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EBF POSITION ON THE PROPOSAL TO REVIEW THE EUROPEAN SYSTEM OF FINANCIAL SUPERVISION [1]

Introduction and Overview

The EBF fully supports the intended objective of promoting finance and reinforcing financial integration, with the ultimate aim of creating a true Financial Union, comprising both a Banking Union and a Capital Markets Union. We broadly support the Commission's objective of supervisory convergence, as it will facilitate further integration of the EU capital markets, remove cross-border barriers and support the wider Capital Markets Union agenda. We believe this process must focus on carefully chosen reforms that offer the best chances of success and strike the appropriate balance between the central and local elements of supervision. With that principle in mind, whilst we support the broad thrust of the proposal, we have concerns about the differing levels of supervisory convergence across the three ESAs, changes in the prospectus procedure, changes to the way delegation arrangements work, the power to remove or temporarily suspend certain obligations under particular and exceptional circumstances and the changes to the funding arrangements. In addition, we reiterate our support for a no-action letter type of regime to be introduced in Europe.

Underlying our approach is our belief that we must build on the current system. The current regime provides a good basis for a well-functioning internal market for capital and financial services. While it is true that the ESAs will face new challenges in the years to come – both in terms of substance and in terms of the institutional framework – we think it is important to recognize that the ESAs have largely fulfilled their duties in a satisfactory way since the coming into place in 2011. Consequently, the current regulatory framework governing the ESAs is a good basis for a continued development of the ESAs' activities. That in turn speaks for an approach of 'consolidating successes' without introducing radical changes at this point of time. By contrast, initiatives to adjust the current setup and enhance the efficiency and coordination of the ESA's are very much needed and will be welcomed by market participants.

In summary, our main concerns/suggestions are as follows:

[1] Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority); Regulation (EU) No 1094/2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority); Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority); Regulation (EU) No 345/2013 on European venture capital funds; Regulation (EU) No 346/2013 on European social entrepreneurship funds; Regulation (EU) No 600/2014 on markets in financial instruments; Regulation (EU) 2015/760 on European long-term investment funds; Regulation (EU) 2016/1011 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds; and Regulation (EU) 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market.

- We believe that the proposal must expressly acknowledge that the supervisory authorities' decisions can have an impact on the wider economy. Therefore they must embed in the over-arching responsibilities of the ESAs, not just the duty to ensure financial stability and investor/user protection, but also other equally important policy goals such as the financing of the economy and maintaining the international competitiveness of the EU's financial sector. Having an appropriately comprehensive definition of the public good will guide the ESAs in their daily work, which often involves choices based on trade-offs.

- We believe that the Commission proposal should better reflect the different degrees of supervisory convergence and of integration reached by the sectors in the remit of the ESAs. Notably, the successful deployment of the SSM in the banking sector makes redundant the conferral of additional supervisory tasks to EBA. Rather than changing radically the set-up of the supervisory framework for all ESAs, the Commission should create the right incentives to foster convergence in the sectorial frameworks where progress is still needed.

- Furthermore, we question the transfer of the approval of certain types of prospectus from National Competent Authorities to ESMA, eliminating the benefits of specialised prospectus expertise depending on the different types of financial instruments, which is one of the main considerations for companies hoping to access capital markets.

- We do not support the proposed amendments to the way delegation arrangements are currently authorised in the EU.[2] The existing framework functions well and there is little market-based justification for the provisions contained within the proposal. We are concerned that the proposals regarding delegation could develop into a more general restriction on delegation arrangements to third countries.

- With regard to the governance of the ESAs, the shift of significant powers and responsibilities from the Board of Supervisors to the Executive Board is a matter of concern because it questions the well-established principle of separation of powers between the supervisory body and the executive body of the ESAs. The split of competence between the two bodies is a major concern which is not tackled in the EC proposal. The role and competences of each body should be more detailed in the level 1 text.

- Although not included in the proposal, the ESAs should be empowered to remove or temporarily suspend certain obligations under particular and exceptional circumstances. This kind of mechanism would have a similar effect to the "no-action" powers enjoyed by other supervisors outside the EU, such as in the US.

- The changes to the funding mechanism also raise concerns. We believe that the ESAs funding arrangement should continue to be based mostly on public contributions, taking into consideration that the regulation of financial institutions, investment firms and other economic actors contributes to the promotion of public interest. While working on regulatory technical standards or implementing technical

[2] This point is not supported by the French Banking Federation.

standards the ESAs are, in fact, performing tasks that should be performed by the European Commission.

EBF position

1. Supervisory convergence

Supervisory convergence will be central in delivering a level playing field for truly integrated financial markets.

Regarding the objective of enhancing the role of the European Banking Authority in promoting supervisory convergence, we highlight that as the geographical scope of Single Supervisory Mechanism extends with additional Member States joining the Banking Union, the importance of the ECB will increase. The EBA is monitored by the European institutions (European Commission, European Parliament and European Council), while the ECB is by definition independent, the interaction between the ECB and the EBA regarding the promotion of supervisory convergence should be more clearly defined.

Tackling gold-plating is of crucial importance. Activities should be regulated and supervised consistently across all Member States. We advocate promoting the homogeneous application of European laws at Member States' level, avoiding national approaches that hamper the level playing field across the European Union. Moreover, where EU laws give pace to national regimes, a jeopardised EU legal framework should be avoided by conceiving Europe as one jurisdiction, hence developing common civil, fiscal and company consolidated laws.

Supervisory convergence should respect the diversity in business models of banks across the EU as well as of local market traditions. Given that a number of NCAs have experience with only a limited number of business models, the ESAs should be careful that convergence of supervisory practices caters for and is appropriate for all existing business models. The ESAs should also be supportive of stakeholders' concerns about ESAs exceeding their competences. Attention should be paid to the proportionality principle to be always embedded in any ESAs' outcome.

Finally, imposing strict entry into application date into Level 1 implies unnecessary rigidity. This restricts the time for the ESAs to work on the implementing measures and leaves in some cases insufficient time for stakeholders to adapt and be compliant. We would suggest agreeing in the Level 1 text that the entry into application will start a certain prescribed number of months after the adoption of Level 2 and/or Level 3 measures.

2. Constitutional framework

The Regulations establishing the ESAs use Art. 114 Treaty on the Functioning of the European Union (TFEU) as the legal basis. Art. 114 TFEU aims to harmonise laws in order to further the internal market. Art. 114 TFEU is not geared to change the EU's institutional and regulatory design although it appears to be used in this sense with the current proposal. Notably, Art. 114 TFEU cannot be the basis to establish quasi-supervisors and

confer enforcement powers on EU agencies as the Treaties can only confer these powers on the EU Institutions (Meroni case law);

An overall assessment of the proposal leads to the conclusion that the purpose of this proposal is not to further the development of a single rule book but more cooperation, coordination and sharing of information, in addition to conferring more powers on the ESAs. This is not in line with the original objectives of the ESAs which – in line with Art. 114 TFEU – is further harmonisation of law and regulations.

The proposal to give EBA the power to request information directly from financial institutions, if the relevant NCA cannot make the information available within a certain time limit, it is particularly worrying:

a) Banks have the obligation to provide information to NCAs and the ECB. The proposal is superfluous and will lead to additional administrative burdens for market participants when all relevant information is already available with the relevant authorities. EBA should be able to rely on information that is already available;
b) Any request should always be adequately reasoned. An information request that simply refers to the proposed Art. 35b as the basis for the request is not adequately reasoned. EBA should always explain why it uses its competence to request information e.g. on the basis of what material requirement of relevant banking regulation;
c) It should be clarified in the proposal that information can only be requested for ad hoc purposes if e.g. there is a specific concern related to a specific institution. The proposed EBA power to request information cannot be the basis for imposing new reporting requirements. Although this seems evident, we have noticed that the ECB does base new reporting requirements on general powers e.g. Regulation 2017/1538 of the ECB on reporting of supervisory financial information imposes reporting requirements in addition to the requirements set in the CRR, while taking as legal basis the generic power of the ECB to request information (art. 10 Regulation 1024/2013). We would like to avoid a similar development taking place at the ESAs.

Given the legal basis for establishing the ESAs, we do not believe that it is legal for the ESAs to impose fines or take measures based on Art. 114 TFEU. Such far-reaching powers should be reserved for EU institutions that have been granted these powers in the TFEU e.g. the ECB or the Council. In our view, giving the ESAs the power to impose sanctions conflicts with the Treaty and would require the ESAs to be turned into genuine EU institutions, with all relevant institutional requirements applying to them. We note that the power of the ECB to impose sanctions is explicitly conferred on the ECB in Art. 132 TFEU and that no similar article is available in the Treaty for any agency of the EU. We conclude that the power to impose sanctions can only be conferred in specific cases and only when stipulated in the Treaty.

3. Defining the 'public good' to include the financing of the economy and international competitiveness of the EU economy and financial sector

We believe that the proposal must expressly acknowledge that the supervisory authorities' decisions can have an impact on the wider economy. It should therefore be embedded in the over-arching responsibilities of the ESAs, not just the duty to ensure financial stability and investor/user protection, but also other equally important policy goals such as the financing of the economy and maintaining the international competitiveness of the EU's financial sector and economy. Having an appropriately comprehensive definition of the public good will guide the ESAs in their daily work, which often involves choices based on trade-offs.

4. Unclear demarcation between regulatory and supervisory responsibilities.

As reiterated previously, we see no proven deficiency in the European supervisory framework that would justify the far-reaching approach adopted by the Commission in some areas. In our view, unjustified major changes would make the existing framework more complex without any obvious benefits in terms of integration or of efficiency. Granting direct and indirect supervisory competences to EBA will blur the lines between the supervisory function and the role of the rule-maker which should be kept distinct to ensure the coherence and the clarity of the European institutional framework. At present these roles are clearly defined within the EU banking regulatory governance. As a standard setter, the EBA looks after the consistency and the substance of the EU's Single Rulebook, while the national supervisors ensure the adequate and timely application of the technical standards and best practices developed by the standard setter. Since the establishment of EBA and the entry into force of the SSM, the division of EBA's regulatory powers and the ECB's supervisory powers have become increasingly blurred. The EBA is increasingly assuming operational supervisory tasks e.g. stress testing and the ECB is increasingly taking up regulatory powers e.g. by designing the ECB regulations in addition to EBA RTS or Guidelines (the latest example is the ECB guidance on NPLs which is subject to debate). The unclear demarcation between EBA and the ECB's powers leads to daily inefficiencies, uncertainties regarding remedies, and related costs both directly and indirectly. Most importantly, these inefficiencies hamper the establishment of a true banking union.

The proposal does not sufficiently take into account the substantial progress made in harmonization since the creation of the SSM, which is successfully deploying a true European and independent supervision. In this context, it would be redundant to grant to EBA sanctioning powers and the power to override decisions taken by Competent Authorities (including the ECB for Significant Institutions) on outsourcing / delegation of material activities to third countries. It would be also misleading to grant to EBA the capacity to set EU-wide supervisory priorities against which Competent Authorities would be assessed. More broadly, no new institutional layer should overlap with the recent reforms establishing the Banking Union (the SSM and the SRM) or with forthcoming ones (e.g. the European Deposit Insurance System): the banking industry now needs a stable and clear institutional set-up.

A clear demarcation between the different regulatory and supervisory tasks is very important as the same persons employed by the national authorities participate in decision-making in the ESAs and within the ECB. The ESAs set-up thus has an inherent risk that the same persons both have legislative powers by setting rules and at the same

time quasi-judicial powers by supervising compliance with the same rules and regulations. This is contrary to the principle of division of powers and not in line with the principle that there should be appropriate checks and balances to achieve a well-functioning banking union, including appropriate effective legal protection for the supervised entities. In the absence of a proper institutional framework and the appropriate checks and balances, the current proposal does not contribute to legal and economic certainty.

5. Guidelines and recommendations

Whilst we welcome the Commission's proposal to require the ESAs to conduct public consultations, we believe this should also apply to Q&As. Q&As are important Level 3 instruments that provide clarifications and/or interpretations on implementation matters. However, they do not have a legal status in the ESAs Regulation, and this gap needs to be tackled. The Q&A process should therefore be made more transparent such that the industry can have sight of the questions that are under consideration by the ESAs and allow for a short consultation process ahead of publication (e.g. of one/two weeks). Also, impactful Q&As should be accompanied by reasonable implementation timelines to allow for sufficient time for the industry to comply with these new guidelines.

We support the proposal to oblige the ESAs to conduct cost-benefit analysis of guidelines and recommendations. In addition, we also agree that ESAs must act in accordance with their mandates, not exceeding their competences when issuing guidelines or recommendations and that ESAs Stakeholder Groups should inform the Commission if the ESAs breach their Level 3 mandates.

Furthermore, we recommend the extraterritorial effect of this recommendations and guidelines to be specifically assessed as well. Level 3 developments and Guidelines should always provide opportunity to give input regarding their content and potential impact. We agree that during the development of Guidelines and Q&A the coherence with the Level 1 mandate should be ensured. We consider that the potential extraterritorial effects should be carefully evaluated in each case too.

Stakeholder Groups should be able to issue opinions to the Commission. We are supportive of stakeholders being able to express concerns about ESAs exceeding their competences. However, the threshold for the Group to be able to issue an opinion, a two-third majority, seems overly high. A simple majority would be sufficient.

Additionally, due to the fact that each country can opt to apply Level 3 Regulation, it is necessary to ensure that Level 3 is not used to introduce any new rules. It should only be used to clarify the provisions in Level 1 and Level 2 regulations to ensure the application of the same regulation across different jurisdictions with no national discretions.

Moreover, the drafting of Level 3 measures while Level 2 has not been adopted is difficult to understand from a legislative perspective and should not be understood as a tool to clarify and provide a homogeneous interpretation of the (future) legislation. Whilst Level 2 is still to be adopted, the unique tool to promote clarity and certainty should be such Level 2 legislation

6. The proposed prospectus review by ESMA will weaken the attractiveness of European capital markets

The Commission proposes to transfer the approval of certain prospectus from national competent authorities (NCAs) to ESMA, namely those regarding (I) admissions to qualified investor-only regulated markets to such specific segments thereof, (II) asset-backed securities, (III) "specialist issuers" (property, mineral, scientific research-based and shipping-companies and (IV) non-EU third country issuers.

In the Explanatory Memorandum and the Impact Assessment accompanying the proposal, the Commission notes that ESMA's existing convergence work has been unable to promote supervisory convergence and the landscape of prospectus approval requirements remains fairly fragmented across the EU. Furthermore, the Commission states that there is also risk of a supervisory arbitrage as issuers might target NCAs which they consider less demanding in order to get approval of prospectus. Another argument, from the Commission, is that many NCAs would have to hire prospectus readers with skills to deal with these relatively rare prospectuses. Finally, it is stated in the Impact Assessment accompanying the proposal that prospectuses falling in the above three categories are normally used to raise capital in several Member States, not only locally (page 177). The impact assessment does not include anything about the impact on SMEs.

Many national regulators have been able to build up experienced and competent teams with great experience in approving prospectuses. Those teams have knowledge of their local market and the associated legislation including company law. The local knowledge of company law is quite important as this is a non-harmonised field in the EU. Handing the scrutiny and approval of prospectuses to ESMA does not seem to respect either the principle of proportionality or of subsidiarity. Furthermore, given the specialised nature of the securities in scope of Article 31a, issuers tend to look for jurisdictions and regulators that have the appropriate framework and expertise. Accessing capital markets occurs through different financial instruments, and involves expertise across instruments, sectors and regions. A fully integrated EU primary market will nonetheless always draw its strength from the specialised expertise accumulated in its various financial centres. Neither do we think these centres are static; over time, we expect specialisation to continue and lead to the emergence of different centres. The current proposal of handing the scrutiny and approval of prospectuses to ESMA will therefore have the effect of not integrating but debilitating the primary markets of the EU; issuers, unable to rely on the expertise of different EU centres, could consider turning to third country financial centres entailing a significant loss for European capital markets and for the EU economy.

7. Removal or temporary suspension of certain obligations under particular and exceptional circumstances

Although the Commission is not proposing anything to this effect, the ESAs should be empowered to remove or temporarily suspend certain obligations under particular and exceptional circumstances. This kind of mechanism would have a similar effect to the "no-action" powers enjoyed by other supervisors outside the EU, such as in the US. 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.

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 the ability to amend the situation other than going through the procedure of modification of the RTS.

With the aim of avoiding the negative impact that these 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, intragroup 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 the ESAs, the European Commission or both jointly.

8. Funding arrangements

The Commission's proposal mentions as a legal basis of all amendments Article 114 of the Treaty on the Functioning of the European Union ("TFEU"). Article 114 of the TFEU prescribes Unions' powers in relation to approximation of laws for the purpose of the development of internal market (Article 26 of the TFEU and following). In accordance with Article 26 of the TFEU, all powers delegated to the Union for the purpose of the development of internal market need to be exercised "in accordance with the relevant provisions of the Treaties", in other words they cannot go beyond the powers delegated to the Union by Members States in the founding Treaties.

Article 2 of the TFEU prescribes categories and areas of Union competence. Articles 3 and 4 lay out the division between the exclusive competences of the Union and those shared between Union and Member States. Neither Article 3 nor Article 4 mention taxation powers as the exclusive or shared competence of the Union. This means that taxation rests exclusively within the realm of Member States.

The amendments to Article 62 provide for a new source of revenue for ESAs, namely annual contributions from financial institutions. These annual contributions imposed directly by ESAs (Union bodies) on the industry, would be tantamount to direct taxation imposed by Union on economic operators. Considering that the Union is not empowered in the sphere of taxation it is our view that the amendments to Article 62 which require

for annual contributions to ESAs budget from financial institutions would not be compatible with the Founding Treaties.

It is EBF's view that any amendment of ESAs regulation requiring economic operators to contribute to the budget of ESA would require changes of the founding Treaties.

If, however, despite the above analysis amendments to Article 62 are maintained we consider that these new arrangements must avoid duplication of charges. Financial entities already contribute to ESA budgets via their national contributions. Where activities move from the national authorities to the ESAs, their related budgets should move to the ESAs as well, and this should not lead to an overall increase of charges to the industry.

More clarity at level 1 is needed to ensure predictability. If the co-legislators nevertheless choose to move forward along the lines of the Commission proposal (according to which maximum 40 percent of the ESAs' budget should come from the EU budget and the remaining part via direct contributions from the sector) there must, as an absolute minimum, be more clarity in the Level 1 text as to how much each financial institution should contribute. We do not think it appropriate for the institutions to decide the methodology for collecting each institution's contribution via a Level 2 Commission delegated act.

Clear checks and balances must also be introduced. It creates unpredictability that the ESA's themselves (the Executive Boards) decide on their own budget, including the size of the budget, together with the fact that the EU budget funding is formulated as maximum 40 percent ("shall not exceed 40 pct.") which gives no guarantees on the actual size of EU funding.

The experience of the SSM and of the SRM shows that centralizing supervision leads to a cumulated increase of costs, both at the central level and at the national level. In the case of the SSM, new staff was recruited by the ECB and by National Competent Authorities in order to perform additional tasks delegated by the ECB. Based on this experience, we anticipate a similar trend driven by the new prerogatives of EBA and by the new funding system proposed by the Commission. The Commission indeed proposes to replace the share of the funding provided by National Competent Authorities by contributions levied straight from the financial sector for at least 60% of the total budget: this mechanism introduces a further layer of cost for banks, which will have to pay multiple times for their supervision.

Conversely, the diversity of the banking sector in terms of banks' business models and size contributes to financial stability, and it should not be put at risk by the uncontrolled inflation of supervisory costs. If funding of the ESAs is to be borne in part by the financial sector, it is imperative that the budget of the ESAs is capped so it cannot be endlessly increased. Under the SSM, the budget of the ECB has increased from 296 mln (2015), 404 mln (2016) to 425 mln in 2017 while the supervisory fees paid at a national level have not decreased. The reason for the significant increase in fees is not very clear as both the ECB and the national authorities do not provide much transparency on how the fees are spent and the European Court of Auditors (ECA) is kept at bay when auditing these authorities. In addition to a cap, we find it reasonable that the financial sector that is to pay for the ESAs is provided with a role in setting the budget of the ESAs as well as the inclusion of a

requirement, that ensures that the costs at the European level can only increase if the costs at national level decrease accordingly.

9. The proposed changes for delegation arrangements with third countries detrimentally impact depositary banks [3]

In our view, the new powers of EBA and ESMA on outsourcing/delegation of material activities to third countries' entities constitute a disproportionate requirement creating uncertainty and additional costs for EU and non-EU financial cross-border groups.

Outsourcing and delegation is well established and common place in financial services and is an integral part of firms providing services to customers. This is particularly relevant for the activity of depositary banks, which usually delegate to third-parties' certain tasks relating to the safekeeping of investment funds' assets. The conditions for delegation of safekeeping duties are covered extensively by the UCITS V and the AIFM Directives, and by Level 2 regulation.

A second layer of verification by ESMA would create undue costs, regulatory complexity and legal uncertainty that would harm the competitiveness of the EU banking industry. This is all the more problematic that there is no objective reason to assume that National Competent Authorities' decisions to authorize delegation to third countries' entities do not comply with EU rules, especially considering the current ESMA consultation system for delegation/outsourcing arrangements. In order to operate efficiently along their business model and their organization, banks indeed need prompt and straight decisions from National Competent Authorities that should not be potentially challenged by a third authority. Significant constraint on investment managers impacting the customer – the importance of proximity to local markets and access to local expertise, in relation to investment/portfolio management, should not be understated. Their potential restriction, as a consequence of restricting delegation to third countries, could present a significant constraint on investment managers and have a detrimental impact on investor returns, both professional investors retail investors, including pensions.

Greater uncertainty and market disruption – in the existing and post-Brexit environment asset management firms' contingency plans, which aim to ensure continuity of service to clients, are likely to seek to build upon existing delegation arrangements (e.g. to the US). Imposing further regulatory constraints on such arrangements could result in greater uncertainty and market disruption in this regard.

There are a number of important existing tools to ensure supervisory convergence for the purposes of delegation and outsourcing; not all of these tools have been tested yet. For example, in 2017 ESMA set up a new Supervisory Coordination Network.

10. The proposed governance dramatically jeopardizes the powers of the Board of Supervisors

[3] The French Banking Federation does not support this point.

The proposed amendments to the governance of the ESAs are also a matter of concern. Transferring key decision making powers (e.g. breaches of Union law, settlement of disagreements between National Competent Authorities, outsourcing / delegation to third countries) from the Board of Supervisors to the Executive Board questions the principle of separation of powers between the executive body and the supervisory body of ESA. This principle, which is universally applied to banking and non-banking undertakings, is a fundamental element of sound governance.

It is important that all interests must be considered in the decision-making process in the ESAs and that a sensible balance between euro zone countries and non-euro zone countries is maintained within the EBA. Stronger checks and balances should be introduced, and a clearer governance system is required. For example, the BoS could be given a role to suggest candidates/short list for members of the executive board (instead of the Commission). We believe that the Board of Supervisors is the adequate decision-making body, since the presence of national authorities ensures that both the EU view and national specificities are taken into consideration. It is worth noting that the governance structure of the SSM has been successfully established along this same pattern.

The split of competence between the two bodies is a major concern which is not tackled in the EC proposal. The role and competences of each body should be more detailed in the Level 1 text.

11. Role of the ESAs with regard to third countries

The ESAs could play a stronger role in the equivalence assessment process by:

a. Assisting the Commission in streamlining the equivalence assessment process where possible;
b. Assisting the Commission in analysing deviation from rules on business or risk taking;
c. Monitoring regulatory, supervisory and market developments in third countries, conducting periodic reviews of equivalence decisions and regularly reporting any potential changes to regulatory equivalence to the Commission; and
d. Being more actively involved in international fora.

Spending more resources on establishing strong dialogues and continuous engagement with third country regulators should be prioritised. This could be strengthened by establishing Memoranda of Understanding that could formalise basic bilateral relations such as exchanges of information.

12. Financial technology and innovation as a key driver

The EBF supports the way forward proposed in the Regulation regarding Financial Technology (FinTech). The Digital Single Market is an opportunity for all operators willing to embrace the digital transformation: authorities, FinTech (banks, non-banking FinTech/FinTech start-ups) corporates and consumers. In the EBF's views, the same regulatory conditions and supervision should apply to all actors (large digital players, financial institutions and start-ups) who seek to innovate and compete in the FinTech

system. Any regulatory framework must keep barriers to entry to a minimum, and should also not hinder incumbents' ability to innovate and develop. The principle of "**same services/activities, same risks, same rules and same supervision**" should always be applied in order to ensure consumer protection and market integrity. Regulation should also be neutral regarding technological developments and business models. For competition and a Digital Single Market for financial services to succeed, improvements are needed in current legislation, and regulatory requirements must be proportionate to ensure the current framework does not hamper innovation and competitiveness. Market incumbents must preserve a level playing field allowing some degree of connectivity to newcomers, however it is important to ensure that all market participants contribute to the appropriate level of investment in infrastructure.

The banking sector will likely see increasing cooperation and partnership among banks and new FinTech start-ups providing innovative products and services to the market. Indeed, the arrival of FinTech start-ups and the establishment of digital platforms has spurred innovation, accelerated the transformation of banks and opened a door to new win-win collaborations. While there are still good reasons for banks to rely on internal IT departments, there is considerable potential to create value — for themselves and the economy at large — by nurturing an ecosystem of start-ups and technology innovators that can assist banks in developing shared platforms thereby increasing resilience and cost effectiveness of banking and payment systems. Banks have a lot to offer to FinTech start-ups, in particular, specific financial expertise (risk assessment, evaluation and management), scalability owing to their large customer base, as well as many years of experience in providing clients with operational security in a highly regulated sector, not to speak of financing needs. The respective strengths of both banks and FinTech start-ups mean that both will often do better by cooperating rather than by competing.

Regarding cybersecurity, the EBF supports the approach proposed in the Regulation. Cybersecurity threats remain one of the most important challenges for banks and the EU has an important role to play, notably when it comes to streamlining harmonised format and procedures for cyber incident reporting, establishing a legal framework for data (intelligence) sharing and encouraging collaboration between the industry and regulators and among regulators.

In addition, we believe that further joint action is needed by public authorities and relevant private stakeholders to help consumers make the best use of digital financial services, expanding awareness and empowering individuals with financial and digital skills. Policies to improve financial/digital literacy and help customers better understand the benefits and risks that they assume when using these new services should be targeted at individuals as well as any company that offers these types of services. Special emphasis should be attributed to financial/digital literacy in connection to overall cybersecurity resilience and ongoing digital fraud, with which all levels of society are confronted on a daily basis.

Finally, the EBF also supports the approach to coordinate national technological innovation hubs. It is important to avoid regulatory arbitrage between different Sandbox-regimes in Member States and to maintain a level-playing field within the European Union.

In this regard, we fully support the creation of an Innovation committee in which the ESAs participate and interact with national authorities for data protection, and national authorities for sandboxes and innovation hubs.

13. Other areas of direct ESMA supervision

In our view, ESMA should be granted the powers to directly supervise data reporting services providers (i.e. approved reporting mechanisms, approved publication arrangements and consolidated tape providers) established by MiFID II, since direct supervision by ESMA will lead to a reduction of trade data errors, duplications and differences.

With regard to critical benchmarks, the direct supervision at EU level of benchmarks that service the whole EU, rather than specific national markets, may also prove useful. However, benchmark contributors should remain within their respective NCA's remits.

Nonetheless, it is important to ensure that fees paid by entities subject to direct supervision by ESMA (one-off costs for registration and recurrent costs for ongoing supervision) are kept at reasonable levels. For example, Credit Rating Agencies' Fees and Trade Repositories' Fees represented €9.3m and €2.4m, respectively, of ESMA's Budgeted Revenues for 2017, 28% of ESMA's total revenues (ESMA63-43-485). These numbers clearly show that there is a risk that direct supervision may translate into additional overall supervisory costs for the industry, if ESAs conflicts of interest are not properly managed and if new direct supervisory costs are not offset by cost savings at a national level.

ESMA direct supervision of funds

We disagree with the EC proposal that ESMA is entrusted with the functions of authorisation/registration and supervision of EuVECA, EuSEF and ELTIF funds and their managers. In fund supervision, the proximity of the regulator to the local market and knowledge of market practices is key. It is unclear whether ESMA would have the needed depth and breadth of knowledge, as supervision requires knowledge of many issues covered by national regulation for such fund structures. Dealing with a remotely located, centralised supervisor rather than a local NCA, would add cost, latency and complexity to the process. This proposal could hamper the competitiveness of the fund industry and create a barrier to entry by creating a more complex and expensive process.

ESMA temporary intervention powers

Temporarily banning the ability of fund managers to sell their products would lead to a publicly imposed 'gate' on new subscriptions. This could impact the ability of fund managers to manage the liquidity of their funds, the pricing of the product and have negative implications for existing investors in the fund. Fund managers have tools, such as gates, to manage fund liquidity when circumstances require. We think that regulators should focus on improving the effectiveness and consistent use of those tools, rather than overriding them with a new intervention power that will likely be counter-productive.

14. Accountability

Article 287 TFEU states that the European Court of Auditors shall examine the accounts of all revenue and expenditure of all bodies, offices or agencies set up by the Union. We have taken note of the current debate between the ECB and the ECA on the scope of the ECA's

mandate with regard to the audit of operational efficiency of the management of the ECB and the ECB's refusal to hand over documentation requested by the ECA. We suggest including in the proposal clear rules on the accountability of the ESAs as there does not seem to be a shared understanding of the applicable accountability regime.