European Banking Industry Committee

European Banking Federation (EBF) • European Savings and Retail Banking Group (ESBG) • European Association of Co-operative Banks (EACB)
European Mortgage Federation-European Covered Bonds Council (EMF-ECBC) • European Federation of Building Societies (EFBS)
European Federation of Finance House Associations (Eurofinas)/European Federation of Leasing Company Associations (Leaseurope)
European Association of Public Banks (EAPB)

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EBIC Position on the Review of the European Supervisory Authorities

Funding of the ESAs

The European Banking Industry Committee is strongly against changing the existing funding model of the European Supervisory Authorities. The present funding model (60% national supervisory authorities, 40% EU budget) is simple and clear, and strikes a good balance between contributions from national supervisors and from the EU budget. The proposal foresees a contribution from the EU budget up to 40%, thereby implying that it could be lowered from the current standard of 40%.

A contribution from the EU's budget is warranted since ESAs' supervision provides public goods such as financial stability and consumer protection, as well as delivers consistent conditions to all market participants. Moreover, an adequate degree of parliamentary control over the budget is needed to prevent a stark increase in costs and to ensure that national interests do not prevail over the commitment to European interests and furthering the single market.

In the proposal, part of the costs are incurred directly on the financial institutions, while no mention is made of decreasing the budget of national competent authorities.

The drafts before us already show also the first expansive effects of the proposed funding with fees: in anticipation of a future participation by the institutions in the ESAs' budgets, the prospect of 220 new posts has already been held out to the ESAs. This applies particularly against the background that the ESAs carry out regulatory functions that would otherwise fall under the responsibility of the Commission (Articles 290 and 291 of the TFEU).

The proposal also specifies that the criteria determining the annual contributions by individual institutions to the ESAs will be clarified at a later stage in a separate delegated act. Should – despite our arguments – the Commission proposal with regard to the funding of the ESAs be maintained, this is not a desirable solution as we believe that the size criteria are not always appropriate and in general the criteria to calculate the annual contributions paid to the ESAs should be specified in the level 1 texts, rather than in a delegated act.

We suggest considering the use of secondments from the industry. In this way, practical experience could be accessed by the ESAs, without incurring substantial additional costs.

Division of Supervisory Competences

The Commission has proposed that the European Securities and Markets Authority (ESMA) should have increased responsibility, skills and competencies. EBIC considers that indeed, in certain cases with strong pan-European elements granting additional competences of ESMA could help create a uniform approach which would be beneficial and makes sense. For example, the supervision of administrators

EBIC Secretariat: European Savings and Retail Banking Group (ESBG), Rue Marie-Thérèse 11, B - 1000 Brussels
Tel: + 32 2 211 11 11, E-mail: secretariat@ebic.org, Transparency register: 776974929089-90

of critical benchmarks, the supervision of trading data reporting services and the greater involvement in third-country equivalence are to be welcomed due to the "pan-European" aspect which is dominant in such cases.

However, EBIC has reservations against this approach when it comes to prospectuses. We think the argumentation "centralising the scrutiny" and "building up expertise within ESMA" in the proposed areas is not justified. According to Art 2 (r) Prospectus Regulation 2017/1129 the "scrutiny by the (…) competent authority" is about "the completeness, the consistency and the comprehensibility of the information given in the prospectus" only. We fear that this proposal would convince issuers to turn to third country financial centres, entailing a significant loss for European capital markets. It could also have severe negative impact on the function of the national securities markets and the financing of SMEs. The expertise of NCAs seems adequate since they know the national conditions/particularities/features of their respective markets. This includes the interaction with (national) civil law and the relevant implications. It should also be noted that the vast majority of securities are offered in one or a few Member States. We see thus no reason to deviate from the status-quo. With respect to "supervisory arbitrage" and "level-playing field" we would like to draw the European Commission's attention to the fact that the Prospectus Regulation has just been adopted and that some time is needed before drawing any conclusion on these aspects.

Moreover, we consider that it does not make sense to create completely new structures and require additional resources at ESMA level in the case of both prospectuses and funds, as supervisory convergence is already adequately ensured with the existing tools (e.g. by conducting peer reviews and issuing guidelines)."

In addition, ESMA's (and the EBA's) task of preparing a 'Strategic Supervisory Plan' should be closely looked into in particular due to the combination with NCAs competences. Supervisory convergence is supported by EBIC but the strategic target and priority setting must be limited to the framework of the ESAs mandate, leaving enough leeway for national market specificities as the ESAs are not familiar with each individual market and hence cannot formulate any strategic goals and priorities. It is vital that double priorities and double questions from authorities are avoided. The ESAs should not result in supervising NCAs.

Direct requests for information by the ESAs should be rejected. In general, we consider that there is a need to reduce as much as possible ad hoc requests, especially if the same information has already been produced for reporting purposes and is available at the level of national authorities.

Furthermore, it should be noted that the use of the XBRL format based on the EBA's Data Point Model (DPM) is only mandatory for reporting submissions between the NCAs and the EBA. In some Member States, the XBRL taxonomies have not yet been used by financial institutions for their reporting obligations. In those Member States, direct requests according to which information shall be provided explicitly in the XBRL format would imply an extraordinary and unreasonable effort for implementation.

Governance

The Commission proposes converting the existing ESAs' Management Boards into so-called Executive Boards that are each filled the respective ESAs chairperson and several full-time members. These together with the ESAs chairpersons should in future be appointed by the European Council, which should enhance their significance within the ESAs. EBIC is in favour of further supervisory convergence. This must not, however, lead to a situation where the national particularities of the

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Member States and the different supervisory structures, if any, are ignored. NCAs should decide on all fundamental matters of supervision through their representation in the Board of Supervisors, as the presence of NCAs ensures that both the EU view and national specificities are taken into consideration. It should be kept in mind that the ESAs are authorities that are supported by the supervisory authorities of the Member States. Against this background, we have reservations towards the proposal to set up an Executive Board that acts independently from the representatives of the national supervisory authorities.

Should this proposal be maintained, in order to ensure sound governance, the Executive Board needs to be monitored by Member States and the composition should be carefully considered; it cannot be the case that a Board is composed of members from only one geographical region of the EU. In addition, decisions taken by an independently appointed Executive Board on key issues of indirect supervision, such as Strategic Supervisory Plan or interventions to ward off serious negative consequences for the internal market and the real economy (Article 22 ESA Regulation) should require the approval of the Board of Supervisors. It should also be provided that Member States which are not affected by a regulatory measure should not be allowed to vote on them.

Stakeholder Groups

The Commission proposes that the stakeholder groups could be granted the right to submit their opinion to the Commission when they deem that an ESA has exceeded its mandate on the guidelines and recommendations. Whilst this idea is welcomed by EBIC, we believe that the first step is to make sure that different banking groups are properly represented in each stakeholder group: the stakeholder groups' main activity is to deal with banking related aspects and therefore the number of participants from the banking industry should be significantly increased. One option could be to split each one into two groups – one being formed by academics, and another which is mainly industry-based. In our view, they would all benefit from more focused stakeholder representation.

With regard to the appointment of the ESMA Stakeholder Group, representation of the different pillars of the banking system (cooperative, savings, 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 EBA Stakeholder Group. In this context, the number of representatives from the industry should be increased.

Level III Measures

It needs to be ensured that the ESAs do not overstep their respective mandates and that delegated acts, implementing acts, technical standards, guidelines and Q&As strictly comply with the provisions of the Level 1 texts on which they are based. It is of utmost importance that the hierarchy between Level 1, Level 2 and Level 3 is fully respected by all EU authorities involved. It is equally crucial to have legal certainty and to avoid that Level 1 legislation is "corrected" or that "add-ons" are created by Level 2 or Level 3 measures, in particular Q&As. The tendency of the ESAs to act without prior mandate from the legislator (e.g. elaborating own-initiative guidelines) is problematic, as the democracy of the process is not fully ensured. Consistency between the work of the legislator, the regulator and the supervisor is key to good governance.

With this in mind, the EBIC would like to propose the following:

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- The right to object to guidelines or recommendations should be granted to the European Parliament and Council before the guidelines or recommendations are published (same procedure as for the RTS).
- Direct access to judicial review should be introduced.
- Clarify the legal nature of Level III measures in general With regard to Q&As, clarifications and improvements are urgently needed. Hence, in the three ESA regulations, it should be clearly stated that Q&As are not legally binding – a fact that the ESAs themselves would not dispute. We suggest a more strongly regulated procedure for issuing Q&As that provides transparency on the development/formation of Q&As.

In addition the proposed scrutiny by the ESAs Stakeholder Groups on whether the ESAs have overstepped their competences with a particular guideline is welcomed as a step in the right direction,.

However, for this process to have a real added value, we would propose at the following amendments:

- Replace the 2/3 majority of the members by the simple majority of the members or at least absolute majority. Indeed, the proposed 2/3 majority, especially in view of the highly heterogeneous composition of SGs, is too high a threshold, which would make it much more difficult to use the mechanism in practice.
- Introduce an obligation on the European Commission to adopt an implementing decision requiring the relevant ESA to withdraw the guidelines or recommendations concerned where the European Commission considers that the relevant ESA has exceeded its competence. Thus, the proposal should be amended (replace "may" by "shall") to require the Commission to withdraw the guideline or recommendation in such cases. For reasons of transparency, the Commission should also be required to give reasons for its decision and to publish it.
- Introduce a time frame within which the EC has to request explanations from the relevant ESA (e.g. 1 month), a time frame within which the EC has to take its decision (e.g. 2 months) and a suspension period during the time within which the EC has to take its decision when the EC receives an opinion that the relevant ESA has exceeded its competence during the "comply or explain" period. In general, the ESAs' guidelines and technical standards that are under review by the Commission -to ensure that the ESAs do not overstep their respective legal mandates- should be suspended until a final decision pertaining to their legality is reached. The suspension would help to avoid wasting resources in case the guidelines or standards are repealed.

According to the EC proposal, the ESAs should also be obliged to conduct open public consultations prior to issuing guidelines and recommendations (cf. Art. 3 para. 7 (b) of the proposal to replace the existing Art. 16 para. 2 of Regulation (EU) No. 1095/2010 (ESMA Regulation)). EBIC is in favour of this approach, as well as the ESAs' new duty to conduct cost-benefit-analyses. However market participants should be involved at an earlier stage of the drafting process and not be only confronted with a "fait accompli". Also, it is unclear under which circumstances a public hearing and a cost-benefit-analysis can be waived ("save in exceptional circumstances"). Clarification is required here.

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