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EBF RESPONSE TO THE PUBLIC CONSULTATION ON THE OPERATIONS OF THE EUROPEAN SUPERVISORY AUTHORITIES

General Remarks

We are supportive of the Commission's intentions to review the ESAs powers. Tackling gold-plating and national discretions by national supervisors has been an essential part of the ESAs' mandate and is one of the key objectives of the Capital Markets Union (CMU). In addition to the amendments to Level 1 legislation that the CMU Action Plan is proposing, comparable supervision standards in the EU Member States are critical to achieve these goals. In order to achieve these objectives we would highlight the following:

Tasks and powers of the ESAs:

Beyond longer term adjustment to the ESAs' governance and powers, the review should identify short-term improvements which will further the ESAs as standard setters in the interest of promoting the single market with implementation powers. The ESAs should be empowered to recommend that the co-legislators quickly suspend the enforcement of regulatory requirements for a certain (limited) time period. This would have a similar effect to the "no-action" powers enjoyed by other supervisors outside the EU, such as the US. For example, the recent uncertainty that arose from industry-wide difficulties to comply with the requirement to exchange variation margin for uncleared derivatives illustrated the need for a clear mechanism which would improve certainty at EU level.

Such an approach should also extend to guidelines and recommendations issued by the ESAs which become outdated by new regulations or directly contradict such new legislation. The ESAs should have a procedure in place that allows for prompt derogation or adaptation of its documents when they are no longer in line with primary legislation.

A number of regulators both inside and outside of the EU (for example the SEC/CFTC) have strengthened their resources in the area of economic/impact analysis. We believe the ESAs should also strengthen their capability in this area and develop their own impact assessment frameworks to enable them to analyse the implementation costs of secondary legislation, both at an EU and national level, and, if implemented, whether its objectives have been achieved. As economic cycles and the market level of integration are still different across EU member states, the potential impact from adopting new regulations can vary considerably depending upon the country's financial system. This can be implemented without changing the legal framework.

European Banking Federation aisbl

Brussels / Avenue des Arts 56, 1000 Brussels, Belgium / +32 2 508 3711 / info@ebf.eu
Frankfurt / Weißfrauenstraße 12-16, 60311 Frankfurt, Germany
EU Transparency Register / ID number: 4722660838-23

www.ebf.eu

Coordination amongst the ESAs:

The ESAs are to be commended for their efforts to progress the substantial volume of Level 2 measures. However, greater coordination is needed among the ESAs to ensure the best use of their resources. For example, conflicting timetables should be avoided to allow for increased participation of stakeholders and allowing different measures by each ESA to be well calibrated both in terms of content and moment of publication.

Implementation timetables should also provide for sufficient periods for the implementation of Level 2 measures. Currently, it may be challenging to adjust internal processes and procedures to new Level 2 requirements if they are published in final form just a couple of days before becoming applicable (,for example, as was the case with the Level 2 measures under MAR).

ESAs relationship with other European institutions:

The legislative process would be improved by giving ESAs observer status during trilogue discussions, allowing them to understand the legislative intent and, when required, to both advise on the substance of the legislation as it is developed and provide input into the feasibility and appropriateness of Level 2 mandates.

Timely development of Level 2 measures:

It is important that the ESAs await the adoption of the Level 1 text by the European legislators before finalising any Level 2 measures (when they have started such work due to time pressure). This is true for legislation originating in the EU or coming from international standards. For example, at present we are concerned that EBA will rush through implementation of some elements of the Basel standard on interest rate risk in the banking book while it is still subject of discussion by the European institutions within the Risk Reduction Package. The development of all standards must be subject to proper legislative due process and quantitative assessment to avoid any unintended detrimental impact for the European banking industry.

Maximising industry expertise and stakeholder input:

The ESAs review is an opportunity to identify how to improve engagement with the industry to benefit from the relevant expertise when the ESAs develop new rules. The ESAs should seek to maximise the benefit and organisation of the Banking and Securities and Markets Stakeholder Groups, which hold critical industry knowledge that would provide a very positive contribution to the legislative process.

Use of Q&As:

Specific attention needs to be given to the increasing use by the ESAs of Questions and Answers ("Q&As") as an instrument to regulate. For example, ESMA has introduced a Q&A tool; however, we are concerned that there is no requirement to consult with stakeholders in developing the Q&As. National Competent Authorities (NCAs) normally follow the interpretations as stated in these Q&As and therefore supervised entities and institutions have to comply with the requirements as a result of these interpretations. It is therefore vital the industry is able to participate in the development of the final Q&A output.

Avoiding duplication of charges in the funding of ESAs:

The ESAs play a major and growing role in the current European supervisory scheme. They must be able to count on the necessary resources, which, for the most part, must continue to come from the EU budget. Any new arrangements must contain the element of budgetary discipline and avoid duplication of charges. Financial entities already contribute to ESA budgets via their national contributions. Where activities are moved from the national authorities to the ESAs, their related budgets should move to the ESAs as well and should not lead to an overall increase of charges to the industry.

I. Tasks and powers of the ESAs

A. Optimising existing tasks and powers

1. Supervisory convergence

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.

We support the idea of improvement of supervisory convergence, bearing in mind that certain issues are still decided at the national level e.g. civil law, fiscal law and criminal law. Supervisory convergence will be central in delivering a level playing field for truly integrated financial markets.

This should also apply for EU versus Eurozone. For that reason, supervisory guidance of ECB and NCA's should be aligned with EBA Guidelines.

There also needs to be a clear distinction between powers of ESA and ECB/NCA's to avoid duplication of supervision (e.g. on-site visits, peer reviews, issue warnings or temporarily bans) and associated costs.

Co-ordination between ESAs and the ECB:

Increased coordination is necessary also between the ESAs and the ECB. For example, in the CRD IV implementing process, two separate consultations (with the same deadlines) were held on the Joint ESMA-EBA guidelines on the assessment of the suitability of members of the management body and key function holders and a related document on internal governance. Around the same time, the ECB launched a consultation on its guide to assessments of board members, explaining how ECB Banking Supervision evaluates the qualifications, skills and proper standing of a candidate for a position on the board of a bank, for example as chief executive officer or supervisory board member. The end result was overlaps and uncertainties arose frequently regarding the scope of application of the two set of rules.

Conflicting content issued by different ESAs should be avoided ex ante and should not need to be flagged up by industry representatives during the consultation phase.

Technical standards:

In practical terms, deadlines in Level 1 legislation have on occasion been too challenging to ensure effective preparation and analysis at Level 2. We would recommend that, as a general rule, the ESAs are given at least eighteen months to complete technical standards following the agreement at Level 1. Equally, it is critical sufficient time is left to the industry to implement these rules, and we would request that as a minimum industry is granted a similar period of eighteen months to implement new rules. Without realistic implementation timetables market participants are not provided with the best opportunity to achieve implementation and compliance.

Proportionality:

Proportionality is a key pillar of the activity of the ECB and ESAs, ensuring diversity in the banking system is preserved and valued, while still ensuring an optimum allocation of resources.

Special reference to Level 3 rules:

In addition to the trend of legislative initiatives at European level, the publication of Q&A documents, statements and guidelines issued by European authorities with the purpose of interpreting or clarifying certain aspects of the regulation is becoming more frequent. Whilst we may share the European Commission's view with respect to the convenience and value of this kind of document, there have been instances where some of these documents are under discussion and have even been published before the Level 2 rules of the relevant legislation have been adopted.

For example, this has been the case with guidelines or Q&A regarding MiFID 2/MiFIR. In our opinion, any necessary clarifications or developments identified before the Level 2 rules have been adopted should be precisely included in those Level 2 rules. This would promote legal certainty, homogeneous application throughout the European Union and the proper control of the contents of those documents by the European Commission, the Parliament and the Council. In short, if a specific ESA considers it is empowered to further develop certain aspects of a Level 1 text, Level 2 should be the driver for these purposes, with the aim of increasing legal certainty and ensuring the correct exercise of the powers of the European Commission, the Parliament and the Council.

In relation to the content of Q&A documents or guidelines issued by European authorities, we are concerned by the fact that these documents may go beyond their initial purpose, i.e. to clarify/interpret certain concepts or provisions. For example, the statement published by ESMA on MiFID practices for firms selling financial instruments subject to BRRD resolution regime imposes new disclosure requirements on investment firms as it requires firms to inform clients about the consequences that the adoption of resolution measures may entail. We would question (a) whether it is really necessary to add more information requirements when in fact the BRRD has improved (or, at least, not deteriorated) the situation of clients in the event of insolvency of firms (NCWOL); (b) whether this information should be included in the KID (bearing in mind the limitation of space in such document); (c) the value or enforceability of such a statement; and (d) the opportunity to publish these new disclosure requirements by way of an "ESMA statement" when the Level 2 rules specifying the information that firms shall provide to clients under MiFID 2 are still under discussion.

We understand that this kind of document should have a limited scope so that they do not create or impose new figures or additional obligations, but it should nevertheless clarify or interpret certain concepts and provisions, particularly taking into account that Q&A documents are not subject to public consultation or to the control of European institutions.

In view of the above considerations, we would like to suggest limiting the content of Level 3 measures to such questions that provide clarity to the market and promote a homogeneous interpretation and application of the law, without creating new obligations or figures or contradicting Level 1 or Level 2 measures.

Uncoordinated local rules:

Differences in national regulation in the investor protection area (and, more specifically, on pre-trade information) create an un-level playing field across Member States, erecting additional barriers to a single market in financial services and products. However, it seems

that many Member States, motivated by the objective to protect their national retail investors, have been adopting, during these intervening years, a host of new laws and regulations and publishing policy papers and guidance. In the current situation of retail investor protection rules in the EU, when dealing in financial instruments, is characterised by considerable and increasing disparity of national legislation in each Member State. This gives rise to legal uncertainty and results in an increasingly disrupted EU single market.

Legislation requiring investment firms to provide its retail clients and potential retail clients with a risk indicator of each particular product that has been introduced in some Member States in these last years.

We recommend promoting the homogeneous application of European laws and the removal of any national legislation that may hamper the goal of European directives or regulations. As stated in the Public Consultation, the ESAs' mandate is to contribute to developing the Single Rulebook, solve cross- border problems, and promote supervisory convergence.

The publication of the EBA Guidelines on common procedures and methodologies for the supervisory review and evaluation process (SREP)(even if these came into force only in 2016) had a positive impact on a common understanding of the SREP elements in 2015, and was the basis for setting the additional capital requirements, expected articulation and communication of these requirements to institutions.

However, as identified by EBA in their last report on convergence of supervisory practices, there are identified areas of the SREP where authorities still face challenges to converge, particularly with regard to the setting of institution-specific capital requirements and common scoring of risks and viability. However, any standardization of the SREP methodology or a revision of the EBA SREP guidelines must not lead to a standardization of methods that institution use for their ICAAP and risk management in pillar II. The existing freedom of methods under Pillar 2 should be retained.

In our view the most relevant are divergences in supervisory approaches towards the nature and level of capital requirements (more specifically, the differences in the quality of capital required to meet the additional own funds (pillar 2R and G) set by NCAs); the different application of automatic restrictions on distributable amounts; convergence of risk-weighted assets is still far from being achieved (despite the considerable emphasis put on converging on the definition of capital. This has created an asymmetry in the capital ratio, and is penalizing those banks in geographies whose national supervisors have followed a more conservative approach on the use of internal models for capital assessments.). A further area where national legislators took different paths due to a vague ESA input, is the domain of the disclosure of SREP letters in case of rumours on raise of capitals or similar events. Regarding the determination of the Pillar 2G, the supervisor failed to make an appropriate link between the outcome of the institution-specific assessment and the proposed additional capital requirements.

Monitoring and analysing supervisory practices and outcomes are necessary ongoing activities in light of their continuous development and the potential impact on the single market. Increasing the number of annual meetings between EU NCAs may be convenient in order to improve supervisory convergence. The development of more detailed annual reports with specific conclusions about divergences and steps to be take may help in the convergence process, as would Rulebooks, even though nowadays they are much diverse in terms of information provided (for example EBA's Rulebook vs. the rulebook for the UK Prudential Regulation Authority). Further coordination in supervision between ESAs and SRB should also be promoted.

No-Action mechanism:

The EMIR review should provide a mechanism that enables the ESAs (or the European Commission) to remove or temporarily suspend certain obligations under particular and exceptional circumstances. We support the introduction of such a mechanism on a horizontal basis, across all fields. This kind of mechanism is already present in other jurisdictions, for instance, in the US where the CFTC can issue no-action and/or exemptive letters not recommending enforcement action for failure to comply with a specific provision of local regulations or a written grant of exemption from a specific provision of local regulations. In fact, these letters may be addressed to a single entity and not necessarily to all market operators so that supervisors are able to tackle general or specific problems.

As stated by ESMA in the Consultation Paper "Clearing Obligation under EMIR (no. 1)" dated 11 July 2014 (paragraphs 63 to 67), in the current text of EMIR there are no flexible tools that may permit ESMA to withdraw or amend some obligations (e.g. the clearing obligation) if some market conditions change (e.g. drying up of liquidity) that then makes these obligations unfeasible. Currently ESMA does not have a possibility to amend the situation other than going through the procedure of modification of the RTS, which is the same as the procedure of issuance of a new RTS.

With the aim of avoiding the negative impact that this kind of situations may have on the market participants and the market itself, ESMA stated that: "Therefore, during the 2015 review of EMIR foreseen by Article 85(1), ESMA will flag that the clearing obligation process may need to be reviewed to take into account the fact that the classes that had been deemed subject to the clearing obligation in the past may no longer satisfy the necessary conditions in the future, and that the time of the procedure to amend the RTS is unsuited to the level of urgency that such a modification may require."

While ESMA's (and the industry's) concern was raised regarding the mandatory clearing, similar situations may arise in many other important fields (e.g. collateral exchange, intra-group exemptions, haircuts, etc.). The current environment is too rigid to facilitate any urgent action that needs to be taken through a legislative measure with long periods involved, with high negative impact on the market. Flexible mechanisms should be enforced to avoid these situations, via specific powers conferred to ESMA, the European Commission or both jointly.

Related to regulatory reporting and in order to foster harmonisation, it would be desirable to have a more active participation of the ESAs (more specifically the EBA) in the ERF/SDD/BIRD initiatives of the ECB.

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.

Granting of new powers:

We would like to re-emphasise the need for ESAs to increase the input from industry stakeholders to ensure all policy is practically applicable and supports the prosperity of the regulated industries.

Further to this, at a time when the EU is considering the impact of Brexit and the uncertainty currently faced by firms operating across the EU, we strongly recommend that the European Commission take steps to minimise uncertainty and avoid measures that could delay contingency planning and the decision-making of firms; adding further supervisory powers (for example with regards to the supervision of CCPs) runs the risk of creating further uncertainty and instability in the markets.

Despite some noteworthy progress, the promotion of a supervisory culture and convergence of supervisory practices by ESAs still has a long road ahead. The convergence of supervisory practices based on peer reviews - as mandated in Article 30(1) of the ESAs Regulations ("in order to further strengthen consistency in supervisory outcomes" the Authorities shall periodically organise and conduct peer reviews") would benefit from further thought. Peer reviews similar to the Basel RCAP (Regulatory Consistency Assessment Programme) process to highlight and remediate national divergences would help support a single rule book. In areas such as the financial markets, supervisory rules and outcomes are widely different, thereby creating a potential for regulatory arbitrage.

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.

A number of tools are available to the ESAs in order to promote supervisory convergence. Q&As are a more informal way to clarify controversial Level 1 or Level 2 legal issues, or to address issues that are more technical in nature. However, Q&As have been considered as non-binding guidance and therefore not subject to better regulation principles and stakeholders consultation.

We are of the view, however, that ESMA's interpretations and clarifications have the potential to produce significant impacts across the marketplace, comparable in some instances to those from the introduction of new regulatory policies or legislation. NCAs also take Q&As as a key supervisory instrument and supervised entities are encouraged to strictly follow the guidance in the same way as they are compelled to follow actual rules.

In view of the weight the answers carry within the industry community, and more widely amongst NCAs, and the potential impact thereof, it is our belief that consultation and consideration with industry stakeholders of draft answers ahead of the publication of Q&As is necessary, particularly those that could have a significant impact on banks, for instance those relating to capital definitions. This would allow stakeholders to contribute to the discussions and to plan ahead on how to manage or mitigate any impacts. There should also be clarity and reasonable expectations regarding when the answers would become available. We recommend that ESMA and the EBA explore potential mechanisms that would enhance the transparency of the Q&A process and allow for some form of stakeholder review, where appropriate, before answers are finalised and published. We recognise that for expediency's sake the potential universe of commentators would be limited but believe that there may

be a role for the stakeholder groups in providing this oversight. A clearer process for the submission of the questions would also be appreciated.

Taking into consideration tasks related to consumer protection and financial activities provided in Article 9 of the ESAs Regulation '[…promoting transparency, simplicity and fairness in the market for consumer financial products or services […] financial literacy and education initiatives]' we consider the ESAs should play a more relevant role in financial education. At the moment, central banks initiatives are developed under OCDE task force with a partial view, mainly focused on inclusion. As a gap has been identified under Consumers Financial Education programs we strongly support that the ESAs deliver some guidelines or opinion about this issue.

On the other hand, the same regulation establishes a Committee on financial innovation [...to achieving a coordinated approach to the regulatory and supervisory treatment of new or innovative financial activities and providing advice for the Authority to present to the European Parliament…] but there is not a specific task properly defined and carried out by the ESAs. We consider that it should be included as a priority activity due as technical complexity may create vulnerable situations for consumers.

Finally, clear guidelines and effectively consumer protection enforcement is necessary in order to achieve the legal certainty to support and recognise rights for both consumer and firms, avoiding, for example, court resolutions with retroactive application in national jurisdictions.

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.

We are not directly aware of instances where the ESAs have overseen mediation of disagreements between home and host supervisors but believe that the mechanisms already in place should permit mutually acceptable agreements to be brokered.

Attention should be warranted to cooperation between the SSM and non-Eurozone supervisors and third countries. Memoranda of Understanding should be promptly signed among authorities, in order to regulate basic bilateral relations such as exchanges of information. Existing Memoranda should be published so the sector is aware which agreements have been made. Also, priority should be given to the recognition of supervisory equivalence to third countries within the EU.

2. Non-binding measures: guidelines and recommendations

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.

ESAs tasks and powers in relation to guidelines and recommendations:

Regarding guidelines and recommendations, according to the ESAs Regulations, these may be addressed to competent authorities or financial institutions. The possibility to address guidelines and recommendations to intermediaries and NCAs at the same time (as it happened), creates confusion on how the market participants should comply with these acts and what consequences these soft regulation tools acts have in practice. The ESAs websites should not only explain whether national authorities have decided to comply but also provide a reference to and details of the specific measures which they have taken to that effect.

Our understanding has always been that the EBA is not authorised to issue Guidelines concerning those areas which already have been covered by the Single Rulebook. This principle has been confirmed in Recital 26 to the EBA Regulation which specifies that only "In areas not covered by regulatory or implementing technical standards, the (European Banking) Authority should have the power to issue guidelines and recommendations on the application of Union law".

Addressing weaknesses:

In general, guidelines and recommendations' contents need to be contextualized in each national legal framework by the competent authorities to whom the "comply or explain" procedure applies. As a result, Member States may interpret the same rules differently: some seeing them as binding rules, others treating them purely as recommendations. It is important that NCAs take the steps necessary to ensure the enforceability of ESAs' technical standards in their respective jurisdictions once they have been endorsed by the Commission. Guidelines and recommendations should however remain non-binding legal texts, so long as there exists no mandate that they be re-cast as technical standards, in turn requiring submission to the Commission for endorsement. Guidelines and recommendations should remain within the realm of the ESA regulations, i.e. "with a view to establishing consistent, efficient and effective supervisory practices" and "ensuring the common, uniform and consistent application of Union law".

Besides this, the ESAs should avoid issuing "preparatory guidelines" at an early stage of the legislative process, as happened for EIOPA for IDD, because this would weaken the "comply or explain" NCAs' commitment and create confusion among the market participants.

EBA took the initiative of issuing Guidelines to implement the first phase of the Basel Committee's Pillar 3 Review, notwithstanding that Regulation 575/2013 had harmonised across the EU public disclosures which banks are required to make. An EU Regulation overrides all national laws dealing with the same subject matter and subsequent national legislation must be consistent with it. Consequently, individual Member States (including their administrative agencies such as banking supervisors) are no longer legally authorised to amend those harmonised rules in any way.

Moreover, public disclosure requirements are typically Level 1 legislation which cannot, therefore, be imposed by administrative agencies at their own initiative. They touch upon freedom of expression and public authorities are only allowed to interfere with free speech provided that the formalities, conditions, restrictions or penalties which they impose are prescribed by law (i.e. by means of an Act of the EU Legislators). Therefore, the EBA Guidelines undermine fundamental guarantees of constitutional nature as enshrined in the EU treaties.

Furthermore, Level 3 instruments issued by different regulatory standard setters often diverge and are often expected to be observed by supervisory authorities even before finalization. Considering that guidelines/recommendations always imply significant administrative burden for institutions (e.g. the guidelines mentioned above, ECB guide to fit & proper assessments and BCBS guidelines on internal governance for banks), their production should strictly adhere to principles of necessity and be exercised within clearly defined boundaries.

Where there are Guidelines that overlap between authorities or are very much related it would be positive to delineate more clearly the responsibilities of each ESA. A mechanism to coordinate related works increasing coherence and consistency will be adequate.

The ESAs guidelines must also consider not only the extent to which the intended guidelines are consistent with national legal frameworks, but also how they may entail a competitive

disadvantage vis a vis other sectors or companies not subject to similar constrains, due, among others, to extra jurisdictional implications. This is especially important where the guidelines apply all over consolidated groups, thus outside the EU. The guidelines on remuneration are a good example. The limitation to pay dividends or interests on the deferred compensation is creating big problems with members of identified staff in countries outside the EU, with high inflation and interest rates, where there is a strong competition for talent amongst financial entities not subject to these rules.

3. Consumer and investor protection

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.

The increasing offer of products and services on a remote basis makes harmonization of rules that customers are subject to essential for consumer and investor protection. In the end, clients or prospective clients should experience the same level of protection and information, irrespective of the service/product provider location. This would also reduce the risk of regulatory arbitrage. However we do not believe that the ESAs should have more tools at their disposal. The ESAs should use the tools they already have fully, and in a more effective and efficient manner in order to achieve stronger investor protection.

We support any efforts ESAs would make towards enhancing consumer and investor protection. It is important that the ESAs co-ordinate with NCAs to ensure there is no gold-plating, and the level playing field is protected.

The coordination and functioning of the Joint Committee of the ESAs must be improved. There appears to be a distinct lack of coordination and communication between the ESAs on matters where there is the need for joint work. For example, EIOPA does not have expertise on PRIIPs for derivative products, yet did not work closely with ESMA in order to correctly understand the specificities of this area of financial markets nor to develop a solution that would be workable for derivative products.

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.

The development of an EU public register of providers of products and services (based on existing national public registers of the regulators) could be a way of anchoring confidence in the system and avoiding "unfair" competition by quasi-bank service providers.

Better guidance on the innovation field is needed and is necessary to dive down into the area of Financial Innovation in order to avoid consumer abuses and establish clear rules granting competitive system for all the players.

Technology is changing banking in exciting and fundamental ways. Innovations happen at high speed and many of our customers are already digital. Financial entities need to be part of the digital transformation. For this to happen, we need regulatory framework to incorporate available innovations, so that customers can more quickly reap their benefits. We will need to understand that financial services are activities, not a particular business model. Businesses behaving like financial services are not always regulated like financial entities. When banks and 'non-banks' do the same activities they should be regulated the

same way. It is not just a question of a level playing field from the providers' point of view but also to really keep the system safe for the customer.

Some specific regulatory requirements should be modified to allow the use of innovative solutions, such as the way to provide advice to investors. For this, we support the creation of a Regulatory Sandbox where both providers, customers and regulators can test innovations in a well-ordered space.

4. Enforcement powers – breach of EU law investigations

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.

There should be a clear delimitation of responsibilities between supervisory authorities avoiding ambiguities and unnecessary complexity. We do not consider a benefit promoting supervision between audit and accounting when the audited companies are not issuers.

In terms of avoiding duplicities and inefficiencies, nowadays NIIFs endorsement process is under the charge of EFRAG. We do not have a preference regarding the authority responsible but we consider it should be only one supervisory authority fully in charge of it.

In the case of financial reporting we consider that only one authority should have responsibility for this. This competency should not be shared as it increases complexity unnecessarily and may lead to inadequacies and divergences of approach.

5. International aspects of the ESAs' work

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

Equivalence decisions are key instruments to manage the cross-border activity of market participants in a sound and secure prudential environment. The assessment of the equivalence should consider the major features of the relevant supervisory and regulatory framework. Along these lines, the equivalence of a third country's regulatory and supervisory framework implies sharing the same objectives as the Union's framework (i.e. ensuring appropriate regulation and supervision, and ultimately financial stability).

However, in practice, the methodology currently used to assess equivalence is too rigid and does not take into account the practices of the countries under assessment, almost being an article by article review, which may lead to a failed assessment of the countries in scope. This process is not efficient and unduly penalizes EU banks with a global footprint.

The EU itself is not fully Basel III compliant and this issue may affect other countries too, as regulation and supervision tend to adapt to the specificities of their own countries. Therefore, we call for a review of the equivalence process in the EU. An effective third country equivalence regime that provides certainty and stability for banks operating outside the EU will be crucial, and could provide an opportunity to enhance the existing regime that already impacts European banks. The European Commission recently issued a report on the equivalence process with non-EU countries in EU financial services legislation highlighting

that continuous work is necessary for further developing the current proportionality- and risk-based approaches to equivalence assessments.

Coordination with NCAs, the EBA and the SRB will be of paramount importance. This will require a constant dialogue, and uniformity of processes (internally) and messages (externally, to the banking industry). Getting a holistic view of main issues at the European level is hampered by fragmentation of competencies among different bodies, for supervisory as well for regulatory issues.

Interaction with third countries is a lengthy process, and needs to be given the priority it deserves. Overall representation of SSM in international fora is considered weak. Attention should be given to cooperation between the SSM and non-Eurozone supervisors. We regret that the ESAs nor the SSM provide more transparency in this regard. As an example: the ECB has informed the banking sector that since the SSM was established, the ECB has stepped into numerous MoUs which were in place between SSM NCAs and third country authorities and is also entering into its own MoUs with third country supervisory authorities. The ECB nor EBA has however not published a list of agreements or MoUs that is in place between SSM and non-SSM authorities or that the ECB 'has stepped in' or agreed upon. More transparency on interaction is necessary as this would enhance transparency about supervisory assessment principles, thus helping to alleviate uncertainty about the cooperation and exchange of information with non-Eurozone countries or third country supervisors and the supervisory expectations in this context and a.o. avoiding duplication of supervision and legal regimes which very often conflict with each other.

Also, priority should be given to the recognition of supervisory equivalence to third countries within the EU.

A prerequisite for any extension of the ESAs tasks or activities should be the availability of sufficient resources. We are concerned that ESMA has insufficient means to perform its envisaged tasks. It should be avoided that new tasks prevent the fulfilment of the ESAs current primary tasks.

Furthermore, given their expert knowledge and experience, the ESAs are extremely well placed to provide more support to the Commission, e.g. for the period after an equivalence decision was taken. Indeed, monitoring the prevailing regulatory regime in third countries and the actual cooperation in practice, would be beneficial. Nevertheless, this should not deprive the Commission from its own responsibilities in this field and from its own efforts to verify whether its decisions work in practice. However, we would support a broad movement towards a unified equivalence regime in EU legislation, to which individual regulations could refer to, in a manner similar to the draft procedure for RTS. The ESAs are well positioned to systematically assist the Commission in determining and monitoring equivalence, providing they are given appropriate resources to do so.

There should also be an open, two-way dialogue between authorities at an early stage in the process before any regulation is changed is amended to keep equivalence. There cannot be a situation where equivalence is suddenly removed without due notice. Equivalence assessments must be done in a proportionate, clear and transparent manner, and the ESAs should clearly and publicly define any specific criteria they are monitoring in order to assess equivalence on an ongoing basis so that market participants and third countries have full clarity on where potential changes may trigger reassessments of equivalence.

Regulation at EU level has been made subject to a range of better regulation principles. Similar principles have not been agreed at the level of the Basel Committee on Banking Supervision (BCBS) and other international fora. Those institutions are, more particularly, not obliged to provide stakeholders with a feedback statement explaining why their (critical) comments have not been taken on board.

The EU better regulation principles need to be amended with a view to obliging EBA to explain to stakeholders why critical comments made during BCBS consultation (or consultations organised by other international committees) have not been taken into account.

Due to their level of expertise, the ESAs should have a stronger role in the equivalence process. The objective would be to reduce the time it takes the ESAs to come up with an equivalence decision (as of today decisions are slow because of a lack of resources). This is especially the case for those jurisdictions that were deemed equivalent by the NCAs. To achieve that goal, the ESAs should be granted more resources. Also, the functions of the ESAs regarding equivalence decisions should be clarified and distinguished from those of the Commission.

6. Access to data

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.

Market participants are already exposed to heavy information requests by many different authorities. Granting the ESAs additional powers to require information directly from market participants would inevitably increase the burden for institutions and would lead to duplicating requests which should be avoided at all costs. NCA's and the ESA's should align their processes in order to avoid redundant request to market participants. It is better that national competent authorities will coordinate the information request at national level. We do not see how additional safeguards could prevent an undue burden to market participants in case of double information requests.

It also needs to be appreciated that it serves little purpose for the ESAs to request data that organisations either do not have or ordinarily would not consider of sufficient quality for submitting to the regulatory authorities.

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

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.

Issues with current reporting framework:

The EU reporting framework suffers from a series of inconsistencies and overlaps. The reporting regimes are very numerous (EMIR, MIFID, MAR, SFTR, PSD2, etc.), sometimes overlapping or inconsistent and result in a significant burden for the industry. Moreover, different practices and approaches across the EU in the collection and publication of data hamper the comparability and the exchange of data or their reliability. Double reporting to NCA's and ESA's is time consuming for firms and absorbs NCA and ESA resource

unnecessarily; the NCA's and ESA's should align their processes in order to avoid redundant requests to market participants.

The negative impact of not streamlining and benefits of doing so:

The ESAs already have a coordination role for reporting requirements, but there is little evidence of streamlining in reporting requirements. Some existing opportunities to streamline where Level 1 allowed have not been taken. E.g. MiFIR transaction reporting expressly aimed to make use of EMIR reports but ESMA designed L2 measures that made this impossible. The SFTR final Level 2 choices show some consideration in CBA of reducing/streamlining, but still final policy choices (e.g. daily rather than monthly re-use reporting) have gone for the most complex and costly solution for industry. The ESAs could potentially be given a task to justify whether and how their decisions achieve the aim of streamlining requirements in order to really promote these objectives.

A more consistent and streamlined reporting could contribute to supporting closer market integration and reducing market participants' costs for complying with numerous information requests. This could be facilitated by delegating the oversight of reporting to ESAs subject to maximum harmonisation. The ESAs, or perhaps an independent body, could then determine whether an extra reporting request from an individual NCA was appropriate or not. To this end, the ESAs are well positioned to play a significant role in the consolidation and streamlining of reporting requirements by developing common data and reporting hubs across the EU.

Banks can only cope with the complexity of the various reporting requirements by automating the reporting production process. The introduction of new reporting requirements, therefore, inevitably requires them to adapt their IT systems and plan resources accordingly. Planning is of the essence to make the data production and project management process more efficient, also considering that banks are faced with a number of constraints in planning the daily work of the teams and the management of the priorities of the department.

Against this backdrop, it would be extremely helpful if the ESAs would undertake efforts to increase their understanding of the operational difficulties which reporting requirements may produce for the reporting agents and streamline its communication with the banking community and wider industry in this regard.

Recommended solutions:

The optimal solution would be for the ESAs to set up dedicated dialogue structures which would enable the banking community to exchange views with on upcoming developments and their timelines on a regular basis. Such a forum would be likely to foster a better understanding between the regulator and the banks and contribute to creating a smoother and more efficient environment. It could take the format of a workshop which would be used in particular to discuss the following issues on a bilateral basis - ideally, at least once per year in advance of any upcoming developments (to allow banks and financial market participants to consider IT/resource budget for bigger scale queries):

- timeline of future reporting requirements: exchanges of views between the standard setter and reporting agents would foster a mutual understanding of the complexity level of particular reports, their operational impact and the time/effort required for their implementation. This would allow the standard setter to adjust the reporting deadlines accordingly, if need be, and to improve the scheduling;

- the objectives pursued by the supervisor/standard setter: they are important to increase the understanding of reporting agents of what and how they need to report;

- breakdowns which may need to be reconsidered because they are too burdensome to implement whilst the benefits they are expected to bring to supervisor are not commensurate;

- reporting frequency: it would be appropriate to increase the banks' understanding of the requested frequency whilst the regulator should be receptive to convincing arguments put forward by the industry to reduce the reporting frequency in some instances;

- detailed specifications;

- validation rules: they should be provided as soon as possible as this would help banks to duly understand the requirements and to implement them.

- misinterpretations and other type of errors which occur frequently;

- possible ways of integrating new workstreams into ongoing projects and initiatives;

- the possibility to utilise data which are already being reported to fill in data gaps instead of imposing new requirements and to eliminate possible duplications and overlaps;

EBA tends to set tight implementation deadlines concerning supervisory reporting streams. Short deadlines limit a bank's capacity to plan ahead and to set up automated processes which are necessary for time and cost-efficient data reporting. As a result, most banks need to hire external staff to specify and implement technical solutions allowing them to update their IT systems, which results in additional expenses. Tight reporting deadlines inevitably affect good quality reporting: they make the reporting process less efficient both to institutions and supervisors.

Reporting standard setters should recognise this and determine the implementation timelines taking into account the development period:

- The development period should be adapted to the scale of the reporting project, its degree of novelty and its level of complexity (granularity, frequency).

- It should be accepted as a general rule that banks need a minimum development period of 12 to 18 months to complete a reporting project starting from the day on which they have been informed of the final details in an official way (e.g. through the publication of the reporting standard in the EU Official Journal). Any reduction of the normal timeline should be duly and carefully justified.

- Whenever the reporting is implemented for the first time, a longer remittance period needs to be determined to take this into account. The timeline for implementing new requirements for the first time should start running only from the day at which (sufficient) guidance has been provided. The first relevant reporting date should be clearly communicated as soon as possible and in the consultation paper at the very latest.

- A transition phase with the potential for live testing during the implementation period should also be considered to spot format, formula and other errors before the final standard is issued. Such a process was followed within the framework of MMSR reporting.

- Improved coordination between the various authorities issuing data requests/ and/or reporting standards (EBA; SSM; Statistical authorities; Single Resolution Board; Basel Committee for Banking Supervision; Financial Stability Board; etc.) would be useful:

(i) to examine if the data which they are looking for is already being reported in one way or another;

(ii) to consolidate information that is already provided elsewhere;

(iii) to avoid clustering of major data requests and remittance dates.

Moreover, reporting standard setters could smoothen the operational impact of challenging implementation timelines through a range of basic measures which can be summarised as follows:

- The ESAs should take the initiative of informing banks and financial market participants of a clear schedule of all upcoming/future reporting requirements adopting a two-year horizon on a regular basis. For more medium-term requests, it would be a good practice for the ECB and NCAs to inform banks at least 12 months in advance of any new forthcoming reporting requests (or any major review of existing reporting requirements).

- The ESAs need to increase their efforts to improve guidance, considering that banks are spending too much time today to merely try and understand what is precisely being asked. The high number of requests for clarification made by banks sufficiently demonstrates that ways need to be found to remedy for the lack of clarity which the text of regulatory reporting standards may imply. Today, instructions provided are often generic and repetitive. Their quality must be improved.

Reporting standard setters should consider elaborating reporting instruction manuals which cover the requirements on a line-by-line basis, highlighting the novelties, including examples and communicating the requirements in a more didactive manner. Such official guidance must be published before the reporting due data whilst the Q&As which would have been published during the consultation period need to be reviewed in the light of the final standard.

In addition, reporting standard setters should take on board a range of recommendations specifically aimed at providing the banks with more flexibility to meet reporting deadlines.

- Remittance dates should be set in terms of working days instead of calendar days considering that this would be more practical. This is particularly relevant whenever the deadline expires on a Sunday (as this means that, as a matter of fact, the timeline is being reduced with two days) or during a holiday season.

- Currently, too many data requests and remittance dates are concentrated in Q1.

- Authorities should consider setting differing reporting deadlines in function of the relevance of the data from a supervisory perspective (statistical, benchmarking info...).

- If amendments to existing reporting streams are made, the same timeline should apply in respect of all the changes.

- Materiality level rules should be defined to avoid costly resubmission of reporting when the correction to be made and/or the data is non-significant, particularly whenever XBRL controls are concerned (considering that XBRL rejects data which do not match with each other, even if the differences are very small). Furthermore, validation rules should not be imposed in a retro-active way (i.e. to already reported periods).

Currently ESMA is working with EBA on guidelines on suitability for financial institutions, however ESMA could enlarge its framework in this matter to listed companies which are not financial institutions. This may allow for comparability through companies from different sectors in Member States and would favour the Capital Market Union in generating a better understanding of them for investors and the public in general.

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.

An EBA opinion recently delivered proposes to give EBA the power to adopt supervisory reporting requirements directly through its own implementing technical decisions, rather than by means of draft ITS which need to be endorsed by the EU Commission. Such a proposal, however, lacks a legal basis as it would be incompatible with the EU rules on delegation of power to agencies as established by the Meroni and Short-selling judgments of the European Court of Justice.

In the Meroni judgment the Court acknowledged the possibility of delegation of powers to non-institutional bodies but immediately added that delegation of powers is only permitted if it involves 'clearly defined executive powers', the exercise of which is open to review in the light of objective criteria. In its Short-selling judgment the Court confirmed the validity of the basic principle established in Meroni: discretionary powers can be conferred to EU bodies created by the EU legislature (such as EBA) only provided that the exercise of the delegated powers is circumscribed by various conditions and criteria which limit the discretion. The main requirement is a clear and precise definition of these powers.

Such a clear definition appears to be lacking where supervisory reporting standards are concerned. The Capital Requirements Regulation has not specified the supervisory reporting requirements which EBA is entitled to impose by means of precise conditions and criteria. Supervisory reporting is in any event not merely being imposed today to enable the supervisory community to determine if institutions do indeed comply with the objective and precise prudential standards set by the EU legislator. The objective pursued by supervisory reporting standards goes beyond such a precise and specific objective which is demonstrated by the fact that institutions are not only made subject to COREP reporting but need to report "financial information" on top of that, i.e. data which do not reflect specific prudential standards but merely aim to provide the supervisors with insight into the financial situation of institutions. In doing so, the EBA FINREP package goes beyond a mere transposition of IFRS standards.

This means that allowing EBA to determine on its own initiative supervisory reporting standards would necessarily imply that EBA would be given a freedom of appreciation which may translate in an actual policy.

Our view that drafting ITS on supervisory reporting is not a mere technical exercise has been largely confirmed by the mere fact that the ECB has deemed it necessary to supplement the EU Commission's Regulation 680/2014 (laying down implementing technical standards with regard to supervisory reporting of banks) with an additional set of supervisory reporting requirements in respect of Eurozone banks. This clearly shows that the ECB has made other policy choices than the EBA in its assessment of how the CRR reporting requirements need to be implemented.

It also needs to be highlighted that the EBA opinion goes far beyond the objective of merely delegating supervisory reporting powers to EBA. The proposal for an amendment of the EBA Regulation which is attached to the EBA Opinion seeks for a basic overhaul of its powers. It aims to allow EBA to adopt implementing technical decisions in the areas specifically set out in the legislative acts referred to in Article 1 (2)" of the EBA Regulation, i.e. Directive 2006/48/EC, Directive 2006/49/EC, Directive 2002/87/EC, Regulation (EC) No 1781/2006, Directive 94/19/EC and, to the extent that those acts apply to credit and financial institutions and the competent authorities that supervise them, within the relevant parts of Directive 2005/60/EC, Directive 2002/65/EC, Directive 2007/64/EC and Directive 2009/110/EC, including all directives, regulations, and decisions based on those acts, and on any further legally binding Union act which confers tasks on the Authority. The EBA proposal to entitle it to adopt "technical" decisions without prior political scrutiny is inadmissible as it would go against the Rule of Law. Today, Article 15 (1) of the founding Regulation of EBA states that EBA is only empowered to submit draft ITS to the Commission for endorsement. This endorsement system is the main safeguard which the EU legislator has put in place to limit

the exercise of discretionary powers attributed to EBA to ensure that the Meroni doctrine is not bypassed.

Giving the EBA the authority to issue technical reporting specifications could shorten implementation periods, which would be a welcome development. We nevertheless consider it essential to continue to involve 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.

One of our major concerns with this proposal would be around timelines for implementation of the rules. It is vital to have clear indication of what is required to be implemented. Given the lack of formality and firm deadlines with guidelines, there is a risk that key details are provided too late in the process for timely implementation. On no account 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.

As an example, we suggest that the FINREP/COREP framework is a good candidate for a more streamlined approach. These have many reporting obligations and validations, which have frequently been updated and which we believe would be more efficiently dealt with via guidelines/ recommendations.

8. Financial reporting

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.

We support harmonization efforts to ensure consistency in application of accounting standards. To increase comparability and transparency, the IFRS should be applied as issued by IFRS and endorsed in EU, without Guidelines or interpretations provided by local or regional authorities. While we support greater harmonisation of accounting practices, the principle based character of IFRS must be maintained. Additional guidance is often unhelpful in that it may narrowly address an issue, resulting in essentially rules and exceptions being introduced. We believe that enforcement though additional jurisdictional guidance would be in detriment of global standards. If ESMA, within its enforcement work identifies issues with standards, they should report them to the IASB and IFRS IC for consideration at global level. The same applies for national enforcers.

Because of national requirements, banks acting as subsidiaries of various EU-based banking groups have to implement in parallel different accounting and financial reporting processes - one for local purposes and another for group reporting purposes - although both are supposed to be IFRS-compliant. The need to maintain double financial reporting systems and processes leads to a significant negative impact in terms of operational risks and costs. A further negative impact is perceived in terms of the impact on business decisions, both at local and at group level. Such situation should be avoided because it conflicts with the

original objective of adopting IFRS as basis of accounting with the aim to eliminate double reporting requirements and to enhance the quality of the external financial reporting.

In this context, we see room for improvements to the current organisation and operation of ESMA in

- strengthening the coordination role with local regulators to improve their standard of enforcement
- strengthening the powers of ESMA to launch a breach of EU law case concerning substantive financial reporting requirement set in the accounting standards adopted under the IAS Regulation.

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 are surprised to see the question on the possible improvements to the endorsement process to be included in the consultation given it was discussed in the context of Maystad review. The EBF considers the current endorsement process of the international accounting standards into EU legislation to work effectively and efficiently. It is important to preserve the efficiency of the endorsement process to ensure all standards are endorsed before their mandatory effective date. Any shortcomings identified by Maystadt report such as its representativeness were addressed with the recent reform of EFRAG. The EFRAG functioning and performance is continuously assessed and improved. The consultation raises a question of improvements without any identification of flaws. Concerning the role of ESMA, we do believe its current role as an observer in EFRAG is appropriate given the importance to keep the standard setting process and enforcement clearly separated to avoid conflict of interest.

However, we wold like to make a point about the interaction of accounting and prudential frameworks. The objective of financial reporting is to provide relevant information that faithfully represents the transactions and economic situations of the respective preparer. Prudential regulation aims at ensuring the safety and soundness of the financial institutions and reducing the risk of instability of the financial system. While we believe the objectives of financial reporting and prudential regulation are different, the interaction of the accounting and prudential frameworks is being of increasing importance given that the accounting figures are in principle the starting point for calculating regulatory capital and regulatory risk data.

To be endorsed in the EU, the IFRS standards must be conducive to the European public good, as one of the criteria of the IAS Regulation. While the definition of the public good is rather vague, the European Commission has adopted a practical approach, whereby the EC establishes the criteria of public good on a case by case basis for each standard in its letter to EFRAG requesting endorsement advice. The effect of IFRS on capital or prudential ratios of regulated entities are not considered by EFRAG in their endorsement advice given that it is not in the competence of EFRAG to respond to the capital consequences of the new accounting standards.

It is, however, questioned whether the assessment of public good can be evaluated in its entirety without considering the effect on capital and prudential ratios. It is not considered appropriate that CET 1 ratios of banks would change because of change in the accounting standards without any corresponding change in the level of risk, risk appetite, the bank's strategy, management or level of losses. Even if not considered material, a cumulative impact of the accounting change together with other prudential measures is likely to add pressure on banks' capital levels. Banks can adjust to higher capital requirements either by raising fresh capital – a scenario that after the earlier considerable efforts by banks in Europe in this regard is not feasible – or by deleveraging. Increased capital requirements are

therefore expected to have an adverse impact on banks' lending practices and pricing, further restraining banks' capacity to finance the economy.

A review mechanism that will ensure a systematic and timely review of the prudential framework whenever a change to the accounting standards is being introduced should therefore be put in place by regulators and legislators both at international and EU level.

Such mechanism should trigger an assessment of:

- The interaction of the new accounting standard with existing regulatory requirements
- whether the regulatory framework still meets its objective considering the accounting change and whether the accounting change still provides an adequate basis for the prudential treatment (conceptual and qualitative assessment – fit for purpose)
- the effect on prudential capital (qualitative assessment)
- whether the increase/decrease in capital should be viewed as a natural consequence and can be justified or is duplicative in nature
- whether any change to the regulatory framework and/or transitional arrangement is needed

The impact of the changes in accounting requirements on capital should be investigated in a timely manner to serve as an input to the standard setting process as well as to ensure that the envisaged changes to the prudential framework or envisaged transitional arrangements take effect simultaneously with the effective date of the revised accounting standard.

The EFRAG endorsement advice should consider the results of the above-mentioned assessment in its final endorsement advice given the potentially significant consequences of the impact of accounting standards on the economy via the capital ratios of banks.

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

1. Approval of internal models under Solvency II

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

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.

We oppose a mandatory prior consultation of the EBA for all new types of capital instruments. The NCAs have to adhere to the existing laws and EBA can ex-post point out if it believes a decision has been wrong. We note that all NCAs do take part in EBA and that EBA also has tools to enforce the application of European law. Furthermore, the emission of capital instruments has to be fast to be able to adapt to the market needs. At the moment decisions of the NCAs already take too long. Adding an additional party to the process by making prior consultation of the EBA mandatory, would slow down the process, which would be counter-productive. However, EBA should be notified and given option to express opinion about approvals where they disagree with NCAs.

The functional independence of all national NCA's is an important objective, but it should be noted that input from the NCAs is important during the drafting of new guidelines and technical standards. The NCAs should assess the impact of the effects in the national (civil law) context to ensure a level playing field and an effective and efficient supervisory framework.

If the EBA was to become the single model approval body or at least an appellate body for prudential models, this could help harmonize further supervisory practices. The EBA could also potentially become the body that at least consolidates, if not also harmonizes, decisions regarding products that should not be made available to retail customers (e.g. UK decision to ban sale of bail-in debt to retail customers).

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.

The ESAs should have the powers to avoid conflicting national guidance by NCA's. This interferes with the envisaged supervisory convergence and prevents the inconsistent application of EU law.

C. Direct supervisory powers in certain segments of capital markets

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?

ESMA should be granted the powers to directly supervise consolidated tape providers (CTPs), that are required to collect trade reports for financial instruments from trading venues and approved publication arrangements (APAs) and consolidate them into a continuous electronic live data stream, providing price and volume data for each instrument.

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

The direct supervision of Consolidated Tape Providers (CTPs) by ESMA would translate into a reduction of trade data errors, duplications and differences, resulting in lower costs for market participants.

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

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 think that it is of utmost necessity to have persons on the board who have a deep knowledge of their respective markets and can bring in the diverse national aspects. 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.

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.

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.

A more systematic role should be conferred to Stakeholder groups in drafting Q&A and Guidelines which interpret different aspects of the regulation, where the most significant ones (to be identified through impact analysis) should also be subject to public consultations.

While we understand that there are a large number of competing interests for Stakeholder groups, trade associations can provide expertise representing a large number of stakeholders, and should be considered for membership of stakeholder groups more frequently than is the case today.

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

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.

Taking into consideration the points already elaborated in this response, we consider that the ESAs' activities should comply with the following criteria:

- more coordination in the rule-making process should be pursued, to avoid duplications, inconsistencies and repetitions;
- operating costs should be adjusted, to ensure synergies and economies of scale;
- regulatory activity and supervision should be clearly demarcated, also to allow a clear allocation of liabilities. In particular, as regards the demarcation between EBA and the ECB, the ECB imposing additional requirements on top of EBA rules should be avoided at all cost. We note that this is a new development that leads to less convergence within the EU and imposes additional administrative burden on the relevant institutions.

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?

Any structural change of the type proposed in the consultation would imply not only changes at the European level, but also on a national basis given that currently, national supervisory schemes are very heterogeneous.

The current configuration of the ESAs' architecture may have effects that should be carefully analysed.. We would support work to review a full range of alternative sectoral structures for the ESAs such as those mentioned above.

The priority should now be to complete the Banking Union.

IV. Funding of the ESAs

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.

The ESAs play a major role in the current European supervisory scheme. Contrary to the former structure of consultative committees (CEBS, CERS and CEIOPS), the ESAs have the legal capacity to issue binding regulatory standards. In a very short time since their creation, these authorities have carried out a great amount of technical work and their duties are likely to be increased in the following years. This makes it necessary to ensure that these authorities can count on the necessary resources to execute their functions.

The ESAs were formed mainly to assist the European Commission in strengthening the financial sector by developing draft technical standards and issuing guidelines and recommendations. In working on regulatory technical standards or implementing technical standards the ESAs are, in fact, performing tasks that should normally be performed by the European Commission pursuant to Articles 290 and 291 of the TFEU. This supports the argument that a significant part of the costs of the ESAs should be covered by the EU budget.

As of today, the ESAs are facing budgetary constraints. The current financing agreement (40% European Commission and 60% National Competent Authorities) extends the budgetary restrictions of both the European Union and Member States to the ESAs. At the same time, the control currently exercised by the European Commission, the European Parliament and the European Council over the ESAs' budgets has proven to be beneficial to maintaining budgetary discipline. A transition to a fee-based financing would not have the same effect.

Should any potential change in funding sources materialise, the EBF believes that the financial institutions themselves should be part of the decision process of the ESAs' budget approval, management and supervision of accountability.

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.

Besides the considerations made under question 29, more time is needed to analyse the possible partial contributions from the industry. An impact assessment should be carried out first to decide i) whether the industry should contribute partially to the budgets of the ESAs and ii) the most efficient system for allocating the costs of the ESA's activities.

The assessment should take into account the fact that part of the budget of the ESAs is already funded by the financial institutions as these same institutions contribute to the budget or even wholly fund the NCAs. As regards the banking sector, we note that the banks moreover fund the operations of ECB. In summary the banks pay the fees that cover (1) the NCAs in their capacity as national supervisory authority; (2) the NCAs in their capacity

as members of the ESAs through their contributions to the NCAs; and (3) the NCAs in their capacity as members of the SSM.

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.

Feedback Statements need to be comprehensive:

The feedback statement that ESAs are expected to produce following consultations which they have organised should address all the main objections and critical comments made by stakeholders. In the past, the ESAs have often created a perception that they refuse to address comments for which they cannot come up with an answer.

Example: EBA's feedback statement on the December 2016 public disclosure guidelines did not examine the argument made by stakeholders that those guidelines were not compatible with the Single Rulebook requirements.

Stakeholders must be provided with sufficient time to respond to consultations:

It is generally accepted that public and stakeholder consultation is integral to well-informed decision-making and to improving the quality of law-making. An effective and structured consultation process which includes a genuine invitation for comments from stakeholders is a crucial component of and contributor to a transparent regulatory system.

One key aspect of a proper consultation process is the importance of allocating sufficient time for stakeholders to respond so that stakeholders have the ability to adequately evaluate the full consequences of the proposed regulations.

EBA's "Public Statement on Consultation Practices" of 25 September 2012 states that EBA will allow those consulted adequate time to respond, according to the complexity of the issue and the time available. It specifies that the EBA will generally aim at allowing a three-month consultation period for public consultation, unless reasons exist to the contrary, for example an external timetable is imposed or the measure requires urgent action.

However, it frequently happens that the EBA organises consultations which do not provide stakeholders with a three-month consultation period, notwithstanding the common better regulation principles and the basic principle of European Administrative Law that administrative agencies need to comply with the rules that they have set for themselves ("Patere legem quam ipse fecisti"). In those instances, the consultations nowhere make mention of reasons which would require the consultation period to be restricted to less than three months. We believe that under European Administrative Law, agencies which claim that there would be cogent reasons justifying any departure from their internal rules, are obliged to be specific in providing these reasons.

Example: the EBA Consultation on operational risk and sovereign exposures reporting was launched on 16 November 2016, specifying that it runs until 07 January 2017. This means that the consultation period was less than two months.

The ESAs should improve the management of the Q&A process:

The management of the Q&As which the ESAs have posted on their website over the past years fails to meet industry expectations in several respects:

1) The way in which the Q&As are presented is extremely unfriendly to users, for example the Q&As which the EBA has posted on its website in the framework of COREP and

FINREP reporting. This needs to be revised. All Q&As must be provided with appropriate tags indicating the areas which they cover.

2) All questions which have been submitted to the ESAs must be posted on their website, including those which the ESAs have not (yet) answered (thus overlaps of raised questions could be reduced- which then again reduces administrative costs for both EBA and the stakeholders).

3) A timeline needs to be set within which the ESAs must provide a response. Some questions deal with time-sensitive issues, therefore it would be a great help for stakeholders to get an indication of a timeline within which they can expect a reply. It would be beneficial to subject these submissions to a defined timeline, whereby the ESAs would commit to respond to requests within a given time period. This process would be greatly enhanced by dialogue between the submitter and the ESAs where the questions can have a material impact on the functioning of the single market. There should also be a transparent Q&A submission tool which details which are currently under review, and provides an indication of likely publication dates to provide guidance, or positive confirmation that no further guidance will be provided.

4) Finally, as highlighted above, we support the recent decision by the ESAs to subject Q&As to an open process, welcoming submissions on their websites. Q&As should be made subject to proper due process.

About EBF

The European Banking Federation is the voice of the European banking sector, uniting 32 national banking associations in Europe that together represent some 4,500 banks - large and small, wholesale and retail, local and international - employing about 2.1 million people. EBF members represent banks that make available loans to the European economy in excess of €20 trillion and that securely handle more than 300 million payment transactions per day. Launched in 1960, the EBF is committed to creating a single market for financial services in the European Union and to supporting policies that foster economic growth.

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For more information contact:
Simon Pettinger Kearney
Policy Adviser – Financial Markets
S.Pettinger@ebf.eu
Direct: +32 (0)2 508 37 63