



EUROPEAN COMMISSION

Directorate-General for Financial Stability, Financial Services and Capital Markets Union

Financial services policy and international affairs

PUBLIC CONSULTATION

On:

Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority) amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (the "**EBA Regulation**");

Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority) amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (the "**EIOPA Regulation**"); and

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 2009/78/EC (the "**ESMA Regulation**").

Disclaimer

This document is a working document of the European Commission services for the purposes of consultation and does not prejudice any decision or action that the European Commission may take regarding the three Regulations establishing the European Supervisory Authorities ("ESAs"), namely the EBA Regulation, the EIOPA Regulation and the ESMA Regulation (collectively the "ESA Regulations").

The views reflected in this consultation document do not constitute any policy position and should not be understood to constitute a formal proposal by the European Commission.

The responses to this consultation document will provide important guidance to the European Commission when preparing a report to the European Parliament and the Council and, if considered appropriate, a Commission proposal.

PUBLIC CONSULTATION ON

THE OPERATIONS OF THE EUROPEAN SUPERVISORY AUTHORITIES

INTRODUCTION

Integrated financial markets bring significant benefits to the funding of the European economy and for promoting jobs and growth on a sound and sustainable basis. To promote financial integration and market integrity while safeguarding financial stability, the EU internal market for financial services requires common rules and strong supervisory coordination. When the EU overhauled its financial system in response to the financial crisis, and in line with global efforts, it therefore introduced a Single Rulebook for financial regulation in Europe and created the European Supervisory Authorities ("ESAs"). The ESAs' mandate is to contribute to developing the Single Rulebook, solve cross-border problems, and promote supervisory convergence. The ESAs constitute an institutional cornerstone of the comprehensive reform package put in place in recent years and they have played a key role in ensuring that the financial markets across the EU are well regulated, strong and stable. Supervisory convergence will be increasingly important going forward, notably in the context of the Capital Markets Union ("CMU").

Significant achievements in furthering the EU's integrated financial framework have been made in the six years during which the ESAs have been operating. The new capital requirements and resolution frameworks for banks¹ (2014) and the solvency framework for insurers² (2016) have entered into effect and contributed to a reinforcement of the Single Rule Book for financial services. The framework for banks in Member States participating in the Banking Union – currently the euro area but open to all Member States - has been reinforced with the creation of the Single Supervisory Mechanism ("SSM") and the Single Resolution Mechanism ("SRM"). At the same time, the development of the CMU has taken off to complete the single financial market and boost EU's capital markets in all EU Member States. These various elements are essential also to an efficient functioning of the Economic and Monetary Union ("EMU"). However, more recently new challenges to financial integration have arisen, as illustrated not least by the vote of the United Kingdom to leave the EU and the position taken by the Government of the United Kingdom in its White Paper on "The United Kingdom's exit from and new partnership with the European Union" that it will not be seeking membership of the Single Market. The departure of the United Kingdom from the Single Market reinforces the need for a thorough reflection on how to further improve the supervisory capacities of the EU27 to promote an efficient, competitive and integrated financial system underpinned by financial stability and strong supervision.

¹ Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms (OJ L 176, 27.6.2013, page 338); Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms (OJ L 176, 27.6.2013, page 1); and Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms (OJ L 173, 12.6.2014, page 190).

² Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (OJ L 335, 17.12.2009, page 1).

Since their establishment, the ESAs 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 CMU, integration within the EU's internal market for financial services and to safeguard financial stability. In the area of capital markets in particular, the Five Presidents' Report of June 2015³ outlined the need for further supervisory responsibilities in the area of capital markets as a vision for a well-functioning CMU, and the 2016 CMU Communication emphasised that further work will be needed to reinforce the European dimension of supervision. 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. Moreover, 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.

Work carried out by the ESAs in relation to supervisory convergence and consumer and investor protection has also highlighted that the definition of the ESAs' mandate and institutional framework could be further improved to increase their effectiveness. This includes improvements to the current governance structure, more clarity regarding the boundaries of certain tasks and powers, additional powers in certain areas, and sufficient and stable resources. These factors have also been highlighted on several occasions in the past by the European Parliament ("Parliament"), the Council and the European Commission ("Commission").

A reflection is therefore 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. This also corresponds to the approach taken in the De Larosière report on Financial Supervision in the European Union published in February 2009, which laid down the basis for the establishment of the three ESAs. The report explicitly mentions the need to consider additional reforms following a first review of the European System of Financial Supervision ("ESFS").⁴ 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. This consultation responds to the requirements for evaluation set

³ https://ec.europa.eu/commission/publications/five-presidents-report-completing-europes-economic-and-monetary-union_en

⁴ De Larosière report, page 58, recommendation 24.

out in Article 81 of the ESA Regulations.⁵ It complements the public consultation carried out in late 2016 to review the EU's macro-prudential framework including the European Systemic Risk Board ("ESRB").⁶ The follow-up to this consultation on the micro-prudential part of the ESFS will be closely coordinated and considered in parallel to work carried out as a follow-up to the public consultation on the EU's macro-prudential framework.

2. Overview of the European Supervisory Authorities

The three ESAs form part of the ESFS and were established as independent EU agencies in January 2011 under the 2010 ESA Regulations. They were tasked with a range of responsibilities of a regulatory, as well as of a supervisory nature.⁷ The principal decision-making bodies of the ESAs are their respective Boards of Supervisors which consist of heads (or alternates) of the national competent authorities ("NCAs") and chaired in each case by an ESA Chairperson elected for five years and renewable once. The ESAs work within a network comprised of NCAs which carry out day-to-day supervision of most financial entities, an ESAs Joint Committee which ensures cross-sectorial cooperation and consistency, and the ESRB.

3. Past evaluations and recommendations

This consultation builds on the Commission's report on the operation of the ESAs and the ESFS published in 2014 ("2014 Report"),⁸ the accompanying staff working document (the "2014 SWD")⁹ and the report published in October 2013 by the Parliament on the ESAs and the ESFS ("Parliament Report"). It also reflects the claims related to the ESAs brought forward in 2015 and 2016 in the context of the call for evidence.¹⁰

⁵ Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority) amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC, OJ L 331, 15.12.2010, page 12; Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority) amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC, OJ L 331, 15.12.2010, 48; and 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 2009/78/EC, OJ L 331, 15.12.2010, page 84.

⁶ For the macro-prudential leg of the ESFS, see the consultation that was published in August 2016 and the following summary report published in December 2016.

⁷ For more information about the ESAs and their powers, tasks and governance, see https://ec.europa.eu/info/business-economy-euro/banking-and-finance/financial-supervision-and-risk-management/european-system-financial-supervision_en#theeuropeansystemoffinancialsupervision

⁸ Report from the Commission to the European Parliament and the Council on the operation of the European Supervisory Authorities (ESAs) and the European System of Financial Supervision (ESFS), SWD(2014) 261 final, 8.8.2014.

⁹ Commission Staff Working Document Accompanying the document Report from the European Commission to the European Parliament and Council on the operation of the European Supervisory Authorities (ESAs) and the European System of Financial Supervision (ESFS) {COM(2014) 509 final}, Brussels, 8.8.2014, SWD(2014) 261 final.

¹⁰ Respondents highlighted amongst other things the need to consider the scope of ESA guidelines, the ESAs role in strengthening supervisory convergence, the ESAs role in pursuing breach of EU law cases and how to increase their focus on enforcement. Commission Communication on the call for evidence: EU regulatory framework for financial services, COM (2016) 855 final and SWD (2014) 261.

The 2014 evaluation took place after a very short observation period (after less than three years of operation)¹¹ and the regulatory and supervisory environment was still uncertain at that time, pending negotiations and the entry into force of revised sectorial legislation and the establishment of the SSM, the SRM and the Single Resolution Board ("SRB"). Therefore, the Commission considered it premature to propose legislative changes. While the 2014 Report concluded that the ESAs had performed well, it identified a number of issues that could be considered for improvement, including: (i) an increased focus on supervisory convergence; (ii) direct access to data; (iii) possible strengthening of dispute settlement powers; (iv) a greater focus on consumer and investor protection; (v) a possible extension of the ESA's mandates; (vi) enhanced internal governance; (vii) further assessment of possible structural changes; and (viii) the use of alternative sources of funding instead of public contributions.¹² These issues correspond to the four broad areas that are the focus of this consultation.¹³

The Parliament carried out a review of the ESAs already in 2013. Some of the conclusions in the Parliament's Report were similar to those in the Commission's 2014 Report in terms of the performance of the ESAs including on the fact that the observation period was very short. The Parliament Report contained a detailed list of items for improvement, some of which would require legislative changes. In its March 2014 resolution on the ESFS review, the Parliament requested the Commission to submit new legislative proposals for the revision of the ESAs on areas including governance, representation, supervisory cooperation and convergence, and the enhancement of powers.¹⁴ Most of the issues raised by the Parliament concern the same four areas that are the focus of this consultation.

The Council concluded in November 2014 that targeted adaptations should be considered to improve, in particular, the ESAs performance, governance and financing.

4. Responding to this consultation and follow up to the consultation

Evidence obtained through this consultation will be assessed against the ESAs objectives to protect the public interest by contributing to the short, medium and long-term stability and effectiveness of the financial system, for the Union economy, its citizens and businesses.¹⁵

In line with Better Regulation principles, the relevance, effectiveness, efficiency, coherence and EU added value of the ESAs will be assessed.¹⁶

Further information about the scope and purpose of this consultation and the issues to be examined can be found in the [inception impact assessment](#).

¹¹ Recognised by virtually all stakeholders, including the Commission and Parliament.

¹² Other recommendations include: direct access to data when necessary; possible strengthening of dispute settlement powers and further assessment of possible structural changes including a single location for the ESAs and extended direct supervision powers.

¹³ (1) tasks and powers; (2) governance; (3) supervisory architecture; and (4) funding.

¹⁴ European Parliament resolution of 11 March 2014 with recommendations to the Commission on the European System of Financial Supervision (ESFS) Review (2013/2166(INL)).

¹⁵ See Article 1(5) of the ESA Regulations.

¹⁶ See chapter VI (page 56) of the Better Regulation Guidelines.

This consultation provides an opportunity for all stakeholders to provide their views. Views are welcome from the ESAs, Member States, competent authorities of financial institutions and market participants, industry, consumer and investors organisations, to name just a few. EU institutions, the Single Supervisory Mechanism and think tanks are also invited to take part.

The issues consulted on in relation to the operation of the ESAs are mostly well known to stakeholders. They have been the subject of discussions with stakeholders and previous consultations and evaluations carried out by the Parliament and the Commission. Issues relating to the ESAs have also come up in responses to the Green Paper on Building a Capital Markets Union and to the call for evidence.¹⁷ This public consultation is therefore rather focussed and for that reason a two month timeframe is foreseen.

You are kindly asked to submit your response by 16 May 2017.

You are invited to reply to the questions in the questionnaire by using the following link: http://ec.europa.eu/info/finance-consultations-2017-esas-operations_en. Please always use this questionnaire even if you would like to submit documents.

You are invited to read the [privacy statement attached to this consultation](#) for information on how your personal data and contribution will be dealt with.

You are kindly asked to reply to a number of questions relating to the above listed issues. Please explain your responses and, as far as possible, illustrate them with concrete examples and substantiate them with supporting data. Please try to take a holistic approach and consider the relationship between the funding, governance and the powers of the ESAs when responding. Please also state clearly which ESA you have experience with and which ESA you are referring to in your response.

PUBLIC CONSULTATION

Following the requirements set out in Article 81 of the ESA Regulations and building on recommendations for improvements set out in the Commission's 2014 Report, and in the Parliament's Report and by Council conclusions, this consultation will focus on four broad categories of issues: (I) tasks and powers of the ESAs; (II) governance; (III) supervisory architecture; and (IV) funding.

I Tasks and powers of the ESAs

This part of the consultation document is divided into three sections: (A) optimising existing tasks and powers; (B) new powers for specific prudential tasks; and (C) direct supervisory powers in capital markets.

¹⁷ http://ec.europa.eu/finance/consultations/2015/capital-markets-union/index_en.htm; and http://ec.europa.eu/finance/consultations/2015/financial-regulatory-framework-review/index_en.htm

A. Optimising existing tasks and powers

This section will deal with: (1) work on supervisory convergence; (2) non-binding measures; (3) work on consumer and investor protection; (4) enforcement powers; (5) international aspects of the ESAs' work; (6) access to data; (7) powers in relation to reporting; and (8) financial reporting.

1 Supervisory convergence

In order to fully benefit from the Single Rulebook, legal acts must be interpreted and applied in a convergent and consistent manner and compliance must be supervised in a consistent way. This is achieved through work on supervisory convergence across the EU.

At the time of the 2014 Report, stakeholders raised concern regarding the ESAs' lack of focus on supervisory convergence. Since 2015 supervisory convergence is however a key objective for the ESAs¹⁸ and each ESA is actively engaged in developing supervisory handbooks, conducting peer reviews, participating in colleges, conducting thematic reviews, training and workshops, and so on.¹⁹

Notwithstanding these important efforts, the ESAs and other stakeholders report that in some instances more can be done to improve supervisory convergence. Problems cited are a combination of insufficient use of the toolbox granted by the ESA Regulations (especially peer reviews and on-site visits), the governance set-up of the ESAs which might prevent them from adopting a more integrated EU approach to decision-making on the use of more effective tools, such as binding mediation or the breach of Union law procedure, and the lack of effective tools which render the ESAs' intervention ineffective in certain cases (to ensure proper follow-up where deficiencies have been detected as a result of e.g., a peer review; work in supervisory colleges is less effective as ESAs have no voting rights].

It is therefore necessary to reflect on how the supervisory and enforcement tools currently available could be developed to enable the ESAs to achieve tangible results in these areas. For example, assessing how the existing supervisory tools could better enable the ESAs to influence a change of behaviour of NCAs, to take action where an NCA refuses to act, or to mitigate potential risks to orderly markets, financial stability or investor protection. It follows from recital 41 and Article 81 of the ESA Regulations that functional independence of all NCAs is an objective of utmost importance. It should be explored how the ESAs could contribute to the NCAs reaching functional independence

¹⁸ ESMA/2015/935, 15.06.2015; EIOPA Multi-annual work programme 2015-2017, EIOPA-BoS-14/109, 29.09.2014; The EBA Multi-annual work programme 2016-2018, 30.09.2015.

¹⁹ Specific examples include: ESMA published its first annual work programme on supervisory convergence in February 2016 and has recently adopted a second annual work programme on supervisory convergence. ESMA has established a Supervisory Convergence Standing Committee ("SCSC") and has committed, in its Strategic Orientation 2016-2020, to deploy a wider range of supervisory tools. To ensure common understanding of effective supervision EIOPA regularly engages bilaterally with national supervisory authorities. It provides balance sheet reviews and technical assistance. EIOPA further promotes the creation of cooperation platforms in situations where a college of supervisors is not formed but where cross-border risks are identified. Upon request, EIOPA assesses the risks posed by specific undertakings, including cross-border issues and recommends remedial actions. The EBA has contributed to significant progress in supervisory engagement, assessment and articulation of additional capital requirements through the implementation of the EBA guidelines on the supervisory review and evaluation process ("SREP") and, for the Eurozone, the implementation of a common SREP methodology and process for the significant institutions under SSM supervision.

and to them operating in accordance with best corporate governance practices, including with respect to conflicts of interests. A reflection is also needed on how the ESAs could more effectively assist supervisors in situations involving cross-border services. Finally, it is also necessary to reflect on to what extent the current governance set-up may disincentivise the use of existing tools.

Questions

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.
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;
- b) to what extent 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 (a) and (b) and, importantly, explain how any weaknesses could be addressed.

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.
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.

2 Non-binding measures: guidelines and recommendations

Article 16 of the ESA Regulations provides for guidelines and recommendations in the areas not covered by regulatory or implementing technical standards. Guidelines and recommendations are legally non-binding. Their overall objective is to ensure consistent and effective supervisory practices and application of the regulatory framework across the Single Market. They are very useful tools in terms of achieving supervisory convergence and uniform application of EU legislation and have

overall been very successful and added significant value to the work of supervisors and financial institutions.

Industry stakeholders, however, have raised concerns that the process and the timing of issuance of ESA guidelines sometimes create legal uncertainty, as well as unnecessary compliance costs for the industry. There are also concerns that the ESA guidelines are increasingly expansive and go beyond their originally intended function, namely to ensure the "common, uniform and consistent application of Union law."

Questions

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.

3. Consumer and investor protection

To ensure investor and consumer protection, the ESAs are promoting "*transparency, fairness and simplicity*" for consumer financial products or services, notably by collecting, analysing and reporting on consumer trends, developing training standards and contributing to the development of disclosure rules.²⁰ The ESAs can also issue warnings where "a financial activity poses a serious threat" to consumer protection. In addition, there is certain scope for the ESAs to temporarily ban or restrict certain financial activities²¹ under certain conditions (notably on the grounds of investor protection).²²

The 2014 Report stated that the general view among stakeholders was that consumer protection had not been given sufficient priority in the work of the ESAs. There were calls for the ESAs to take a more proactive approach and recommendations included clarifying and enhancing the ESAs' powers further in the consumer protection area. Consumer organisations and the Parliament are also strongly advocating for a more powerful ESA mandate in relation to supervisory convergence and enforcement of the EU consumer protection rules.

All three ESAs have also sharpened their contribution in the area of consumer protection, especially by deepening policy focus on financial innovation. In the context of the CMU, the Commission is working with the ESAs to explore how they could best contribute to helping retail investors benefit from recent EU rules aimed at enhancing disclosure requirements at product level, i.e., in Markets in Financial Instruments Directive II ("MiFID II"),²³ in the framework for Packaged Retail and Insurance-based Investment Products and in the Insurance Distribution Directive.²⁴ The Commission services will also continue to work with the ESAs to explore how to improve enforcement and supervisory

²⁰ The ESA Regulations entail an explicit mandate to "contribute to enhancing customer protection" and "foster depositor and investor protection," see Article 9 of the ESAs Regulation.

²¹ *Ibid.*

²² However, this power may only be exercised in relation to the marketing, distribution or sale of certain financial instruments, PRIIPs and structured deposits.

²³ Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments (OJ L 145 , 30.4.2004, p. 1).

²⁴ Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution, OJ L 26 page 19, 2.2.2016.

practices across the EU to ensure that legislation aiming at protecting consumers is effectively in place and enforced.²⁵

Consideration should be given on how to further increase the effectiveness of the ESAs work with regard to consumer and investor protection while taking into consideration that consumer protection issues are a shared competence of the EU and Member States and respecting the limits of the subsidiarity principle. This should include a reflection on the use of the current tools and powers, and on the necessity and ways to potentially extend that ESA's mandate to robustly follow up on supervisory convergence and enforcement. The role of the ESAs Joint Committee should be considered in particular the benefits of it taking on a more important role in enhancing consumer and investor protection and in pro-actively identifying cross-cutting trends across all three sectors (e.g. digitisation and FinTech).

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.
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.

4 Enforcement powers – breach of EU law investigations

The ESA Regulations confer on the ESAs the power to act in the case of national authorities incorrectly applying EU law, in particular by failing to ensure that financial institutions satisfy the requirements laid down in EU law. The power to address recommendations to national authorities (and decisions to financial institutions under certain circumstances) in this area should help ensuring effective enforcement of EU law on the ground and tackling possible deficiencies in national supervision. This also complements the ESAs important work on supervisory convergence as it contributes to ensuring high quality financial supervision across the EU.

The 2014 Report mentioned that the current procedure could be more transparent on the requests to the ESAs to investigate alleged breaches of law and on the justification for not opening an investigation or launching a procedure, and that the ESAs had not made use of these powers. The governance set-up of the ESAs' Boards of Supervisors may have impacted on the incentives of the ESAs to use their tools.

Since the 2014 Report there has been one instance where one of the ESAs has issued a recommendation under the breach of law powers.²⁶

²⁵ As will be further described in the forthcoming Commission Action Plan for building a deeper Single Market for retail financial services, announced in the Commission Work Programme for 2017.

²⁶ EBA Recommendation to the Bulgarian National Bank and the Bulgarian Deposit Insurance Fund on action necessary to comply with Directive 94/19/EC (Deposit Guarantee Schemes Directive), EBA/REC/2014/02, 17.10.2014

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.

5 International aspects of the ESAs' work

The ESAs are active at an international level contributing to regulatory and supervisory cooperation through arrangements with supervisory authorities, international organisations and third countries. The ESAs also enter into a number of Memoranda of Understanding with third country supervisory authorities. The ESA Regulations also envisage that certain tasks and responsibilities may be carried out by the ESAs in the field of equivalence: *"the Authority shall assist in preparing equivalence decisions pertaining to supervisory regimes in third countries in accordance with the acts referred to in Article 1(2)."*²⁷

It may be appropriate to consider an amendment to the ESAs Regulations to clarify the ESAs' role in respect of the initial equivalence assessment of a third country's regulatory and supervisory framework as well as of the necessary continuous follow-up monitoring and implementation work that takes place once equivalence has been granted.

At present, the ESAs provide an initial analysis feeding into the equivalence assessment of the Commission in cases where they have received a specific request for technical advice from the Commission or (in a few cases) where they are specifically expected to do so in accordance with primary legislation (e.g., Solvency II). In some areas, they also play an important role in the work that follows from an equivalence decision in relation to third-country entities, notably by being in charge of the recognition process for third-country central counterparties and the certification process for third-country credit rating agencies. In many cases they are also expected to develop co-operation arrangements with third-country authorities, entering into the relevant arrangements themselves or facilitating such process for their member NCAs.

However, the ESAs do not have specific responsibilities to follow third-country developments having an impact on the continuity of equivalence decisions taken. In addition, existing tools and co-operation arrangements may not be sufficient to ensure in practice that third country supervision and enforcement practices satisfy on an on-going basis the relevant equivalence criteria. A greater involvement of the ESAs in the monitoring and implementation of equivalence decisions could be considered in order to ensure a more effective control of the application of equivalence decisions in practice (e.g., following regulatory, supervisory and market developments in third countries as well as the supervisory record of third country authorities, monitoring and co-ordinating supervisory co-operation among financial supervisors in the EU and their foreign counterparts).²⁸ In addition, section C below on possible additional direct supervisory powers is also relevant in this context.

²⁷ Article 33(2) of the ESA Regulations.

²⁸ For more details, see the Commission's Staff Working Document on EU equivalence decisions in financial services policy: an assessment, COM (2017)102 final.

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.

6 Access to data

The financial crisis highlighted the need for uniform and consistent collection and exchange of data between national and EU supervisory authorities. Currently there are still many different practices and approaches across the EU in the collection and publication of data. The 2014 SWD noted that these differences hampered the comparability and the exchange of data or their reliability.

It should be reflected on whether the ESAs should be empowered to obtain information directly from market participants in specific cases and without first having to exhaust every other means of getting information (i.e., via competent authorities, or other supervisory authorities, a ministry responsible for finance where, a national central bank or the statistical office of the Member State concerned) which is currently the case according to the ESA Regulations.²⁹ Such an empowerment could improve the ESAs' ability to better perform their tasks (e.g., in relation to supervisory convergence and consumer and investor protection). In order to avoid any undue burden on market participants, corresponding safeguards may be necessary. Reflections in this context should also consider what type of data the ESAs would need to receive in case the ESAs funding arrangements would change to include industry contributions, or in case the ESAs' mandates would be widened to encompass additional direct supervisory powers.

Questions

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.
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.

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

A majority of respondents to the call for evidence called for eliminating the overlaps and inconsistencies in reporting and for streamlining disclosure requirements, in particular in the banking sectors, but also for capital market participants. The respondents to the Green Paper on Building a Capital Markets Union also called for streamlining and reducing reporting requirements for capital market participants. Similar calls have been made during the discussions related to the 2016 review of the capital requirements framework. The Commission is also looking into ways of making

²⁹ The powers relating to the collection of information were further clarified and strengthened as a result of Regulation (EU) No 1022/2013 amending the ESA Regulations, OJ L287, 29.10.2013.

regulatory reporting more efficient, less burdensome for those who need to report, and more effective for the recipients and users of the reports.

Against this background, a reflection is needed regarding the ESAs' role in the consolidation and streamlining of the reporting and/or other data related requirements in the various pieces of legislation (banking, insurance, pensions and capital markets) by developing, for example, common data and reporting hubs across the EU.³⁰ More consistent and streamlined reporting could arguably contribute to supporting closer market integration and reducing market participants' costs for complying with numerous information requests.

Moreover, and indeed beyond the review of the ESA Regulations, a reflection is needed in respect of processes applied to reporting, disclosure and benchmarking requirements.

Currently these requirements (e.g., for reporting, disclosure and benchmarking) are further specified in implementing acts up to a degree of small detail, which means that these acts can be particularly voluminous. This often contributes to significant delay between formal submission by the ESAs and the final publication of the standards in the Official Journal of the EU. This delay creates significant disruptions for the ESAs, NCAs and financial institutions and other market participants. Supervisory reporting is highly technical and aims at achieving uniformity. It needs regular updates, corrections and clarifications that are important in terms of data quality.

At the same time, where the main lines to be followed are sufficiently described in an implementing act, there may be reasons to believe that more detailed and technical guidelines and recommendations adopted by the ESAs in the matter, in accordance with Article 16 of the ESAs Regulations, would be followed by national authorities and market participants.

Questions

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.
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.

8 Financial reporting

ESMA currently plays a limited role in the field of financial reporting (accounting and auditing). Enforcement of accounting standards is a national task often carried out by securities markets regulators but in some cases by other national authorities. These authorities meet within the

³⁰ There are already a number of areas in which the ESAs have been delegated tasks or responsibilities in relation to specific reporting or other data related requirements to reduce the administrative burden of NCAs and to facilitate access to information. For example, EIOPA has developed an IT framework so that all insurance companies report under the same format and put in place a central database to facilitate collection of information and exchanges under the Solvency II framework. The EBA already ensures some coordination in respect of supervisory reporting, but it could be assessed whether such a coordination role could be broadened, starting with periodic reviews and assessment of reporting requirements.

European Enforcers Coordination Sessions which is an ad hoc group operating under the aegis of ESMA's Corporate Reporting Standing Committee. EU level convergence of the enforcement of accounting standards remains limited. ESMA adopted guidelines on the enforcement of financial information in 2014 and it can in principle initiate cases for breach of union law if NCAs fail to enforce filing obligations imposed by the Transparency Directive. However, ESMA considers that it has no powers to launch a breach of EU law case concerning substantive financial reporting requirements set out in accounting standards adopted under the IAS Regulation and in the Accounting Directive.³¹ ESMA can adopt opinions about the implementation of accounting law but has only done so in one case linked to the Greek sovereign debt crisis in 2011.

Similarly, the supervision of statutory auditors and audit firms remains a national responsibility. Depending on the Member State, the supervisory authority can be part of the securities markets authority, of a Ministry, of a *sui generis* body, or of a self-standing audit supervisor (the most common approach). These authorities meet in the context of the Committee of European Audit Oversight Bodies ("CEAOB").³² Notwithstanding the establishment of the CEOAB, supervisory convergence remains limited in the audit field and there are currently fewer legal means to promote supervisory convergence in this area than in the accounting area.

The Five Presidents' Report called for a greater harmonisation of accounting and auditing practices, which is needed in the context of the progressive building of a CMU. Giving ESMA a stronger technical advisory role in the enforcement of accounting standards adopted under the IAS Regulation and the supervision of auditors and audit firms of public-interest entities may be a means to promote greater supervisory convergence in both areas. It may also provide an opportunity to enhance synergies between the enforcement of audit and accounting standards.

Finally, there may also be scope to streamline the adoption process of international accounting standards. One possible avenue, which was already considered in the Maystadt report published in October 2013,³³ would be to give ESMA an advisory role in the endorsement process, subject to appropriate safeguards to ensure that the European public interest is fully considered as part of the endorsement process. For example, this could involve a clarification of the endorsement criteria set out in the International Accounting Standards Regulation and/or an advisory role for other ESAs, the ECB or the ESRB to ensure that international accounting standards do not undermine financial stability, and macro- and micro-prudential supervision. A similar approach could be taken for international standards of audit, should the Commission decide to harmonise audit standards at EU-level, by giving ESMA an advisory role in the adoption of audit standards, perhaps after integrating the CEOAB within ESMA.

³¹ Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards, OJ L 243, 11.9.2002, page 1; Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC, OJ L 182, 29.6.2013, page 19.

³² Regulation (EU) No 537/2014 on specific requirements regarding statutory audit of public-interest entities requires that the Commission provides the CEOAB's secretariat and that the latter's operating costs are included in the Commission's budgetary estimates. While the budgetary impact is currently limited, the proliferation of sub-groups established by the CEOAB ties up significant Commission resources. Moreover, if the CEOAB is to achieve tangible progress towards supervisory convergence, resource implications for the Commission will inevitably increase. Six CEOAB members are full ESMA members. ESMA is a non-voting member of the CEOAB and chairs the latter's sub-group on international cooperation.

³³ http://ec.europa.eu/internal_market/accounting/docs/governance/reform/131112_report_en.pdf

Questions

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

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

1. Approval of internal models under Solvency II

Solvency II³⁴ allows for the use of internal models to calculate entities capital requirements. Conceptually, internal models are intended to be more risk-sensitive than the standard formula, to better capture individual risk profiles and to provide a better alignment between the underlying economic risks and prudential requirements such as those under Solvency II. But the development of an internal model is a complex task, both from the technical and the management perspective.

Internal models are currently subject to validation and approval by competent authorities, with a role for colleges of supervisors in the case of cross-border groups. Internal models are one of the main areas of work for EIOPA in order to achieve supervisory convergence in the way competent authorities oversee internal models. For example, EIOPA has spent much effort in developing tools for the application and guidance on joint decisions for group internal models, with a view to achieving consistency. But major inconsistencies remain in the requirements of competent authorities for internal models, including for cross-border groups, despite the work of colleges.

The lack of supervisory convergence in this area should trigger a reflection on whether there should be a direct role for EIOPA in the approval and monitoring processes of internal models, at least for cross-border groups.

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.

2. Mitigating disagreements regarding own funds requirements for banks

Under the current bank capital requirements framework, common equity tier 1 capital instruments are approved by competent authorities and then communicated to the EBA for inclusion in a list of approved instruments. A prior consultation with the EBA is optional for the competent authority. In case the relevant competent authority decides to approve a new type of instrument, the EBA can only intervene *ex-post* if it has concerns as to the compliance of the instruments terms with the eligibility criteria in capital requirements regulation. It could for example use the breach of union law procedure (which in practice proves very difficult to use).

³⁴ See footnote 2.

This should trigger a reflection on whether the current situation could and should be improved, including: (i) whether the consultation of the EBA for new types of instruments could be made mandatory; (ii) whether competent authorities could be required to take EBA's concerns into account; and (iii) whether the same procedure should also apply to additional tier 1 and tier 2 capital instruments.

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.

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

18. Are there any further areas where 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.

C. Direct supervisory powers in certain segments of capital markets

Effective and consistent supervision of financial entities and activities contributes to building a CMU by eliminating unjustified supervisory barriers to cross-border investment and therefore by creating additional incentives for cross-border investment. ESMA's work on enhancing supervisory convergence is a catalyser for deeper market integration. As the EU is developing the CMU, there is a need to consider how more integrated supervision at EU level can support the development of deeper and more integrated capital markets through more convergent supervisory approaches and outcomes which ensure consistency in the application of capital markets rules and the supervision of market participants. This has been stressed in the Commission Communication on Capital Markets Union – Accelerating Reform of September 2016. The Five Presidents' Report had previously acknowledged the need to strengthen the supervisory framework through more centralisation of supervision of capital markets in order to ensure the solidity of all financial actors. The vote of the United Kingdom to leave the EU, the position of the Government of the United Kingdom that it will not be seeking membership of the Single Market, and the expected impact on the market of those decisions also underline the need to reflect carefully about supervisory arrangements.

Currently ESMA's direct supervisory powers are limited to credit rating agencies and trade repositories as well direct product intervention powers in some cases (e.g., MiFID II).

This section therefore is asking for views to help identifying specific areas where stronger European supervision will provide clear added value to overcome market fragmentation to develop integrated capital markets, and ensure risks are being appropriately regulated and supervised, while taking into

account the specific nature of different capital markets segments and respecting the principle of subsidiarity.³⁵

A possible extension of ESMA's powers could be considered in market segments in which there is a strong need to support more integrated, efficient and well-functioning financial instruments markets, in areas where common solutions in the application of the EU capital market rules are more efficient (for example due to synergies or to more uniform application of rules leading to less obstacles for market integration and less opportunities for companies to take advantage of loopholes in order to avoid unprofitable regulations or for regulators to compete with one another in order to attract businesses or other actors to operate in their jurisdiction.) or in areas where high integration or intense cross-border activity entail higher cross-border contagion risks to financial stability or market integrity. Three examples are given below to illustrate some of the reasons which may justify, in certain market segments, a reflection on a possible extension of ESMA's current mandate to accompany the building up of the CMU.

1. Direct supervision of data providers

To improve the effectiveness of ESMA's work on supervisory convergence consideration should be given to whether ESMA should be granted the powers to directly supervise Data Reporting Services. More specifically powers could cover the following providers (as indicated by MiFID II): (i) Approved Reporting Mechanism ("ARMs") that are firms that make public the details of transactions in financial instruments; (ii) Approved Reporting Arrangements ("APAs") which report the details of transactions to regulators for the purposes of market abuse surveillance; and in relation to (iii) Consolidated Tape Providers ("CTPs") that provides consolidated trading data from across the whole of the EU.

The consolidated tape that would give EU-wide comprehensive trading data is a critical element in the MiFID II regime for data publication and it should be reflected on ESMA whether could be directly entrusted with responsibility for constitution and supervision of a single consolidated tape for financial instruments transactions in all markets, on- or off-exchange, wherever they are traded in the EU.

2. Pan-European investment fund schemes

Several EU laws provide for standardised fund rules whose success across the EU depends on their consistent use. Stakeholders confirmed that the understanding and supervision of such funds is very different among NCAs, which ultimately limits the uptake of these funds.³⁶ In order to reap the full benefits of the Single Market, the role of ESMA could be further strengthened, in particular in the area of these funds. Proper cross-border functioning of the passport could also be further streamlined.

³⁵ The 2014 Report noted that the possible extension of current mandates should be assessed in the light of the subsidiary principles and against costs and benefits. Potential areas mentioned in the 2014 Report relate to the direct supervision of highly integrated market infrastructures.

³⁶ Public consultation on cross-borders distribution of investment funds- CMU action on cross-border distribution of funds (UCITS, AIF, ELTIF, EUVECA AND EUSEF) across the EU, 02.06.2016; Call for Evidence – EU Regulatory framework for financial services, SWD(2016) 359 final p. 52.

3. Post trading market infrastructures

17 central counterparties (CCPs) are currently authorised within the EU. Their activities are governed by the European Market Infrastructure Regulation ("EMIR")³⁷ and the Markets in Financial Instruments Regulation ("MiFIR")³⁸. In addition, 22 non-EU CCPs are already recognised by ESMA³⁹ pursuant to Article 25 of EMIR.⁴⁰ Under EMIR, EU CCPs are supervised by NCAs at national level. The cross-border dimension of CCPs is clearly reflected for instance in the central role given to the CCP College of supervisors. Their systemic importance is recognised by the recent proposal to establish a framework for recovery and resolution of CCPs.

Given the cross-border nature of their activities and their systemic importance (and that of some other post trading infrastructures such as international central securities depositories (ICSDs)), consideration could be given on how to strengthen their collective supervision through a transfer of appropriate powers to the pan-European level, also consistent with the ideas set out in the De Larosière report.⁴¹ In this respect it should also be taken into account that currently CCPs established in the United Kingdom have a large share of the EU clearing market and therefore an important part of the supervisory capacity of that market is in the United Kingdom.

Questions

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

II. Governance of the ESAs

Assessing the effectiveness of the ESAs governance

The operation of the ESAs is supposed to serve the common interest of the EU. In this light, it appears appropriate to analyse the existing governance structure. The ESAs' Management Boards and the Boards of Supervisors are composed of representatives of NCAs (the head of the respective national competent authority), as well as representatives of EU institutions. Only the representatives of national competent authorities have a right to vote. Experience has shown that, depending on the

³⁷ Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on the over-the-counter derivatives, central counterparties and trade repositories (OJ L 201, 27.7.2012, page 1-59).

³⁸ Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments, OJ L 173, 12.6.2014, pages 84-148

³⁹ https://www.esma.europa.eu/sites/default/files/library/thirdcountry_ccps_recognised_under_emir.pdf

⁴⁰ Regulation (EU) No 648/2012, OJ L 201/1, 27.7.2012

⁴¹ De Larosière report, page 58, recommendation 24.

circumstances, this configuration may lead to conflicts of interests and may fail to deliver solutions and decisions in the best interest of the EU as a whole. The on-going work of the ESAs on fostering supervisory convergence, and the building of the CMU highlight the need to increase the effectiveness of decision-making of the ESAs to enable swifter decisions and a stronger European dimension of supervision in view of increasing the effectiveness of the work on supervisory convergence.

The Management Board is composed of the Chairperson and six members of the Board of Supervisors. The Management Board is mainly in charge of the ESA's work programme and plays a central role in the adoption of the budget. An Executive Director and a representative of the Commission participate as observers (except on budget matters where the Commission has a right to vote). The Board of Supervisors (the main decision-making body) consists of the Chairperson, the head of the NCA in each Member State, and one representative each from the Commission, the ESRB, the other two ESAs, the EEA-EFTA States and the EFTA Surveillance Authority. In the case of the EBA, the Supervisory Board of the ECB participates as a non-voting member. In addition, the Chair of the SRB acts as an observer when resolution matters are dealt with by the Board of Supervisors.

The Chairpersons of the ESAs' Boards of Supervisors are appointed by the Board of Supervisors following an open selection process and a hearing before Parliament. The Chairpersons' only formal tasks comprise the preparation of the work of the Boards and chairing the Board meetings. They do not have voting rights.

The 2014 Report stated that overall the Boards and the Chairpersons were considered to have executed their tasks well. Nevertheless, a number of concerns were raised by many stakeholders, in particular with regards to the fact that the Boards of Supervisors focus too much on technical regulatory matters and too little on strategy and supervisory matters. Moreover, stakeholders commented that the set-up of the Boards of Supervisors had sometimes led to a lack of supranational orientation in the decision making process and a prevalence of national interests. Stakeholders point to the current governance structure of the ESAs which does not favour decisions or proceeding against individual members of the Board of Supervisors, given that most decisions, such as binding mediation, the launch of a peer review or the adoption of follow-up reports are taken by qualified majority in the Boards of Supervisors.⁴²

The 2014 SWD detailed that one way to provide more room for the Boards of Supervisors to focus more on policy and substance would be to grant the Management Boards a stronger role, for example, by transforming them into a permanent Executive Boards. This would give the Management Boards a stronger operational role while at the same time ensuring supranational orientation in its work. It could also be reflected on whether extending the composition of the Boards with a number of permanent members could enhance the decision making process and in particular level out the perception that national interest sometimes dominate. Examples of such governance structures include the SSM and the SRB. In those bodies, the Boards comprise four full-time independent members appointed on the basis of their merits.

⁴² See for example: stakeholder replies to the Commission's 2014 Review Report, the Commission's 2014 Review Report, the Parliament's 2013 Review Report of the ESFS, the IMF Country Report No 13/65 on the Financial Sector Assessment of the European Union – Issues in Transparency and Accountability.

Both the Report and the SWD also underlined that stakeholders question whether the ESAs' Chairpersons have the necessary authority or decision making powers to intervene to ensure a better prioritisation of work and better orientation in the decision-making process.

Targeted changes to improve the ESAs' performance and governance have also been called for by the Parliament in its April 2014 Resolution and the Council in its November 2014 Conclusions. A Parliament's Resolution on the Stocktaking and Challenges of the EU Financial Services Regulation of 19 January 2016 further called for enhanced accountability of the ESAs.⁴³

Questions

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.
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.
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.
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.

Stakeholder groups

To ensure a structured liaison with stakeholders, the ESA Regulations establish specialised stakeholder groups for each ESA. Each stakeholder group is composed of experts on the sector in question, representing a broad scope of stakeholders including financial institutions, employees' representations, consumers and users of financial services, representatives of SMEs and academics. Stakeholder group members are appointed by the ESAs Boards of Supervisors.

The stakeholder groups are consulted when developing draft technical standards, guidelines and recommendations and may also submit opinions and advice on their own initiative.

The 2014 SWD reported on stakeholders' perception that stakeholder groups had only had a very limited impact. Several reasons were cited for that, including composition, length of mandates,

⁴³ <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2016-0006+0+DOC+PDF+V0//EN>.

restrictive rules on access to information, lack of transparency in the appointment process and too short consultation deadlines.

These concerns are still being raised by industry and consumer groups; especially that the composition of the stakeholder groups limits their effectiveness because of difficulties in agreeing to a common opinion.

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.

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

Financial supervision has traditionally mirrored the tripartite nature of the financial industry (banking, insurance/pensions and securities). However, as financial markets have evolved and become more complex and interconnected, the contours of this tripartite regulatory and supervisory division have blurred. While some Member States have kept the sectorial approach (*e.g.*, Cyprus, Spain, Portugal) several Member States have reacted to these developments and moved towards more integration, either in the form of a single, unified authority that covers prudential, conduct and consumer protection of all financial sectors (*e.g.*, Germany, Poland, Sweden) or some type of twin-peak model (clear cut or a hybrid).

A "twin-peaks" model of supervision is broadly speaking a model where there is one prudential regulator/supervisor for financial institutions and one market conduct regulator/supervisor for financial markets, dealing with conduct and consumer protection (how firms conduct their business, design and price their products and treat their customers). There are hybrid versions of the twin-peaks model of supervision where the division between prudential supervision and conduct and consumer protection is blurred.

Previously, most stakeholders expressed satisfaction with the sectorial structure of the ESAs (which was the natural continuation of the already existing more informal sectorial structures already existing at EU level)⁴⁴ and were in favour of giving the new supervisory system more time to settle, also in light of the establishment of the Banking Union. Most stakeholders also considered it premature to rethink the current structure of the ESFS and pleaded for evolution rather than revolution. However, some stakeholders expressed a preference for more radical changes, like merging the ESAs into a single authority or introducing a twin peaks approach.⁴⁵ The De Larosière report had recommended moving to a system relying on only two authorities upon a review of the ESFS.⁴⁶

The 2014 Report stated that a review should assess the need for structural changes, including a single seat (as also required by Article 81 of the ESA Regulations). In its Review Report published in October 2013, the European Parliament also pointed out that an evaluation of the supervisory

⁴⁴ The ESAs replaced the former Committee of European Banking Supervisors ("CEBS"), Committee of Insurance and Occupational Pension Supervisors ("CEIOPS") and the Committee of European Securities Regulators ("CESR").

⁴⁵ SWD(2014)261, page 26.

⁴⁶ De Larosière report, page 58, recommendation 24.

architecture should be part of any future review of the ESAs. One reflection in this context is how to render the EU supervisory regime more effective and efficient in order to achieve the objectives of building a CMU and to reap the full benefits of a CMU. In addition, the EBA will have to be relocated once the United Kingdom leaves the EU. While it is for the European Council to decide on the location of agencies, the United Kingdom's decision to leave the EU provides an additional opportunity to reflect on the appropriateness of the current supervisory architecture.

Questions

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.
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?

IV. Funding of the ESAs

As the ESAs are assuming an important role for financial stability and the development of a CMU, a review of the current funding framework should ensure a more appropriate basis for their work. Such a funding review is part of the mission letter sent by the President of the Commission to Vice President Dombrovskis in August 2016.

The funding levels of the ESAs should be stable and commensurate to what is necessary, operating efficiently, to effectively fulfil the objectives and tasks set out in their founding regulations, including obligations imposed by other legislation.

In discussions, stakeholders have variously pointed to the need for the funding structure to be transparent, efficient and as simple as possible while assuring that requisite approval processes and audit oversights are in place for proper accountability.

Currently, the ESAs' revenues are based on contributions from NCAs (60 percent) and from the General EU Budget (40 percent). In addition, ESMA receives some of its funding from the private entities it directly supervises i.e., credit rating agencies and trade repositories. National contributions follow the qualifying majority voting rule. This means that contributions are not in proportion to the size or risk of the financial sector in question.

In 2014 stakeholders perceived the ESAs as understaffed which in their view had impacted on the ESAs ability to carry out their mandate satisfactorily. It was mentioned that funding was insufficient to ensure that the ESAs resources were commensurate with their tasks and responsibilities. Two key conditions for a new framework were identified: (1) ensuring sufficiency at EU and national level; while (2) respecting the strained economic environment and the EU multiannual financial framework.

The European Parliament has also adopted several documents calling on the Commission to improve the ESAs financing framework.⁴⁷

At national level, a significant number of NCAs (regulatory and supervisory authorities) are fully funded by industry. Eight authorities are financed through a hybrid system based on both private and public funding, and 14 authorities rely exclusively on public funds (twelve are National Banks, and the rest are pension and insurance regulators).

Shifting to an industry based funding of the ESAs should better ensure stable and sufficient levels of funding which is crucial for the ESAs to be more mission-driven and deliver on its objectives and tasks. A number of arguments have been put forward to this effect. Industry funding is not subject to political decisions on state budgets. There is also no competition with other policy goals. Moreover, this would make the ESAs more independent *vis-à-vis* Member States, the Commission and the co-legislators while ensuring that the ESAs remain accountable towards the EU institutions.

In a fully industry funded system the industry bears the full costs of regulatory and supervisory services instead of the general public. While the EU Budgetary Authority does not determine the budget of fully industry funded agencies there is today an obligation to provide the Commission and the Budgetary Authority with a planning document with budgetary forecasts. An inter-institutional group with Parliament, Council and Commission is also monitoring the evolution of agencies resources, including for self-financed agencies.

In case of a partly industry funded model (EU and industry), the Parliament and Council will act as the budgetary authority for the EU funding part which would allow for enhanced accountability and involvement of a Commission's representative in the budgetary decision making. An argument in favour of this model, which necessarily implies an important role for the EU institutions, is the fact that the ESAs work is intended to prevent and mitigate systemic financial stability risks in the EU. Moreover, a mixed funding framework can mitigate procyclical effects; in period of crisis, the workload of supervisors tends to be heavier and their needs for resources are greater, while the capacity of the industry to pay fees is undermined.

The attribution of the cost of the ESAs' activities could be done on a Member State basis. For example, costs could be attributed through a "Member State key" that would involve adjusting current Member State contributions (costs are shared among Member States based on qualified majority voting) to reflect the size of each Member State's financial industry. Then, each Member State would have to attribute the cost to the financial institutions on its territory. It could also be done on an entity basis meaning that contributions would be calculated on the basis of their balance sheet size or other specific criteria and considering the importance of each financial sector and of the entities operating within each sector (and falling within the remit of sectorial legislation).

The identification of entities may require different approaches depending on the relevant sector as market participants are very diverse. An approach based on one or more pre-defined criteria (*e.g.*, balance sheet size, risk profile, level of cross-border activity) may work better for the banking and insurance/pensions sector, but less so in the heterogeneous financial markets sector falling under ESMA's remit.

⁴⁷ Most recently in its Resolution on the Stocktaking and Challenges of the EU Financial Services Regulation of 19 January 2016.

Relevant parameters for contributions could be based in EU legislation. For example, in the case of the SRB the principles regarding individual entity contributions are set out in legislation adopted by Parliament and Council while EU implementing legislation directly determines the methodology for the calculation of fees due from each sector and from each entity operating within that sector. Finally, contributions could be collected by the NCAs building on the existing collecting structures.

Questions

29. The current ESAs funding arrangement is based on public contributions:

- a) should they be changed to a system fully funded by the industry;
- b) should they be changed to a system partly funded by industry?

Please elaborate on each of (a) and (b) and indicate the advantages and disadvantages of each option.

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"); or
- 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.

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.

General 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.