identified any shortcomings in the area of consumer and investor protection. In the past, it was questionable if the ESAs always acted according to the competencies conferred on them.

Moreover, from 3 January 2018 ESMAs and EBAs competences in this area will even be increased as, pursuant to Art. 40, 41 MiFIR, both will have temporary intervention powers. Therefore, it seems reasonable to evaluate the success of these new competences at a later stage.

It should be noted that consumer protection is also deeply rooted in the national legal systems, especially in civil law. Furthermore, also constitutional problems could arise. Accordingly, the role of the ESAs should focus only on coordination and cooperation.

Particularly in relation to ESMA:
In pursuing the legitimate objective of investor protection, ESMA often

disregards the particularities of the national financial markets. The toying with idea of upgrading ESMA to a consumer protection and behaviour overseer along the lines of the American Securities Exchange Commission (SEC) or the British Financial Conduct Authority (FCA) – should therefore be categorically rejected.

As an example, the issue of inducements can be used as an illustration here, too. Stricter rules on the acceptance of inducements/incentives have no practical effect in Member States (such as the Netherlands and England) whose national laws already provide for a ban on inducements, but have conversely had a significant impact in countries such as Germany, where inducement-based investment advice is a core business of the institutions. ESMA's proposals have thus meant interference in business models. Here, the European legislator had made the Level 1 decision for inducement-based investment advice and so-called independent investment advice to be offered and provided alongside each other.

An expansion of ESMA in the area of investor protection analogous to the SEC or the FCA would, constitutionally, be very questionable. While the U.S. and the British legal systems confer on their national supervisory authorities SEC or FCA extensive capital market legislative powers (sometimes even without specifying the content of such powers), such an approach would blatantly violate the principles of German constitutional law. So, a "blank-cheque empowerment" to issue legal regulations is according to German (constitutional) law out of the question. Rather, the German legislator must give instructions in terms of content, purpose and extent (Art. 80 para. 1 of 1 sentence 2 of the German Grundgesetz = Basic (Constitutional) Law). In Germany, moreover, only a delegation to federal government, federal minister or provincial governments comes into question; the supervisory authority (BaFin) can therefore not act in a legislative capacity until after further (sub)delegation as legislator.

Question 7: What are the possible fields of activity, not yet dealt with by ESAs, in which the ESA's involvement could be beneficial for consumer protection?

If you identify specific areas, please list them and provide examples.

We take a critical view of aspirations to further widen the ESA's mandate in the area of consumer and investor protection. This would question or even overturn the constitutionally enshrined function of parliamentary decision making processes. It should ultimately be in the interests of the democratically legitimised bodies to legislate on issues that need regulation in the law-making process. Both the European legislator and the ESAs should, moreover, orientate themselves more strongly as closely as possible with the experiences and needs of the market players and use their expertise when structuring client-bank relationships. The quality of information, for example, should thus be at the forefront, not the quantity. A "too much" of information usually results in people not paying attention to the issues any more. An "all-round no worries package" for consumers is not compatible with the rightly accepted model of the responsible consumer and a dynamic and growth-orientated market development.

I. A. 4. Enforcement powers – breach of EU law investigations

Please refer to the corresponding section of the consultation document to read some contextual information before answering the questions.

Question 8: Is there a need to adjust the tasks and powers of the ESAs in order to facilitate their actions as regards breach of Union law by individual entities? For example, changes to the governance structure?

Please elaborate and provide specific examples.

In our view, no further extension of the ESA's authority/powers is necessary. Rather, one should question whether after the assignment of responsibility for European bank supervision to the ECB direct rights of intervention by the ESA are still appropriate. As outlined, the EBA in particular is first and foremost a standard -setter (see also Question 17). To at the same time confer on it the right to execute these standards (and other legal principles) leads to demarcation difficulties and to a mingling of the legislative and executive.

I. A. 5. International aspects of the ESAs' work

Please refer to the corresponding section of the consultation document to read some contextual information before answering the questions.

Question 9: Should the ESA's role in monitoring and implementation work following an equivalence decision by the Commission be strengthened and if so, how? For example, should the ESAs be empowered to monitor regulatory, supervisory and market developments in third countries and/or to monitor supervisory co-operation involving EU NCAs and third country counterparts?

Please elaborate and provide examples.

We would appreciate if the ESAs were empowered to monitor regulatory, supervisory and market developments in third countries and/or monitor supervisory co-operation involving EU NCAs and third country counterparts, provided that such information be shared also with the institutions. For international institutions, this is a main aspect for competition considerations and supervisory certainty. This should not, however, be at the expense of other primarily assigned duties; their performance has priority.

It would make sense to strengthen the ESA's powers in connection with equivalence decisions for third-country issues – be it in relation to the legislative process for the equivalence decision, the actual equivalence decision or also as a follow-up to the observation and implementation of an equivalence decision made by the Commission. For the determining of whether financial institutions of a third country have equivalent standards on their financial markets to those of the European Union, including the subsequent follow-up obligations, should be managed consistently.

At present, there is no such third-country regime. Rather, the structures differ, depending on the underlying legal act. Depending on the individual case, competent is, besides the national and European (supervisory) authorities, the EU Commission, which can decide by means of an equivalence resolution; a combination of various decisions is in part necessary too. A bundling of powers in this area therefore makes sense. The equivalence regime in particular gains new significance through Brexit.

At present, the principle "once equivalent, always equivalent" often applies, i.e., an equivalence decision in favour of a third-country financial institution will generally not be revisited anymore. Here, a more effective review process should be created that ensures that not only the regulatory framework is equivalent, but also that this is actually practised.

I. A. 6. Access to data

Please refer to the corresponding section of the consultation document to read some contextual information before answering the questions.

Question 10: To what extent do you think the ESAs powers to access information have enabled them to effectively and efficiently deliver on their mandates?

Please elaborate and provide examples.

We are of the opinion that the ESAs powers to access information enable them already to effectively and efficiently deliver on their mandates. Even more so in light of the upcoming extension of ESMA's access to information on 3 January 2018 (Art. 26 MiFIR). Consequently, we believe that the current status quo is sufficient and that there is no need to guarantee the ESAs additional powers to access to information. Access by ESMA to data even to the existing wide extent may in no event lead to the double-querying of data that were already collected by other authorities. This would mean unnecessary costs for the institutions too. Close coordination between the supervisory and standard setter/supervisors should obviate superfluous efforts. Finally, conclusions drawn from obtained data should be shared with institutions.

Question 11: Are there areas where the ESAs should be granted additional powers to require information from market participants?

Please elaborate on what areas could usefully benefit from such new powers and explain what would be the advantages and disadvantages.

We are absolutely against the ESAs' directly accessing data from market players. The current way of trying to get primary information from national authorities should be preserved to avoid unnecessary regulatory costs for the market participants. The reporting and disclosure obligations and the various ad hoc queries by the competent authorities are already a considerable burden for the institutions. A further extension is therefore not tolerable any more. All the necessary data should, moreover, already be with the NCAs or the ECB. There is therefore no need for additional queries. On the contrary: more disclosure requirements should be prevented and existing requirements should be more consistent (same definitions and tools) and existing reporting /disclosure requirements should be scrutinised for overlaps.

Against the background of the increasing international networking of markets and trading infrastructures, a bundling of pan-European trading data in a shared data bank with the ESAs ("financial instruments reference data system" or "FIRDS" for short) could make sense. Such a common data bank could serve the European market players as an important source for the monitoring of their regulatory obligations.

I. A. 7. 7 Powers in relation to reporting: Streamlining requirements and improving the framework for reporting requirements

Please refer to the corresponding section of the consultation document to read some contextual information before answering the questions.

Question 12: To what extent would entrusting the ESAs with a coordination role on reporting, including periodic reviews of reporting requirements, lead to reducing and streamlining of reporting requirements?

Please elaborate your response and provide examples.

We would greatly welcome a reduction and streamlining of reporting requirements. As things stand, different sets of reporting requirements are defined by too many different parties. This has led to overlaps and a general “inflation” of requirements. Our aim is to achieve an efficient reporting regime in Europe. Therefore, we are interested in an europeanwide coordinated reporting regime, as a way of reducing the reporting burden for banks, so that ultimately data will only need to be collected once and duplicating reporting requirements will be avoided. In our opinion, a preliminary study supported by the banking industry should examine the most efficient way of collaborating with the NCAs and ESAs for determine harmonised reporting requirements and collecting supervisory data.

Particular relevance for the EBA:
With regard to EBA reporting standards, there have been numerous delays in the adoption of ITSs by the Commission in the past. In some cases, it took up to 23 months from submission to publication of particular reporting ITSs. These delays in endorsement and adoption have more than once led to disparities between reporting obligations and underlying regulatory requirements, unduly creating excessive implementation burden for institutions and their service providers.

We therefore strongly advocate accelerating the current adoption procedures seen in practice. While the EBA has suggested a fast-tracking of reporting standards in which the EBA would publish binding ITSs on its own (Opinion of the European Banking Authority on improving the decision-making framework for supervisory reporting requirements under Regulation No 575/2013; EBA/Op/2017/03), we believe the proposed ‘ex post objection period’ of one month would be too short.

Whatever measure should be chosen to accelerate the current procedures, the current process of endorsement and adoption should not be replaced with a less democratically legitimate alternative.

As of today, the EBA is already entrusted with a coordination role on FINREP. The introduction of periodic reviews of these reporting requirements could be beneficial to credit institutions as they would be better able to prepare for future updates. The frequency of such reviews should be sufficiently long so as to avoid constant changes to FINREP (we suggest a minimum period of 3 years between reviews). This cycle should be interrupted only if absolutely necessary (current example: the introduction of IFRS 9).

Particular relevance for ESMA:
In the context of implementing MiFID II, all reporting processes are currently geared to the national supervisory authorities. An additional or alternative reporting line to the ESAs would not lead to a slimming down or simplification here, but to more work and should therefore be rejected.

ESMA is also required to issue an RTS on the implementation of a European Single Electronic Format (ESEF) for financial statements this year. According to ESMA, from 2020 onwards it should be mandatory to publish financial reports based on the IFRS Taxonomy. The IFRS Taxonomy does not reflect the specificities of preparing banks' accounts. Banks are already obliged to report financial information to supervisors in a structured electronic form (FINREP). Therefore, we recommend to allow banks to use FINREP Reports instead of applying the IFRS Taxonomy.

Question 13: In which particular areas of reporting, benchmarking and disclosure, would there be useful scope for limiting implementing acts to main lines and to cover smaller details by guidelines and recommendations?

Please elaborate and provide concrete examples.

With regard to FINREP, such measures could in general be adequate to streamline the adoption procedure. Giving the EBA the authority to issue technical reporting specifications could shorten implementation periods. This would be a welcome development, in our view. We nevertheless consider it essential to continue involving the European Commission as an oversight mechanism when changes are made. The Commission should be given an adequate period of time to raise objections. We would consider a mandatory period of three months appropriate. If no objections were raised within this period, the draft would be regarded as approved. Such an arrangement would speed up the process while retaining the oversight function of the European Commission.

On no account, however, should this procedure be used to shorten the lead time for banks. It is essential to allow banks sufficient time both to respond to the EBA's proposals during the consultation phase and to implement new requirements once they have entered into force. Our experience to date has been that the EBA tends to set excessively short consultation deadlines, making it difficult for banks to submit an adequate response to its proposals. In respect of the implementation period, it has to be clear, that with presentation of the final draft, this draft has to be published in all languages of the European Union. In other words, the implementation period should not start until the publication of final regulations is available in all languages of the European Union.

We are in favour of freeing the implementing acts of minutiae and sticking to essentials. That would also help in an environment which is bound to face rapid technological changes. The more detailed regulation is, the less well can it adapt to these changes.

However, the implementing acts should allow for equally sufficient political scrutiny of the respective guidelines and recommendations to avoid a quasi-legislative role by the EBA. An 'ex post objection period' could potentially be an adequate mechanism to achieve this; it should, however, be instituted only with a long enough time period for objection.

I. A. 8. Financial reporting

Please refer to the corresponding section of the consultation document to read some contextual information before answering the questions.

Question 14: What improvements to the current organisation and operation of the various bodies do you see would contribute to enhance enforcement and supervisory convergence in the financial reporting area? How can synergies between the enforcement of accounting and audit standards be strengthened?

Please elaborate.

As things stand, enforcement is a task carried out by individual national authorities. At the same time, the EECS provide a good platform for promoting both an exchange of information and coordination between national enforcers. In Germany, this approach has worked extremely well in practice. The German enforcement system is highly regarded in the marketplace and the German enforcer is widely seen as highly competent and effective.

On the other hand, we see some merits in activities by ESMA to achieve convergence in financial reporting enforcement across the EU. A uniform European enforcement process is desirable when it comes to enforcing IFRS financial statements. One way of achieving the desired convergence, in our view, would be to apply the basic principle of the SSM to enforcement. The existing tried and tested enforcement agencies should continue to perform their tasks under standardised guidance issued by ESMA. National enforcement is nevertheless still required, especially concerning GAAP financial statements and national specificities.

Supervision of statutory auditors and audit firms
The national supervisory regimes for statutory auditors have just been adapted to the amendments to Directive 2014/56/EU and Regulation (EC) No 537 /2014. The supervisory regimes thus continue to converge with regard to their central elements. We currently see no reason for further changes and more convergence. The legal and institutional structures governing the supervisory regimes differ widely across Member States. Therefore, diversity among the supervisory regimes is inevitable. While the effectiveness of national supervisory regimes is crucially important, their uniformity is not.

At present, it is not appropriate to give ESMA a greater role in the supervision of auditors and audit firms. Only recently, the Committee of European Oversight Bodies (CEAOB) was established with the purpose of coordinating national supervisory regimes on the basis of Article 30, Regulation (EC) No 537/2014. ESMA is a member of CEAOB, while EBA and EIOPA can participate as observers in CEAOB meetings. Therefore, the ESAs are sufficiently involved.

Please refer to the corresponding section of the consultation document to read some contextual information before answering the questions.

Question 15: How can the current endorsement process be made more effective and efficient? To what extent should ESMA's role be strengthened?

Please elaborate.

We believe that the current endorsement process is sufficiently effective and efficient. We also support EFRAG's role in giving endorsement advice to the European Commission. The endorsement process has proved its worth and we see no reason to make any adjustments. There is no need for ESMA to have an advisory role in the endorsement process as well.

In our view, standard-setting and enforcement are two different tasks (see above) and should be clearly separated. Setting and interpreting IFRS is the job of the IASB and the IFRS Interpretations Committee, whilst enforcement aims at ensuring that the standards are applied uniformly. Combining the two would lead to a conflict of interest, in our view.

B. New powers for specific prudential tasks in relation to insurers and banks

I. B. 1. Approval of internal models under Solvency II

Please refer to the corresponding section of the consultation document to read some contextual information before answering the questions.

Question 16: What would be the advantages and disadvantages of granting EIOPA powers to approve and monitor internal models of cross-border groups?

Please elaborate on your views, with evidence if possible.

No comments.

I. B. 2. Mitigating disagreements regarding own funds requirements for banks

Please refer to the corresponding section of the consultation document to read some contextual information before answering the questions.

Question 17: To what extent could the EBA's powers be extended to address problems that come up in cases of disagreement? Should prior consultation of the EBA be mandatory for all new types of capital instruments? Should competent authorities be required to take the EBA's concerns into account? What would be the advantages and disadvantages?

Please elaborate and provide examples.

It shows that the current capital requirement framework, that allows competent authorities to approve CET1-instruments, is an effective process

for each participating entity. A mandatory prior consultation with the ESAs for new capital instruments is neither necessary nor expedient:

It is not necessary because at the time of instruments' being issued the competent authorities apply the relevant law. Should it be established (ex post) – particularly by the EBA – that an issue does not comply with applicable law for capital eligibility, then there is nothing to stop its eligibility from being disqualified by the competent authority. Should the competent authority not follow the relevant indications from the EBA, then the EBA has ample instruments available to it to enforce compliance with European law.

Backed by this division of responsibilities between the EBA and the competent authorities, the framework takes into account several types of capital instruments within the different Member States.

By existing rules, the current validity of approved instruments is ensured as well as their compliance with stipulated requirements. In cases of ambiguity, the competent authorities are free to consult the EBA in advance. A mandatory consultation of the EBA ex ante would cause an unnecessary slowdown in approving CET1-instruments and decrease in flexibility.

When issuing own funds/capital instruments, it is important that institutions can react in a timely manner to market situations. Already today, one can see that the processing time by the competent authority takes, in part, months. The inclusion of further instances would considerably slow the process still more. This must be prevented.

In our opinion there is no advantage and, in particular, no need to adjust the current procedure.
In addition, we see no legal basis for implementing a mandatory consultation with the EBA for all new types of capital instruments. There is no article concerning AT1- or T2-instruments in the CRR which is comparable with article 26 (2). For this reason, we oppose extending the EBA's powers in this case.

In any event, one could think about a dialogue between the CA and EBA. In contrast, it would not be appropriate if the CA had to bear in mind the EBA's concerns. The CRR stipulates clear criteria that own funds instruments must meet. If these are fulfilled, the instrument is, for regulatory purposes, eligible for the own funds calculation. The judgment as to CRR-conformity is made by the NCAs/ECB as competent authority. It is, in our view, that for this reason the provisions of Art. 26 para. 3 CRR already exist, pursuant to which CET1 instruments must be included on an EBA list, and the EBA can, if necessary, raise concerns, in contrast to the principle-based approach of CRR.

We support the approach that EU law be uniformly exercised. In the assessment of supervisory practice and compliance with the regulations, however, there must not be an intermingling of the various competencies. As part of the executive and at the same time a standard-setter, the EBA should not conclusively decide on compliance with statutory regulations. Also, the contours of its actual supervisory activity, which includes the comparison of

institutions' practice with legal regulations, must be drawn (more) clearly.

I. B. 3. General question on prudential tasks and powers in relation to insurers and banks

Please refer to the corresponding section of the consultation document to read some contextual information before answering the questions.

Question 18: Are there any further areas were you would see merits in complementing the current tasks and powers of the ESAs in the areas of banking or insurance?

Please elaborate and provide examples.

We see no further tasks and powers of the ESAs in the areas of banking which need to be complemented.

C. Direct supervisory powers in certain segments of capital markets

Please refer to the corresponding section of the consultation document to read some contextual information before answering the questions.

Question 19: In what areas of financial services should an extension of ESMA's direct supervisory powers be considered in order to reap the full benefits of a CMU?

Please elaborate on your responses providing specific examples.

With regard to ESMA:
In our view, the current system of securities supervision, which is based not only on ESMA but also on the national competent authorities (NCAs), should generally remain in place because it is best suited to deal with the different market structures of the Member States. The NCAs are the competent supervisory authorities in the field of securities regulation and investor protection issues. They have a sound knowledge of the particularities of the respective national financial markets and, therefore, the necessary supervisory expertise. On the other hand, ESMA has no practical supervisory experience whatsoever in relation to banks.

A widening of ESMA's competence can make sense in parts of trade and market infrastructure regulation. Besides the aforementioned bundling of pan-European trade data in a common/shared database at ESMA, here, one should consider the monitoring of systemic risks for the pan-European financial and economic system, as in the supervision of central counterparties (but cf. the constraint in Question 20) and the supervision of administrators of critical benchmarks. The transfer to ESMA of competencies of the national regulatory authorities, however, are to be firmly rejected. The national markets just are – for good reasons – very different. An efficient (pan-European) supervision is not possible.

A transfer of direct supervisory responsibilities to ESMA would, furthermore, contradict the principle of subsidiarity. The national supervisory authorities are familiar with their respective national market conditions and the business models on which these are based, but also the crucial interaction with civil law. In this respect, they have the supervisory competencies that ESMA lacks.

Question 20: For each of the areas referred to in response to the previous question, what are the possible advantages and disadvantages?

Please elaborate on your responses providing specific examples.

Critical benchmarks have a pan-European dimension. Extending ESMA's direct supervisory competences in this area is thus an advantage because ESMA is better suited than NCAs to take into account the pan-European dimension in the supervision of administrators of critical benchmarks.

The effective supervision of CCPs is essential to ensure the integrity and stability of financial markets. As financial markets are interrelated, the supervision of CCPs has not only a national but also a pan-European dimension. Therefore, it would be advantageous if ESMA competencies included the supervision of CCPs. With regard to this possible extension of ESMA's direct supervisory powers over central counterparties, however, particular attention would have to be paid so that, with a "communitarisation" of the supervision over central counterparties, the risk of liability for their failure did not end up at national level. In this case, an appropriate European security would therefore have to be provided for.

Question 21: For each of the areas referred to in response to question 19, to what extent would you suggest an extension to all entities or instruments in a sector or only to certain types or categories?

Please elaborate on your responses to questions 19 to 21 providing specific examples

We suggest an extension to only certain categories of entities or instruments in a sector in order to guarantee that only those with a pan-European dimension would be supervised by ESMA. This approach would still allow the taking into account the different market structures where necessary and thus reflect the principles of subsidiarity and proportionality. Accordingly, only administrators of critical benchmarks would be supervised by ESMA, while administrators of non-critical benchmarks would still be supervised by the respective NCA.

II. Governance of the ESAs

A. Assessing the effectiveness of the ESAs governance

Please refer to the corresponding section of the consultation document to read some contextual information before answering the questions.

Question 22: To what extent do you consider that the current governance set-up in terms of composition of the Board of Supervisors and the Management Board, and the role of the Chairperson have allowed the ESAs to effectively fulfil their mandates? If you have identified shortcomings in specific areas please elaborate and specify how these could be mitigated?

We don't see a lack of supranational interest orientation in the decision making process of the board. By contrast, we think that it is of the utmost necessity to have persons on the board who have an in-depth knowledge of their respective markets and can bring the various national aspects to bear. Knowledge of the markets and business models is essential for good regulation. In this respect, we believe that the current setting with members stemming from the national authorities should in principle remain.

The national supervisory authorities know their respective national financial markets and have the necessary supervisory competence. Their wealth of experience should therefore be taken into account in ESMA’s and EBA’s decision-making processes. This should be regarded as a positive factor, rather than the lack of supranational orientation, as expressed in the consultation paper.

Therefore, when weighting the votes during voting on the Board of Supervisors, the size of the respective national financial markets should be considered accordingly. Because the larger the market, the greater is the expertise of the respective competent supervisory authority. This “increase in” experience must therefore be reflected in the weighting of votes on the Board of Supervisors too. In addition, it should be stipulated that Member States which are not affected by a regulatory measure may not vote on a decision about it.

The decision-making processes in the ESAs are basically very tedious. This is due to the large number of Member States and reflects the various backgrounds. To shorten this process by increasing the competencies and the number of staff, e.g., the secretariat, would not be appropriate, since these may not adequately represent the different views and not be able to weigh them up.

We cannot understand the criticism in the consultation paper “that the Board of Supervisors focuses too much on technical regulatory matters and too little on strategy and supervisory matters”. The preparation of technical regulatory standards is one of the ESAs’ core tasks (cf. Art. 8 para. 1 a) ESA Regulation). Strategy issues, however, are the job of the legislature.

Question 23: To what extent do you think the current tasks and powers of the Management Board are appropriate and sufficient? What improvements could be made to ensure that the ESAs operate more effectively?

Please elaborate.

No comments.

Question 24: To what extent would the introduction of permanent members to the ESAs' Boards further improve the work of the Boards? What would be the advantages or disadvantages of introducing such a change to the current governance set-up?

Please elaborate.

No comments.

Question 25: To what extent do you think would there be merit in strengthening the role and mandate of the Chairperson? Please explain in what areas and how the role of the Chairperson would have to evolve to enable them to work more effectively? For example, should the Chairperson be delegated powers to make certain decisions without having them subsequently approved by the Board of Supervisors in the context of work carried out in the ESAs Joint Committee? Or should the nomination procedure change? What would be the advantages or disadvantages?

Please elaborate.

A delegation of powers, when clearly defined as to its purpose, contents and extent could help to speed up certain procedures, but at the same time it constitutes the risk of creating imbalance in the power structure within the ESAs, which in turn would weaken their effectiveness. Strengthening the rights of the chairperson alone would not ease the ESAs' in part tedious decision making processes and should therefore not be seen as a solution. This applies all the more because the bottleneck is often to be found in Commission's sphere of influence. It is more essential that the national supervisory authorities are adequately represented in the ESAs and that their opinions are heeded.

B. Stakeholder groups

Please refer to the corresponding section of the consultation document to read some contextual information before answering the questions.

Question 26: To what extent are the provisions in the ESA Regulations appropriate for stakeholder groups to be effective? How could the current practices and provisions be improved to address any weaknesses?

Please elaborate and provide concrete examples.

The provisions in the ESA Regulations are basically appropriate. Apart from the “formal” stakeholder groups, the ESAs should strive for an ongoing participation of stakeholders which is already best practice in the Member States. Although the existing ESA-stakeholder groups are involved on an ongoing basis, they do not act as representatives of the markets as a whole. Consultations of the market participants on the other hand take place at a comparatively late stage of the regulatory process. We therefore need an effective culture of standing dialogue between the ESAs and the full range of their stakeholders. National authorities may pave the way for such a third channel in the national jurisdictions. We can see some developments in that direction, which is very much welcomed.

Regarding the transparency of the Stakeholder Group’s work, the relevant meeting minutes (as well as those of the relevant ESA’s Board of Supervisors (BoS)) are made available to the public. However, they are typically published about three months after the meetings, which is a significant time lag. Furthermore, published meeting minutes often offer insufficient information on the reasoning for a particular decision and the surrounding discussions that have taken place. GBIC [German Banking Industry Committee] therefore advocates significantly enhancing the content of all published meeting minutes (BoS, MB and Stakeholder Group) and making them available on the ESA’s web site within one month after each meeting.

With particular regard to EBA:
In practice, however, it is necessary to include the BSG members in the decision making processes more effectively. E.g., by early involvement in consultations, earlier preparation of meetings/sending of documents and paying more in-depth content-related attention to the BSG’s concerns.

With particular regard to ESMA:
From the perspective of the market participants, the work of the stakeholder groups is not transparent. In particular, a discussion of individual issues in the stakeholder groups is no substitute for a market consultation.

With regard to the appointment of the ESMA stakeholder group, representation of the different pillars of the banking system (cooperative, private, and public) should be factored in. This means, that representatives of all pillars of the banking system should be considered – as is already the case with the stakeholder group at EBA. Furthermore, one could consider introducing different stakeholder groups (e.g. for financial market participants, consumers, academics etc.).

There is still room for improvement as regards the involvement of market participants into the legislative process of ESMA. Currently, ESMA includes market participants only to an insufficient extent in the legislative process. They are often confronted with the “finished product” only after the event. The result of this is that once ESMA has adopted a course, corrections can be made only in part or not at all.

III. Adapting the supervisory architecture to challenges in the market place

Please refer to the corresponding section of the consultation document to read some contextual information before answering the questions.

Question 27: To what extent has the current model of sector supervision and separate seats for each of the ESAs been efficient and effective?

Please elaborate and provide examples.

With particular regard to EBA:
Closer locational proximity for the ESAs would, on grounds of efficiency, be much welcomed. This could be achieved, for example, by moving the European Banking Authority (EBA) to Frankfurt.

Furthermore, duplicities between EBA and the SSM should be reduced.

With particular regard to ESMA:
Firmly rejected should be deliberations to transfer competencies of the national supervisory authorities to ESMA. For good reason, the national markets just are very different. An efficient (pan-European) supervision is thus not possible.

A transfer of direct supervisory responsibilities to ESMA would, furthermore, contradict the principle of subsidiarity. The national supervisory authorities are familiar with their respective national market conditions and the business models on which these are based, but also the crucial interaction with civil law. In this respect, they have the supervisory competencies that ESMA lacks.

Question 28: Would there be merit in maximising synergies (both from an efficiency and effectiveness perspective) between the EBA and EIOPA while possibly consolidating certain consumer protection powers within ESMA in addition to the ESMA's current responsibilities? Or should EBA and EIOPA remain as standalone authorities?

A pooling of EBA and EIOPA appears to make sense to realise possible synergy effects. A merger should take place in a financial city location in order to facilitate access to personnel with the necessary expertise. An amalgamation at EIOPA's domicile in Frankfurt would be welcome. Regardless of their concrete future structure, the ESAs should not lose sight of regional and local features and interests (subsidiarity principle). In other words, they should work closely in and with the markets and a culture of dialogue should be promoted. Also, a risk-based approach as a fundamental principle of ESAs' work is definitely advisable. We don't see that assignments at Level 1 must be transformed into detailed regulation. In addition, we refer to our comments on Question 27, which apply here accordingly.

With particular regard to ESMA:
We reject a transfer of responsibilities of the national supervisory authorities to ESMA (cf. our detailed answer to Question 18).

IV. Funding of the ESAs

Please refer to the corresponding section of the consultation document to read some contextual information before answering the questions.

Question 29: The current ESAs funding arrangement is based on public contributions. Please elaborate on each of the following possible answers (a) and (b) and indicate the advantages and disadvantages of each option.

a) should they be changed to a system fully funded by the industry?

- ○ Yes
- ◉ No
- ○ Don't know / no opinion / not relevant

What are the advantages and disadvantages of option a)?

While the financial crisis may have created political pressure to make financial entities contribute more heavily to their regulation and supervision, there are strong reasons in favour of an ideally exclusive public contribution to ESA funding:

1. The adoption of a funding model based on fees by market participants would constitute a discrimination against other sectors as it would be in stark contrast to the general practice in regulation and supervision. Most EU agencies are fully or mostly funded by the EU budget, for instance the European Food Safety Authority (EFSA), the European Railway Agency (ERA) and the European Global Navigation Satellite Systems Agency (GNSS).

2. In many cases, financial entities are already contributing to ESA budgets via their NCA contributions. However, national funding models differ considerably across the EU. Introducing additional ESA fees on top of these funding models would only magnify the existing distortions.

3. The ESA's responsibilities are predominantly of a regulatory nature. If the ESAs' would not exist their respective tasks would largely have to be carried out by the European Commission itself and under the European Parliament's and the European Council's scrutiny. While, for example, the European Central Bank's fee-based funding model within the Single Supervisory Mechanism may be justified by the direct relation between supervision costs and an entity's size and riskiness, such a relation is lacking in the ESA's case.

4. The control over the ESAs' budgets currently exercised by the European Commission, the European Parliament and the European Council has proven to be beneficial to maintaining budgetary discipline, whereas a transition to a fee-based financing would almost certainly lead to significant increases in the ESAs budgets. This is because the industry cannot defend itself against inappropriate budgetary increases in the way that the European Commission or Member States are able to do - the industry would very likely be accused of not cooperating with financial supervision.

In summary, the GBIC strongly suggests maintaining the current composition of ESA funding to ensure budgetary discipline and consistency with other sectors as well as to avoiding highly detrimental implications for budget governance. An overall and progressive increase in regulatory costs, including the financing of national and European supervisory and resolution authorities and contributions to the Single Resolution Fund, must be avoided not only to guarantee the functioning of the financial markets but also to safeguard the interests of market participants and their clients.

b) should they be changed to a system partly funded by industry?

- ○ Yes
- ◉ No
- ○ Don’t know / no opinion / not relevant

What are the advantages and disadvantages of option b)?

Compare our answer to Question 29 a).

Question 30: In your view, in case the funding would be at least partly shifted to industry contributions, what would be the most efficient system for allocating the costs of the ESA’s activities?

- ○ a) a contribution which reflects the size of each Member State’s financial industry (i.e., a "Member State key")
- ○ b) a contribution that is based on the size/importance of each sector and of the entities operating within each sector (i.e., an "entity-based key")

Please elaborate on (a) and (b) and specify the advantages and disadvantages involved with each option, indicating also what would be the relevant parameters under each option (e.g., total market capitalisation, market share in a given sector, total assets, gross income from transactions etc.) to establish the importance/size of the contribution.

As we oppose funding by the industry, (cf. answer to Question 29), the question of a method of funding does not present itself.

Question 31: Currently, many NCAs already collect fees from financial institutions and market participants; to what extent could a European system lever on that structure? What would be the advantages and disadvantages of doing so?

Please elaborate.

Should, despite our negative stance, a levying of fees by the ESAs be introduced, the existing fee burden on the institutions must not be increased, but must be cost-neutral. It must, in addition, be ensured that the institutions have a right of control over the authorities’ budgets.

General question

Question 32: You are invited to make additional comments on the ESAs Regulation if you consider that some areas have not been covered above.

Please include examples and evidence where possible.

With regard to Question 32 we refer to our additional document "Public consultation on the operations of the European Supervisory Authorities – Comments with regard to Questions 1, 5 and 32".

3. Additional information

Should you wish to provide additional information (e.g. a position paper, report) or raise specific points not covered by the questionnaire, you can upload your additional document(s) here:

36dbb4b4-cbc2-4711-ab38-e2eb90354c09/20170516_ESAs-Review_KOM_DK_Questions_1-5-32-fi.pdf

Useful links

More on the Transparency register (http://ec.europa.eu/transparencyregister/public/homePage.do?locale=en)

Consultation details (http://ec.europa.eu/info/finance-consultations-2017-esas-operations_en)

Specific privacy statement (https://ec.europa.eu/info/sites/info/files/2017-esas-operations-privacy-statement_en.p

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