efama
European Fund and Asset Management Association

EC CONSULTATION ON OPERATIONS OF THE EUROPEAN SUPERVISORY AUTHORITIES

EFAMA Response

16th May 2017

I. TASKS AND POWERS OF THE ESAs

A. OPTIMISING EXISTING TASKS AND POWERS

1. SUPERVISORY CONVERGENCE

Questions

1. In general, how do you assess the work carried out by the ESAs so far in promoting a common supervisory culture and fostering supervisory convergence, and how could any weaknesses be addressed? Please elaborate on your response and provide examples.

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

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

   To what extent:

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

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

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Please elaborate on questions (a) and (b) and, importantly, explain how any weaknesses could be addressed.

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

4. How do you assess the involvement of the ESAs in cross-border cases? To what extent are the current tools sufficient to deal with these cases? Please elaborate on your response and provide examples.

EFAMA RESPONSE

1. Supervisory convergence is a core element of the Single Market and integral to removing barriers to cross-border provision of financial services. It is not enough to have a common rule book, but also the reading of those rules by supervisors and supervisory practices should converge to ensure the Single Market is not hampered by diverging interpretations and gold-plating of EU rules. Whilst we believe that the European Supervisory Authorities 'ESAs' have been successful in carrying out their regulatory functions, we are of the view that the strong focus on legislative work has overshadowed their supervisory functions.

The past ten years have seen a constant flow of new legislative proposals in financial regulation. At this juncture, we believe it would be timely for policymakers and regulators to take a step back from new initiatives and focus resources on the consistent implementation of existing legislation across Member States.

EFAMA is also of the view that more coordination is necessary between the three Supervisory Authorities to ensure a level playing field for financial products and services. Unless there is close cooperation between the ESAs, there is a high risk of differing regulatory priorities and an unlevel regulatory playing field to the detriment of end retail consumers. The implementation of PRIIPs and of MiFID II/IDD rules at the beginning of January 2018 is one example where such coordination will be necessary.

Further coordination between the ESAs and National Competent Authorities 'NCAs' is also needed to ensure consistent implementation and interpretation of EU legislation.

2. EFAMA would question whether the ESAs are effectively using the instruments at their disposal:

- In our view, peer reviews, as currently conducted, do not achieve Article 30's stated purpose of the authority conducting "peer reviews of some or all activities of competent authorities, to further strengthen consistency in supervisory outcomes". As currently conducted, peer reviews focus on the activities of given NCAs without the supervisory convergence element. A peer review would be more efficient if used to exchange about best practices on a defined and limited topic, in a more horizontal fashion. There could

be a role for the ESAs in developing thematic peer reviews carried out in a more constructive spirit alongside the exhaustive review of a given NCA.

- While binding mediation is a powerful tool, it is very rarely used. We believe more attention should be given to stakeholders' remarks and a simple and swift handling procedure be put in place within ESAs to address these. Such a procedure would point out areas of concern that NCAs have not raised but which are of interest for stakeholders. These remarks should be able to activate the mediation process.

- Finally, we see merit in empowering ESAs with the chairmanship of Colleges of supervisors to ensure a preservation of EU interests in all circumstances.

3. Before envisaging giving the ESAs additional tasks or powers, we believe the priority should be for the ESAs to make the most of the considerable powers they already have.

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.

EFAMA RESPONSE

The implementation of ESAs guidelines through efficient peer reviews and their consistent application across 28 Member States is a crucial element in ensuring a successful Capital Markets Union through supervision. Standards, guidelines and recommendations issued by ESMA should contribute to the promotion of a common supervisory culture and convergence in supervisory practices.

EFAMA is of the view that guidelines and recommendations, as envisaged by the EU legislator when the ESAs were created, should give guidance on the interpretation of existing financial regulation at EU level with a view to ensuring "common, uniform and consistent application of Union Law", while at the same time preserving principles of proportionality and without prejudice to the local supervisor's responsibility to protect the end consumer.

However, despite their stated purpose, guidelines and recommendations have effectively become new regulatory tools which have had a significant impact on national laws as well as operating conditions of the markets and their participants. The 'comply or explain' mechanism means that in practice guidelines are quasi-legislative tools. Some regulators have systemically implemented guidelines as soon as they are published in their language, hence making them de facto binding. These NCAs do not introduce any flexibility, even where justified.

In addition, whereas guidelines and recommendations are non-binding and provide for best practice, there have been examples of the ESAs exceeding their mandates and sometimes going against the spirit of the EU legislator. Guidelines and recommendations should not seek to issue additional layers of quasi-regulation without clear mandate, impact assessment or legal basis on

matters which were not previously regulated at EU level, nor should they introduce new legislative provisions which were not foreseen by European legislators. For example:

- ESMA guidelines on ETFs and other UCITS issues (initially published in December 2012 and now ESMA/2014/937 of August 1st 2014) amount to gold-plating the UCITS Directive on the ban on re-use of collateral and transparency of benchmarks.
- The Opinion issued by ESMA under article 29 on UCITS share classes (ESMA 34/43/296 of January 30th 2017) heavily restricts the variety of share classes that can be created in a UCITS, limiting them to foreign currency overlays only. Whilst the UCITS Directive left the matter open, ESMA introduces limitations which were not foreseen in the original level 1 text, thus creating law without competence to do so.
- EBA's definition of shadow banks in its shadow bank guidelines (guidelines on limits on exposures to shadow banking entities which carry out banking activities outside a regulated framework under Article 395 para. 2 Regulation (EU) No. 575/2013) is, in our view, a political decision which goes beyond the remit of guidelines as set out by Article 16 of the EBA Regulation. EBA is not empowered by CRR to define shadow banking entities. While we acknowledge a serious flaw in the CRR text which required EBA to draft guidelines without determining which entities might be subject to those guidelines, we would argue that this does not give EBA the legal power to set the rules that should have been set by democratically elected representatives.
- Finally, we were also concerned with the legal basis of EBA's guidelines on the treatment of credit value adjustment risk under the supervisory review and evaluation process (SREP) and the conformity of the guidelines with the ESAs' Regulations and with the legislative framework of CRR/CRD IV. EBA's guidelines are likely to impose capital requirements for credit value adjustment risk under the Pillar 2 process (ICAAP and SREP), where there is no Pillar 1 capital requirement by reason of CRR Article 382 (4). The guidelines allow Pillar 2 to eviscerate the exemptions granted by the CRR. This is objectionable on the basis that the explicit will of the co-legislators as expressed in CRR Article 382 (4) would be thwarted by supervisory action to comply with these guidelines.

We believe that a mere clarification of the ESAs' powers within the existing framework is not sufficient to deal with the shortcomings identified above. The regulatory experience so far demonstrates that there is a clear need for a formal control and review mechanism in relation to the supervisory guidelines. Such mechanism could be facilitated by either of the following:

- Introduction of a 'right of action' against supervisory guidelines issued under Article 16 of the ESAs Regulations: the entitlement to such right of action could be entrusted to national authorities and possibly also to individual market participants in case the latter were directly affected by the relevant guidelines. The claim should be founded upon breach of EU law or disregard of the ESAs' competences in relation to the guideline-setting.

- Introduction of a 'complaint procedure' against supervisory guidelines to be initiated by the European Commission**:** given its constitutional role as guardian of the Treaties, the European Commission could also be empowered to submit complaints or otherwise take action against supervisory guidelines issued by ESAs in case of potential incompatibilities

with EU law. Market participants should be able to contact the Commission in order to report on irregularities in the ESAs' work.

More generally, we urge for a better application of the proportionality principle. We do not agree with the ESAs' view that proportionality should be overlooked on the basis that it is not under their remit. It should be confirmed that the ESAs have the power in all circumstances to apply proportionality, except when level 1 text excludes it. This is necessary in overcoming obvious unintended consequences in the application of some texts. The burden resulting from AIFMD reporting and the application of the Budapest protocol in the framework of IORP II are two such examples.

One other area for improvement is in the governance of Q&As:

- Clarification of the precise status of Q&As would be beneficial, as would certain issues around their operation, such as whether there is any specific right of appeal that would be available to market participants or national regulators who disagreed with a response published by one of the ESAs[1]. More and earlier industry engagement in the Q&A process should be allowed for;
- Too extensive use of Q&A by the ESAs: measures likely to have structural or operational impact should be taken via guidelines rather than Q&As;
- There is no public consultation before the ESA issues Q&As, so ex ante debate is not possible. The Review of the ESAs could be an opportunity to introduce public consultations not only on guidelines but also Q&As when needed, for example when stakeholders ask for it;
- Q&As should include grandfathering provisions where appropriate;
- There is a permanent flow of new Q&As and in practice it is difficult for market participants to follow them on an ongoing basis;
- No cost analysis or impact assessment is carried out on Q&As;
- EFAMA believes there is a need for increased transparency, particularly in cases when a large series of questions needs to be answered. For example, in the case of the forthcoming MiFID II/MiFIR and PRIIPs Q&As, the list of Questions has not been made available in advance. This is regrettable given these Q&As will be crucial for implementation of these frameworks by market players in a very short time frame. Therefore, we highly welcome EBA's new practice of publishing any incoming questions submitted by market participants via the Q&A tool and would welcome ESMA and EIOPA adopting the same approach.

[1] For example, ESMA's Q&A on the application of AIFMD dated 16 November 2016 (Section VIII: Delegation – Questions 2 & 3) goes beyond the objective of a supervisory convergence tool, as it makes a legal interpretation of the AIFMD Level 1 text and is at odds with how AIFMD has been applied locally in several jurisdictions.

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.

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.

EFAMA RESPONSE

6. Regulatory consistency and level playing field is all the more important in the context of consumer and investor protection. ESMA already has considerable powers in the area of consumer and investor protection, including on product intervention, and we would encourage ESMA to make full use of its powers in this respect.

There have been instances where we have had reservations on the role played by the ESAs in the area of investor protection. The tasks assigned to the ESAs in the area of investor protection under Article 9 of the founding regulations include promotion of supervisory convergence, market surveillance and issuance of warnings or prohibitions. They do not cover the regulatory competences of the ESAs and therefore should not be used for putting in place political demands in relation to investor protection by means of technical advice for Level 2 measures as explicitly foreseen in Articles 10 (RTS) and 14 (ITS) of the founding Regulations. The ESAs do not have any political mandate regarding development of normative rules for investor protection which should be the exclusive remit of EU legislators.

The role and functioning of the Joint Committee of the ESAs, particularly relevant for investor protection given the horizontal nature of its work, is in our view, another example where there have been shortcomings in this area.

For example, in the PRIIPs Regulation, the process was slow and confusing. The level 1 application date being set independently of the date of publication of the Delegated Act (unlike UCITS) created legal uncertainty and a lot of confusion for market participants.

The PRIIPs RTS is a missed opportunity to truly enhance investor protection, disclosure and financial literacy. In our view, some key elements of the KID could be misleading retail investors, in particular:

- The lack of disclosure of past performance, despite consumers' associations' recommendations;
- Performance scenarios methodology: by prolonging almost automatically bull and bear market trends, we believe this methodology could give unrealistic estimation of potential returns and no indication of potential market downturn or recovery;
- Methodology to compute transaction costs (including the "market impact") could result in inflated, false and misleading figures (i.e. negative costs).

Another example of concern can be found in the statement made by ESMA on its supervisory work on potential closet index tracking (ESMA/2016/165 published on February 2nd, 2016). We agree with ESMA, the ESAs and legislators that cost is of utmost importance to the end investor, as it directly impacts return. We welcome the overarching rationale of ESMA's work on costs and fees, to ensure the effectiveness of investor disclosure and the legitimate expectations of investors in respect of the service provided by asset managers, however we would disagree with ESMA passing judgement on the appropriate level of charges for funds.

7. In terms of possible fields of activity, not yet dealt with by ESAs, where their involvement could be beneficial for consumer protection, we would support efforts to further enhance cross-border distribution of investment funds. Despite the increase in funds distributed cross-border over the past decade, marketing and distribution practices remain fragmented within different Member States, resulting in higher costs for market participants. Enabling a wider distribution of funds outside their domicile Member State would mean a larger and more diversified choice of investment opportunities for investors, as well as more efficient allocation of resources across the EU. We believe there is room for further work on legal clarity and consistency on marketing and pre-marketing activities, notification processes and regulatory fees. EFAMA submitted its response to the European Commission consultation on remaining barriers on cross-border distribution of investment funds. In our view, the priorities for addressing these barriers should be on:

- Ensuring legal clarity and transparency on the regulatory requirements for funds distributed cross-border and,
- Effectively dealing with gold-plating where additional layers of national legislation do not address specific investors' needs and rather create additional barriers for non-domestic firms.

The ESAs, and in particular ESMA, have a key role to play in achieving both objectives. The optimal way to enable full use of the Single Market for investment funds would be to find practical solutions for further consolidation without imposing additional regulatory requirements. One example would be via guidelines or Q&As which could be developed and implemented within a much shorter period of time and therefore, bring improvements in a more timely way. We would also recommend facilitating the access to key cross-border information through a specific internet portal hosted by ESMA and fully available in a language customary in the sphere of international finance including tables updated by NCAs presenting national regulatory fees, main national tax regimes, marketing requirements. Ensuring harmonisation of notification procedures (alignments of notification costs and harmonisation of the procedure itself) should also be a priority.

The ESAs could also be more active in the field of financial education. A major change in culture as envisaged by the CMU cannot happen without teaching investors how to understand and take risk in a reasonable way. It is a long-term process and we regret that PRIIPs will be a step backward in helping the general public understand that past performances are not a proxy for future performances but rather give a fair view of the skills of the manager and allow for fruitful comparison. A more positive move would be to open education programmes and investors' guides

on ESAs' website. The question of education is cross-cutting and it might be appropriate to open a large section dedicated to it at the level of the Joint Committee.

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.

EFAMA RESPONSE

We strongly believe that the procedures on breaches of Union law and binding mediation can play a decisive role in ensuring the consistent application of EU law but also in fostering a common supervisory culture among national competent authorities.
We would definitely encourage ESMA to make full use of these procedures, if and when necessary, to prevent Member States from regulatory dumping or gold-plating which are detrimental to the development of the Single Market based on an effective level playing field. We encourage ESMA to make full use of the existing tools/procedures at its disposal before envisaging extending its power of intervention.

We believe however that there is room for certain adjustments to be made with regard to breach of EU law investigations. For example, on the activation of a procedure, the persons/entities authorised to activate the procedure of breach of Union law according to article 17.2 of the ESAs' Regulations is, in our view, limited (i.e. NCAs, EP, Council, EC, ESAs Stakeholder Groups) and a more transparent and open procedure should be introduced allowing for industry stakeholders to raise an issue of suspected breach of law. Remarks, comments or complaints handling procedures should not be limited to level 1 or 2 texts as stated in article 17.1 of the ESAs' Regulations but should also apply to diverging interpretation of texts of a lower degree such as guidelines.

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.

EFAMA RESPONSE

EFAMA would be in favour of strengthening the ESAs' work in relation to monitoring regulatory, supervisory and market developments in third countries. Given access to the EU market by third country firms via equivalence of their legal framework has become more prominent in EU

legislation, we believe monitoring of equivalence decisions should be carried out by the ESAs on an ongoing basis and a report be made to the Commission to ensure that the conditions under which equivalence was granted are still valid. We believe the ESAs have the practical experience and knowledge to carry out such monitoring.

In relation to third countries, a centralisation of relationships at the regional level represented by ESAs is appropriate and the most efficient way to have uniformity in the assessments and hence, the implementation. Third countries' passport under AIFMD is a good example of the benefits of a centralised approach. The suggestion by ESMA to split the cost of assessment of a third country's equivalent legal framework and supervision between all trade repositories established in that third country is another illustration of the benefits of a centralised approach at ESAs' level.

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.

EFAMA RESPONSE

10. Reporting is burdensome for market participants especially due to the various layers of competing reporting frameworks partially covering the same scope but developed independently under specific regulations: AIFMD, MIFID/MIFIR, SFTR, EMIR, SRD etc. The existence of six trade repositories is another obstacle to having an aggregated view, which is necessary both for regulators and participants.

Ultimately, the ESAs are not in a position to use all this data. We would refer to ESMA's Consultation Paper on its technical advice to the Commission on fees for trade repositories under SFTR and on certain amendments to fees under EMIR (December 19, 2016) which states in paragraph 60 that there is no clear view on the number of reported and outstanding trades two years after the implementation of EMIR reporting. Market participants as well argue that there is still no consolidated tape providing a comprehensive view of transactions.

We believe that modern technology will help solve the current problem of financial reporting to authorities. In this sense, it would be important to create a new architecture with one central point of collection. This hub would receive all fields that have to be reported under one or the other regulation. Authorities, ESAs as well as NCAs and other stakeholders, would have appropriate rights to load whatever is in their own scope. Clearly the investment necessary for this central data basis should be made at the level of ESAs to avoid duplication.

11. We agree with the principle that authorities should strive to share information gathered from firms before asking for the same information on multiple occasions from financial market participants.

Except for activities that are directly supervised by ESMA, the local supervising body should be the unique authority entitled to ask for data from market participants. For activities supervised by NCAs, information flows have to come through NCAs. We believe that it should be possible to grant ESAs a power of injunction on NCAs for the transmission of data. In any case, requiring the collection of new data must have a legal basis. If there is a central hub where data of all contributors are collected with access granted to NCAs as well as ESAs, the question is a simple definition of authorisations, both direct and full or restricted and subject to validation.

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.

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.

EFAMA RESPONSE

EFAMA would see considerable merit in further developing the Single Rule book in the area of reporting requirements. Asset managers and investment funds face multiple and often inconsistent reporting requirements. We would be in favour of a streamlining exercise by the ESAs of reporting obligations under different pieces of legislation and believe a standardisation of formats and protocols would increase efficiency for market participants.

Reporting must be fully standardised in terms of content, timing, format, transfer. We would strongly welcome the reinforcement of a consolidated tape with the objective of avoiding:

- Multiple national data reporting to different national regulators, in different formats although on the same data
- Heterogeneous data reporting based on various pieces of EU legislation although on similar data

Such a consolidated tape would not only increase operational efficiency for firms, but would also give supervisors more complete and comparable data sets, allowing them to identify and manage cross-border risks more effectively. In our view, the Commission should in the first place develop a regulatory approach to streamlining of the reporting requirements. In parallel to this ambitious regulatory remit, however, we think that certain targeted improvements can be achieved by a stronger coordination at ESAs level. This would be particularly relevant for the standardisation of

data contents and formats to enable consolidation and processing of the reports at the European level with due consideration of the work on identifying potential data gaps currently conducted by IOSCO.

Such a project should only go ahead if and when there has been made a proper analysis, finding that it would be both realistic and cost efficient to set up such a system and the data being provided is capable of being analysed effectively.

We believe the industry has been effective in creating a tripartite template enabling asset managers and insurers to efficiently communicate data necessary for mandatory reporting under Solvency II. This shows that it takes time to build a useful template that is satisfactory for all participants. This type of initiatives should be acknowledged by authorities and promoted as a common standard but not made mandatory.

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.

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

EFAMA RESPONSE

IFRS 9 is a striking example of the negative impact of the current process of empowerment for accounting standards.

IFRS 9 requires holders of open funds, UCITS or AIFs, to show any variation of valuation in the profit or loss account. It means that, contrary to a regularly reaffirmed principle with funds, there will be a breach of neutrality depending on the way investments are made. If through a fund, there is no choice in accounting method or if held directly, the investor will have a choice to prefer amortised cost for some bonds or profits and losses through Other Comprehensive Income for some equities. This is quite worrying, especially for all long-term investors who do not want to introduce apparent volatility in their result simply because they hold their investment in a fund.

As a result, IFRS 9 will illogically force long-term investors to allocate more to bonds compared to equity and investments funds. When investing in a fund under IFRS 9, the unrealised gains or losses will have to be registered in the yearly income (i.e. profit or loss), irrespective of the investment horizon. Given this discrimination of funds, long-term investors might redeem significant amounts of out of EU funds and more generally reduce their exposure to equity as, unlike bonds, direct exposure to equity does not allow to recycle profit, i.e. to have realised gains or losses added to the profit and loss account.

IFRS 9 will therefore narrow investment options for such actors and make it more difficult for them to fulfil their legal obligation. It also goes against the objectives of the Capital Markets Union, as it will discriminate indirect investment via investment funds compared to direct holding, penalise long-term investors holding equity and reinforce the debt bias in the EU.

This issue had been pointed out at the earliest stage of the process and taken into consideration by EFRAG in its report. However, it was necessary to fully endorse the obligation rather than any modifications being introduced to amend and clarify the norm. The trouble with IFRS 9 is that the rationale for this absence of choice according to the type of investment held through the fund relies on the definition of equity and bonds which is not the subject of IFRS 9 but of IAS 32 which has not been modified.

We further think that the role of EFRAG should be reinforced with an obligation for the Commission to address all the points and reservations raised in EFRAG's report.

Finally, we agree that different application of common accounting standards lead to unlevel playing field and regulatory arbitrage that should be prevented. There is, in our view, a role for ESMA to intervene directly and be empowered to supervise auditing and accounting practices.

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.
Not applicable

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.
Not applicable

3. GENERAL QUESTION ON PRUDENTIAL TASKS AND POWERS IN RELATION TO INSURERS AND BANKS

18. Are there any further areas were you would see merits in complementing the current tasks and powers of the ESAs in the areas of banking or insurance? Please elaborate and provide examples.
Not applicable

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? 20. For each of the areas referred to in response to the previous question, what are the possible advantages and disadvantages? 21. For each of the areas referred to in response to question 19, to what extent would you suggest an extension to all entities or instruments in a sector or only to certain types or categories? Please elaborate on your responses to questions 19 to 21 providing specific examples.
EFAMA RESPONSE We agree with the European Commission that stronger supervision can help overcome market fragmentation and is a natural step towards achieving a successful Capital Markets Union. However, care should be taken that any such transfer in the future be fully justified, both on a cost / benefit analysis and in terms of governance, accounting and subsidiarity. If further tasks are given to ESMA, this extension of responsibilities should be matched with adequate powers and tools to conduct new supervisory tasks. Areas of financial services where EFAMA could see an extension of ESMA's direct supervisory powers: - Current and pending reporting requirements (data, formats, channels) vary under EMIR, MiFID, SFTR and AIFMD. Market transactions are subject to different regulations, each of which have their own reporting. There is therefore a need for a horizontal approach in this area. ESMA could play a useful role in terms of ensuring a coordinated approach for reporting requirements under EU legislation and enable simplification and standardisation of data content and format. - Direct supervision of critical benchmarks by ESMA is another area for expansion of ESMA's powers which we would support.

- For flexibility purposes and as recently shown in the context of the implementation of variation margins under EMIR, there would be merit in considering giving the ESAs the power to adjust the implementation of a rule through mechanisms such as US "no-action letters". Careful consideration should be given to the circumstances in which these would be used. For example, they should not be used simply to deal with the co-legislator setting unachievable deadlines. Rather, this is a question of adequate timing being allowed for due process which needs to be addressed separately.

In terms of the three examples provided in the European Commission's consultation paper:

- Direct supervision of data providers: We believe ESMA should supervise data providers to the largest extent possible. We fully support the idea of a single consolidated tape and the aggregation of data of different trade repositories which would allow for a more comprehensive view of the markets. We believe that ESMA is best placed to organise and run such instruments and agree that CTPs, ARMs and APAs are part of the chain. We are also of the view that commercial market data vendors should also be under the supervision of ESMA as there are a number of questions over their commercial practices (frequent bundling of services), their legal documentation (exemption of liability on their part), their definition of the service provided (temporary access to data without possibility of keeping what has been loaded when contract ends).
- Pan-European investment fund schemes:
    - We believe that the current architecture of European investment funds works well, whereby funds are distributed in the EU through passport mechanism with the home NCA agreeing and supervising and the host NCA receiving a notification and being able to ask for complementary information. While the rules of some funds such as ELTIFs and EuVECAs/EuSEFs are harmonised under EU law, taxation is a matter of national competence.
    - Proximity of local NCAs can be important for better protection of retail investors as financial literacy, market experience, sensitivity to inflation, volatility, capital protection, amongst others, can vary considerably from one country to another.
    - The example of the UCITS Directive is instructive in this regard. While providing for harmonised product rules especially regarding eligible assets and investment limits, the UCITS Directive does not follow the principle of maximum harmonisation and thus still gives considerable leeway to national regulators. Many aspects of the UCITS regime, especially those not subject to more detailed rules at Level 2, have been implemented differently at national level. This is the case for instance for the necessary arrangements for subscription and redemption of fund units, liquidity management tools available to UCITS or requirements for regulatory reporting on the use of derivative instruments. In our view, bundling of supervisory powers over UCITS at EU level is therefore not appropriate.
    - The need for retail products like UCITS to establish documentation in the language of the country in question is another reason why direct supervision by ESMA of pan-European investment fund schemes would be inappropriate. ESMA does not have the capacity to prepare documentation in all EU languages.

- However, we would clearly point out that any flexibility provided by the EU regulatory framework should not lead to introducing additional requirements at national level that do not appear to address specific investors' needs. For instance, rules related to offering documentation, marketing activities and discretion as to the implementation of specific rules. ESMA already contributes to the practical alignment of national approaches by issuing guidelines and opinions. Under the current legal framework, this approach appears to be the best option for achieving an incremental convergence of UCITS standards (and to pave the way for a more integrated supervision of UCITS in the long run).
- As regards AIFs, these vehicles are not subject to harmonised product rules at EU level and therefore, cannot be considered suitable for direct supervision. The same applies to the supervision of UCITS managers and AIFMs as their activities are neither fully harmonised nor considered systemically relevant.

- Post-trading market infrastructures:
  - We believe there could be benefits for EU CCPs to be directly supervised under ESMA given their cross-border activity as well as crucial importance in terms of financial stability. We think that the College of Supervisors would provide useful insight in relation to the position of all concerned regulators, but we agree that ESMA ought to be the head of the College and in a position to make the final decision. As there will be resolution authorities for CCPs, we further think that the dynamic between ESMA and these national authorities should be clarified in the text proposed by the Commission on resolution of CCPs.

II. GOVERNANCE OF THE ESAS

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

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

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

25. To what extent do you think would there be merit in strengthening the role and mandate of the Chairperson? Please explain in what areas and how the role of the Chairperson would have to evolve to enable them to work more effectively? For example, should the Chairperson be delegated powers to make certain decisions without having them subsequently approved by the Board of

Supervisors in the context of work carried out in the ESAs Joint Committee? Or should the nomination procedure change? What would be the advantages or disadvantages? Please elaborate.
EFAMA RESPONSE **22 - 24**. It could be argued that a number of shortcomings in the ESAs' lack of supervisory convergence and culture may be a result of the current governance set-up of the ESAs, where there may be cases of conflicts of interest between the role of the ESAs Board of Supervisor, as EU Supervisor, and the individual interests of the NCAs who sit on the Board of Supervisors. However, the current governance is nonetheless an equal representation of NCAs of each Member State. We therefore believe that changes in ESA governance regarding the role of the Board of Supervisors and the Management Board would be inappropriate and other means should be found to remedy the lack of an EU interest orientation. Given the specificities of the EU, and especially given the dynamics between large Eurozone Member States and smaller, diverse markets including non-Euro currencies, it is important that the role of all supervisors in the ESA decision-making is taken into account. Whilst we are supportive of further supervisory convergence, we do not support changes that would weaken the role of national supervisors in ESA decision-making. **25.** Role of the Chairperson: We believe that the model which has developed of the Chairman looking outwards and the Executive Directive covering management/operational issues works well. However, the decision-making must be collegial and the staff of the ESAs, as well as the Chair, are technicians who prepare meetings and decisions but do not vote. We do not support the idea of mixing functions that would make the governance more opaque. **Other point:** The governance of ESRB should be rebalanced to ensure a fair balance between Central Banks/banking supervisors, insurance supervisors and securities regulators.

STAKEHOLDER GROUPS

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.
EFAMA RESPONSE EFAMA is of the view that the role of stakeholder groups should be enhanced. In the context of ESMA, we do not believe that ESMA's stakeholders group adequately matches ESMA's increasing powers. We believe that, in order to be most relevant to the ESAs, the role of the stakeholders groups should not be limited to replies to consultations. Instead, stakeholders groups should preferably be involved at an earlier stage of the process with a view to providing advices to the ESAs on certain

topics as the policies are being formulated and well before they are submitted to public consultations. Stakeholders are most impacted by the decisions taken by legislators and regulators and their opinion being taken into account is necessary for good regulation. Whilst acknowledging the importance of preserving political decisions and intentions of legislators, implementation will certainly be more efficient if participants are adequately involved. Given the broad range of expertise they represent, stakeholders groups might also play a useful role in giving 'early warnings' on evolutions in the financial markets that may require action from the ESAs.

We believe it would be beneficial to have more transparency about the criteria being used to select the members of the stakeholder groups. In general, the current composition of the stakeholders groups ensures a relatively balanced representation of stakeholders in the relevant sectors, although it could be argued that, given its economic importance, the asset management industry in general is underrepresented within ESMA's stakeholders group.

There are a few suggestions in the practical organisation of the stakeholders' groups which we would also put forward:

- Stakeholders groups do not meet often enough and should receive their material well in advance.
- A "Europe" category should be available for European trade bodies in the stakeholders group.
- Meetings can be very large, involving the members of the group and all national competent authorities. This does not lend itself to effective exchanges of views. Anyone attending meetings of the groups should be expected to participate actively rather than being there "just to listen". Members of stakeholders group also need to be given adequate time to consider issues which are put before them and not just be given a matter of days of consideration.
- If and when the stakeholders groups take a formal, public position on an issue which the ESAs do not follow, we believe it is important for the ESAs to explain why this is the case.

On a separate but related matter, we also believe that the ESAs need to be more transparent about their internal organisation, which we consider unsatisfactory. As well as the general stakeholders groups, 10 different consultative working groups attached to 10 of the 14 existing standing committees have been set up in all three ESAs. In addition ESMA's organigram is, in our view, not very comprehensive (no names and contact details are available).

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.

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?

EFAMA Response

27. Whilst it may be argued that the shortcomings of the ESAs in the area of consumer and investor protection may warrant a move to a twin peak model of prudential and conduct regulators, we nonetheless support the current model of supervisory architecture and the separation of powers between the three authorities. We believe the current sectoral supervision of the ESAs allows for tailored supervisory approaches to particular business models and specificities of each financial sector. In this regard, the industry also benefits from sector-specific expertise present at each ESA which can be availed also for regulatory purposes when developing technical regulatory advice or technical standards.

The Joint Committee of the ESAs is, in principle, the appropriate forum for communication between the ESAs and the mechanism by which cross-sectoral issues should be dealt with. Interactions of the ESAs within the Joint Committee have increased in the past few years, also covering market intelligence projects such as the recent consultation on the use of big data by financial institutions. As pointed out in question 6, this Joint Committee needs to work better in future on cross-sectoral issues affecting European consumers and end investors.

As representatives of the fund management industry, with a model based on agency, we have at times struggled with inappropriate spillover effects of banking regulation to other sectors such as investment management. It is our view that any maximising of synergies between the different authorities could exacerbate this problem and it is therefore important that the ESAs keep their sector-specific expertise.

For example, we have witnessed the EBA overstep its competences with regard to the remuneration of asset management entities. In preparing the review of the CRD/CRR package for the European Commission in the course of 2015, EBA fundamentally challenged the proportionality principle applied to asset managers' remuneration as per the existing CRD requirements. EBA's final guidelines on sound remuneration policies under CRD (EBA/GL/2015/22) of December 2015, accompanied by the related Opinion (EBA/Op/2015/25), both fail to sufficiently reflect the need for more appropriate remuneration structures in light of the unique "agency" nature of intra-group asset management activities, while substantially overstating considerations around group risk. Moreover, the conclusions of EBA's analysis appeared to be at odds with ESMA's own previous interpretation of the sectoral AIFMD (and later UCITS) provisions applicable to remunerations of asset managers in their July 2013 guidelines on sound remuneration policies under AIFMD. The different interpretations by the ESAs on some of the same remuneration principles applicable to asset managers prompted ESMA to review its 2013 guidelines for AIFMs and prepare the respective UCITS-related ones under a compromise. Even though ESMA's own outcome in the form of consolidated remuneration guidelines for UCITS and AIF management companies published in March 2016 provides clarity on rules applicable to asset managers within a group context, ESMA's own interpretation, we feel, has inevitably and inappropriately been tainted by the views of bank supervisors.

28. As explained in the previous question, we do not support the suggestion of a merger between EBA and EIOPA. The three standalone authorities must remain to ensure a balance between the

three sectoral authorities, the market participants of the three sectors and in order to ensure a specific knowledge of each sector by a specialised sectoral supervisor. A twin peak model as contemplated in the consultation paper with one prudential supervisor and one conduct authority appears inappropriate in view of the breadth and complexity of financial markets in the EU. There is a natural risk that such a scope of supervisory function would shift the focus to a one size fits all approach and be less flexible to act according to the specific challenges and issues arising for respective market participants.

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.

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

a) a contribution which reflects the size of each Member State's financial industry (i.e., a "Member State key"); or

b) a contribution that is based on the size/importance of each sector and of the entities operating within each sector (i.e., an "entity-based key")?

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

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

EFAMA RESPONSE

The current system with a 40% contribution by the budget of the European Union and a 60% contribution by NCAs, largely funded by industry in most countries, is appropriate and in our view, should not be changed.

Against this background, it is important that the ESAs can show through increased convergence that they can deliver value with more efficiency and lower costs for market participants. Then a decision could be taken at a later stage when it comes to giving more powers to the ESAs with different funding arrangements.

In the event that there would be a move to a system fully or partly funded by the industry, industry contributions to the ESAs should be deducted from their contributions to NCAs budgets when this is the case. In other words, changes to the funding model of the ESAs should not lead to an overall increase of the industry contribution to the financing of EU and national supervisory authorities. A possible reallocation of powers between NCAs and ESAs should in future be accompanied by a proportional reallocation of funding too, but again without implying a cost increase for the industry.

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