Brussels, 16 May 2017

EACB Response to the

EC Public consultation on the Public consultation on the operations of the European Supervisory Authorities

May 2017

The **European Association of Co-operative Banks** (EACB) is the voice of the co-operative banks in Europe. It represents, promotes and defends the common interests of its 28 member institutions and of co-operative banks in general. Co-operative banks form decentralised networks which are subject to banking as well as co-operative legislation. Democracy, transparency and proximity are the three key characteristics of the co-operative banks' business model. With 4,050 locally operating banks and 58,000 outlets co-operative banks are widely represented throughout the enlarged European Union, playing a major role in the financial and economic system. They have a long tradition in serving 210 million customers, mainly consumers, retailers and communities. The co-operative banks in Europe represent 79 million members and 749,000 employees and have a total average market share of about 20%.

For further details, please visit www.eacb.coop

Introduction

The European Association of Co-operative Banks (EACB) welcomes the opportunity to participate in the EC Public consultation on the operations of the European Supervisory Authorities (ESAs) as we consider this exercise as an appropriate step in thinking and deciding on the best way forward. We consider that the ESAs' role in developing the Single Rulebook and promoting supervisory convergence is crucial, and will continue to be so. In this context a reflection is needed on the overall supervisory framework, including the role of the ECB and SRB and the way the authorities interact with each other.

The ESFS and in particular the three ESAs have undoubtedly contributed to a more coherent supervision of the EU financial system and better coordination between national supervisory authorities. We appreciate and thank the ESAs for their hard work and efforts both individually in their respective field of operation but also when working together as the Joint Committee.

The EACB has closely followed the ESAs different work streams and has pursued to contribute to the fulfilment of their task sharing ideas and concerns. It is true that the ESAs work is highly challenging and complex and the ESAs have delivered significant achievements. Having said that, we welcome the EC's wish to perform a stock taking exercise of the operations of the ESAs with an aim to reframe them and adjust them where necessary, as there are some areas that need improvement and clarification. For example, we believe that in many cases the ESAs tend to go beyond their mandate, that their complex task is translated in delays in the drafting of level 2 or level 3 measures while some times the drafting process of certain convergence tools is not transparent. In a few instances already the EACB has taken the opportunity to set forth examples of such cases.

Please find below the EACB response to a number of Consultation questions.

EACB Specific Responses:

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.

The ESFS and in particular the three ESAs have undoubtedly contributed to a more coherent supervision of the EU financial system and better coordination between national supervisory authorities. We appreciate and thank the ESAs for their hard work and efforts both individually in their respective field of operation but also when working together as the Joint Committee. The EACB supports continuing on that promising path, building on it refining it and shaping it further – in a more efficient way.

In particular we have identified the following points that –in our opinion- need to be addressed in the upcoming ESAs review:

- *ESAs should abide to Level 1 text and not go beyond their mandate*:

All of ESAs proposals but also supervisory convergence tools must be in line with the Level 1 text and should not add requirements on top of the Level 1 text. That is of utmost importance.

ESAs have the task of "technically" determining the rules set by the Commission at the level 1 in order to contribute to a uniform supervisory culture. However, we have observed a tendency of the ESAs to overstep the Level 1 mandate given to them in some cases or not pay enough attention on the intention/decision of the Level 1 legislator when drafting Level 2 and/or Level 3 measures. Any overstepping of the powers conferred at Level 1 leads to the Level 2 measure not being properly mandated.

One example of this is the criteria to be met by permissible inducements in the context of investment advice under MiFID II. MiFID II provides for both inducement-based investment advice and so-called independent advice to be offered and provided alongside together. In its technical advice submitted to the Commission, ESMA set highly complex requirements, especially concerning what constitutes “quality enhancement”, which meant a de-facto ban on inducement-based investment advice, thereby going against the level 1 text

A similar situation applies to product governance requirements under MiFID II. Level 1 is based on the concept that (only) the manufacturer determines the target market of its product and the distributing agency takes this target market into consideration during sales. In the Level II text, as presented in the ESMA's final report, it was implied that also the distributors should determine another target market.

Exceeding the powers conferred by Level I means that ESMA measures are not sufficiently legitimated.

Another issue in this context concerns the ESAs guidelines. Guidelines that may be issued by the ESAs have no immediate binding legal force. Nevertheless, they should not conflict with Level 1 or Level 2 legislation. Although they are not always immediately binding for banks, they effectively have an indirect impact in practice as supervisors have to say whether or not they follow the guidelines (“comply or explain”). If a supervisor states that it is compliant, this affects banks. For this reason, it should also be ensured that guidelines do not contain any rules or regulations that go farther than Level 1 or Level 2 legislation. For example, EBA guidelines on credit valuation adjustment (CVA) charges under the Supervisory Review and Evaluation Process (SREP) revoke exemptions provided for in the CRR. They expand the range of relevant exposures posing a significant risk to include some that were explicitly excluded in the CRR. This leads to higher capital requirements that were not intended by the legislator.

Just as serious is when ESA guidelines remain in place alongside a delegated act and these contradict each other. In such cases, there is needless uncertainty about which of these supervisory rules will apply.

Moreover over recent years a trend towards own-initiative work has emerged in the ESAs’ work programs. The ESAs have visibly expanded their activities apart from explicit Level 1 mandates by issuing Level 3 guidelines and recommendations. While this is in itself worrying from both a political and a governance perspective, such activities may at times jeopardize the timely exercise of Level 1 mandates, thus frustrating the prioritisation intended by EU legislators. (This aspect is explained in more detail under question 5).

In this context it is important to remember that the ESAs, are executive bodies, and as such -according to the principles of the rule of law- should not entitled to exercise their own right. In any case, the ESAs should be hesitant to take own initiative.

For this reason, it needs to be ensured that delegated acts, implementing acts,[1] technical standards[2] and guidelines strictly comply with the provisions of the Level 1 text on which they are based. It is crucial to have legal certainty and it is of utmost importance that the hierarchy between level 1 and level 2 is respected by all EU authorities involved. Supervisory authorities should not assume the role of the three EU institutions that are first and foremost in charge of initiating and negotiating legislative initiatives. In other words, supervisory authorities should limit themselves to develop the technical details of the regulatory framework based on Level 1 text. It would indeed be an undesirable outcome if the three principal EU institutions were limited to merely defining the broad regulatory framework whilst level 2 authorities designed strategic decisions or policy choices.

In this context it is critical to assess ESAs mandate, and how it is interpreted by the ESAs themselves and to clarify their competences and tools to achieve this, bearing in mind the original objectives of their establishment. We consider effective governance results from clarity of purpose and clarity in the nature and purpose of the mandating / legislative process involving these three EU institutions. Consistency between the work of the legislator, the regulator and the supervisor is key to good governance. We recognise that there are often fine lines involved; however when the ESAs initiate any activity without sufficient clarity from the legislator as to the limits of their mandate this may become problematic.

We also believe that the unclear legal status of non-binding measures (i.e. Guidelines) needs essential clarification. Art. 16 of the ESAs Regulations could be made clearer indicating whether a commitment to the guidelines would be expected only by the Competent Authorities which in turn would have the duty to transpose those rules they are willing to be compliant with into their body of supervisory regulation. That would also allow for clear recourse to the courts, which is an essential element of the rule of law.

The situation is similar for the Q&As as a regulatory instrument. For example ESMA has introduced a Q&A tool. ESMA justifies the use of Q&A with supervisory convergence. However, there is no legal basis for Q&As and no consultation of stakeholders is needed. Although Q&A's are not legally binding, NCA's normally follow the interpretations stated in Q&As. In the end, supervised entities and institutions have to comply with the requirements as a result of these interpretations, which produces a de-facto binding character. The Q&As of the ESAs increasingly become a new set of Level 3 regulation with a very high level of detail. ESAs should restrain themselves on using Q&As. This taking into consideration the level 1/ Level 2 regulation and level 3 guidelines there are already in place.

More in general, Level 3 instruments should be used less frequently by the ESAs and only within clearly defined boundaries. It should be avoided that Guidelines are used as a tool for example for implementing Basel's recommendations without involving a legislative process, in a pre-emptive manner (e.g. EBA guidelines on disclosure requirements.

- Timing Factor:

[1] It is important to note that when determining whether the act to be be adopted by the Commission comes under Article 290 TFEU (delegated act) or Article 291 TFEU (implementing act) depends on the nature of the powers confered by level 1 text.There is no free choice according to case law (see landmark cases: Judment in case C-88/14, Commission v. Parliament and Council (visa reciprocity mechanism) and Judment in case C-427/12, European Commission v. European Parliament and Council ('Biocides Case')). It follows from the wording of Article 290(1) TFEU that the lawfulness of the EU legislature's choice to confer a delegated power on the Commission depends solely on whether the acts the Commission is to adopt on the basis of the conferral are of general application and whether they supplement or amend non-essential elements of the legislative acts.

[2] It is worth noting that the ESAS should not themselves adopt Technical standards as this power is conferred solely to the European Commission by the Treaties, contrary to EBA assertion in its recent opinion of the European 7 March 2017.

Another important point that needs to be duly considered in the design of the regulatory framework is the timing factor.[3] Adequate, realistic and legally effective implementation periods should ensure in future that the legislative acts of the different stages are coordinated with each other and that there is still sufficient time to implement the new regulations in time. Two recent examples show that this is not always the case. Both MiFID II and the PRIIPs Regulation are supplemented by comprehensive Level II measures, without which implementation cannot take place. Both legislative projects failed to adhere to the timetable envisaged, which led to considerable legal uncertainty and significant additional costs for market participants and in particular banks and investment firms.

This is further illustrated by a look at the technical standards issued by the EBA under CRD IV/CRR: In the case of 26 legal acts based on an RTS published in the Official Journal of the European Union the EBA and the Commission failed to adhere to the time limits five times and seventeen times respectively. In the case of 21 published legal acts based on an ITS the EBA and the Commission failed to adhere to the time limits twice and twenty-one times respectively. Also a number of EBA products are still pending, creating additional uncertainty as a review of the Level 1 legislation is now under way. It is the case for instance of RTSs for Assessment methodologies for the Advanced Measurement Approaches (AMA) for operational risk, Risk weights for specialised lending exposures, Probability of Default (PD) estimation (Internal Ratings Based (IRB) assessment methodology), Criteria for intragroup inflows & outflows, Default definition, thresholds for past due items, Permanent partial use of Standardised Approach, etc.

In order to avoid this in future and to ensure that Level 2 can be adopted appropriately and without time pressure, the implementation deadlines for the market participants should be based on the enactment of Level 2 (e.g. 12 months after publication in the Official Journal of the EU). This would permit also the two legislative levels to be properly synchronised with one other and avoid situations where Level 1 legislation has to be postponed at short notice as a result of delays at Level 2 (as has happened with MiFID II and the PRIIPs Regulation). The problem is that Level 1 cannot be applied in the absence of the more detailed specification provided by Level 2 measures.

Moreover, communication between banks and the Commission or supervisors is essential, which is why we recommend improving notification of the state of play in the legislative process. It would be helpful if the Commission or an ESA announced at an early stage whether it would be able to meet a deadline or, as the case may be, what the new timetable was.

In addition, we would like to note, that the ESA regulations do not contain any provisions regarding the review of Level 2 measures on the ESA's own initiative. No timeline is set on how to deal with review proposals. As a result, e.g. the ESMA's Final Report regarding the review of the Level II measures on reporting under EMIR had been forwarded to the EU Commission, who did not start work on it for almost one year. Since most of the time the implementation periods are rather short, the industry usually has to start its implementing measures on the basis of the drafts. However, with no official timelines it is very difficult for market participants to plan their internal implementation projects and allocate staff.

In general, the process in the drafting of level 2 measures and in particular the timeframes need to be clarified (e.g. which is the timeframe for the EC to approve a revised proposal of the ESAs, how many times can this process of a revised proposal, is there a maximum number of attempts etc.). Indeed, having specific timeframes

[3] It is to be welcomed in this context that, when it comes to issuing Level 2 legal acts such as RTS and ITS, the ESAs are not allowed to proceed on their own but have to consult with the Commission. Such consultation must, however, fully adhere to the timetables set at Level 1. These timetables are designed to provide legal certainty. Failure to adhere to them has serious repercussions for market participants including banks. Experience unfortunately shows that timetables are often, or actually mostly, not observed. Also the Commission frequently fails to adhere to the three-month time limit to which it is subject.

and all parties involved in the legislative process observing such timeframes is very crucial for implementation by market participants even more so as many requirements have a direct impact on client relationship, service offering by financial institutions but also entail business decisions.

In addition to that we do consider that an extension of the consultation periods would be beneficial both for the ESAs and market participants in order to allow them to elaborate on possible issues, solutions and even allow data gathering. In the same vein, the consultations should be used by ESAs to gather feedback and genuinely assess comments/ suggestions made by stakeholders.

- "Non action" letters or similar tools need to be introduced:

We would recommend that the European Supervisory Authorities are granted the power to issue so called "no-action letters" or a similar instrument - which are available to most other financial markets regulators- in order to improve the speed with which it can respond to pressing market issues/ implementation situations and ensure supervisory convergence. Experience has shown that this is necessary under specific circumstances (e.g. the case of quickly evaporating liquidity) in order to avoid market disruptions. The kick- in of the EMIR margin requirements on 1st March 2017 clearly shows this necessity.

- Need to ensure consistency between different pieces of legislation:

In the context of the efforts to achieve convergence, due care should be taken to avoid inconsistent rules concerning the same or similar requirements (for example cost transparency according to MiFID II and PRIIPs, see also our answer to Question 5). Such inconsistency is causing significant problems in implementation.

- Streamlining Reporting to Supervisory Authorities:

Another issue that could be addressed is the need to streamline reporting to supervisors so that the SRB can directly find the necessary info at the level of the competent ESAs rather than at the level of individual market participants. Indeed, in the current daily practice the interaction and the (insufficient cooperation between the ESAs, the SRB and the national competent authorities is a massive problem for the institutions. This is for example particularly evident with regarding to the reporting requirements for institutions where an exchange of information between the supervisory authorities does not or does not exist to a sufficient degree. In this context we strongly oppose the consideration of the EC to reflect on whether the ESAs should be empowered to obtain information directly from market participants in specific cases and without first having to exhaust every other means of getting information (see section 6 on page 12 - access to data).

- Excessive Formalism and legal certainty:

Moreover, excessive formalism and excessive regulation has perverse side effects. It present implementation challenges so big that smaller market participants are pushed out of the market but can also impact costumers in the area of investment services. For example we see a withdrawal of retail clients from capital market investments.

Moreover, legal certainty is important in order for banks to fulfil their function as intermediaries between investors and companies and all counterparties to exercise their rights and fulfil obligations. The European law should take this point of view into account when designing the relevant framework. In this context, and in line

with what was explained above we consider that the ESAs should always abide to Level 1 text and should not be allowed to adopt guidelines that go beyond a clear and specific mandate given by the EU legislators insofar as the latter have defined the provisions which need to be clarified by the ESAs. We suggest to modify the regulations establishing the ESAs in this sense. Again, in this context it is critical to clarify the ESAs mandate and competences but also tools (and process) to achieve this.

Question 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? Please elaborate on questions and, importantly, explain how any weaknesses could be addressed.

The above mentioned ESAs' tools and powers have contributed to a significantly improved coordination between national supervisory authorities.

In particular, peer reviews and supervisory colleges are adequate tools for monitoring supervisory practices and for enhancing supervisory convergence where necessary. However, we suggest to reflect on whether the power of binding mediation is adequately aligned with the division of powers and the specific allocation of competencies in financial supervision. Since, for example, the EBA is generally not vested with direct supervisory competencies, it is at least legitimate to question whether it should be provided with the power to make binding decisions in cases where there are disagreements.

b) has a potential lack of an EU interest orientation in the decision making process in the Boards of Supervisors impacted on the ESAs use of these tools and powers?
Please elaborate on questions and, importantly, explain how any weaknesses could be addressed.

We do not share the assessment that the ESAs' Boards of Supervisors would not sufficiently incorporate broader EU interests in their decision-making processes or a lack of supranational interest orientation in the decision making process of the board. By contrast, we think that it is of upmost necessity to have persons on the board who have a deep knowledge of their respective markets and can bring in the diverse national aspects and sectors e.g. cooperative. Knowledge of the markets and business models is essential for good regulation. In this respect we believe that the current setting with members stemming from the national authorities should in principle remain. Their experience must be taken into account in the decision-making processes of ESMA, EBA and EIOPA. This should be seen as a positive factor and not as a lack of supranational orientation, as expressed in the consultation paper (see also our response to Q 22).

Question 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.

We do not think that any further tools are necessary. To the contrary, the existing mechanisms seem to be sufficient in every respect. The uniform supervisory practice is developing progressively and any further tools will only complicate the process without any added value.

Against this backdrop, we would like to draw the attention to the large number of Guidelines and Q&A that has been published by ESMA, and note that already the existing tools should be used with due care and under specific circumstances. And again, as already expressed, all Level 3 measures should abide and be based on specific legal requirements/ framework at level 1 and/or level 2 (please see also our answer to question 1 and Question 5 where this issue is addressed in more detail).

Questions 5. To what extent are the ESAs tasks and powers in relation to guidelines and recommendations sufficiently well formulated to ensure their proper application? If there are weaknesses, how could those be addressed? Please elaborate and provide examples.

- **Guidelines & Recommendations:**

As already explained above, we would like to once more stress that the guidelines adopted by an ESA should comply with the level 1 and level 2 text and that they should not add requirements on top of those provides in the level 1 and level 2. See also our response in Q 1.

Just to mention a few examples in which recent draft guidelines add requirements to a level 1 text:

- With respect to ESMA, the product governance requirements have to be mentioned as a (negative) example again. Level I is based on the concept that (only) the manufacturer determines the target market of his product and the distributing agency takes this target market into consideration during sales. The Level II text, as it had been proposed in the ESMA's final report, implies that the distributors should also determine a target market. The European Parliament has been able to achieve a written clarification by the Commission that this is not necessary. However, ESMA's Level 3 draft still refers to the company's own target market definition. Despite the Commission's clarification, there is therefore legal uncertainty as to the scope of the distributors' obligations (discrepancy between levels 1 and 2) and this is reinforced by the Level 3 draft Guidelines.
- Another example comes from the area of corporate governance. The ESAs took action to close a perceived gap in the legislation introducing certain elements that are not provided in the Level 1 legislation. The notion of key function holders is not used by CRD IV but the draft joint ESMA and EBA guidelines on the assessment of the suitability of members of the management body and key function holders under Directive 2013/36/EU and Directive 2014/65/EU (28 October 2016) and the draft EBA guidelines on internal governance (28 October 2016) introduce such an element. Moreover the draft joint ESMA and EBA guidelines on the assessment of the suitability of members of the management body and key function holders provide for the assessment of their suitability by the supervisory authorities. In this respect, the action of the ESAs overshoots its aim and goes beyond the mandate of the legislation. The level of detail and the scope of the provisions as they stand they would have important consequences on the governance of cooperative banks (for ex. : the cooperative model implies that members of our management bodies would not be considered as independent insofar as they all have economic relationship with the bank, important administrative burden related to the application of the suitability assessment of the key function holders not only to the central body where the main responsibilities of the said functions are centralized).In any case, it is all but certain that EBA and ESMA would maintain provisions related to formal independence and to the key function holders in their final guidelines.

- Another example is EBA/GL/2016/11 'Guidelines on disclosure requirements under Pillar Eight of Regulation (EU) No 575/2013 submitted by EBA on 14 December 2016. Even though EBA does not have level 1 authority, it uses in our view level 3 text to add level 1 requirements. The way EBA has formulated the guidelines makes it in our view hard for Global systemically important institutions (G-SIIs) and Other systemically important institutions (O-SIIs) not to comply even if there is no legal mandate.
- We fear that the Guidelines are used as a tool for implementing Basel's recommendations without following the formal legislative process. Only by initiating a normal legislative procedure through the European Commission it is guaranteed that the implementation within the several Member States takes place in a homogeneous way and that the legislature is well though through. For that reason we suggest to decrease or rather stop the use of Guidelines in that regard.

Such additional requirements to level 1 (or level 2) text are unacceptable and it should be emphasised that the ESAs should not assume the role of the 3 EU institutions in charge of initiating and negotiating legislative initiatives.

In particular, when it comes to the guidelines (& recommendations) adopted by the ESAs:

1. These have a de facto binding effect due to the "comply or explain" procedure which results in their implementation by many National Supervisory Authorities at national level while they are developed without any involvement of the EU co- legislators.
2. It seems that the ESAs are allowed to adopt guidelines (& recommendations) that go beyond a clear and specific mandate given by the legislator on the basis of their general power to adopt guidelines without any mandate (article 16 of the regulations establishing the ESAs).For example, as the mandate given by article 91 (12) of CRD IV to EBA and ESMA to develop guidelines on the suitability assessment of the members of the management body contains a list of issues that shall be clarified by EBA and ESMA: time commitment, independence of mind… We consider that the ESAs should not be allowed to adopt guidelines that go beyond this clear and specific mandate given by the EU legislator (for ex.: the draft guidelines introduce provisions on formal independence which is not part of the list)- which opens room for unjustified additional practices at national level.
3. In addition, it is worth noting that the budget cuts of the ESAs have been linked with some reprioritisation of activities, these including the postponement of standards and guidelines but also the increase of new own-initiative activities. For example, the EBA's' 2015 work program was amended by the EBA in April 2015 to reflect the budget cuts by the European Commission. While 22 regulatory products were assigned lower priorities and their delivery dates were postponed, 4 new own-initiative Guidelines in the areas of Deposit Guarantee Schemes and Liquidity Risk were added to the Work Program.

   While the ESAs' recent trend toward own-initiative work is in itself worrying from a political and a governance perspective, such activities should particularly be abandoned in view of budgetary restrictions before a postponement of any explicitly mandated standards or guidelines is considered. In this regard, it should be ensured that own-initiative activities do not jeopardise the timely exercise of Level 1 mandates.

Again as explained in Q1 we consider that the ESAs should not be allowed to adopt guidelines(& recommendations) that go beyond this clear and specific mandate given by the EU legislator (for ex.: the draft guidelines introduce provisions on formal independence which is not part of the list). We suggest to modify the regulations establishing the ESAs in this sense. Moreover, we would suggest to introduce a scrutiny of the ESAs' guidelines and recommendations by the EU institutions to guarantee their effective control, by amending accordingly the regulations establishing the ESAs. Indeed, the Council and EP shall have the right to object a

guideline or recommendation before it is published (same proceedings as the ones for RTS). The CJEU shall review the legality of guidelines and recommendations where these acts intend to produce legal effects vis-à-vis third parties.

In addition, we suggest to reemphasise the non-binding nature of these instruments. Currently, these instruments can be considered factually binding due to the comply-or-explain mechanism. Our practical experience is that the supervisory authorities expect mandatory implementation/compliance with ESA guidelines and recommendations although they are not legally binding (e.g. EBA guideline on internal governance, EBA/ESMA guidelines on the assessment of the suitability of members of the management body and key function holders, Guidelines on PD estimation, LGD estimation and treatment of defaulted assets). Against this background we criticise the unclear legal status of such non-binding measures. Art. 16 of the ESA-Regulations could be made clearer if a commitment to guidelines and recommendations would only be expected by National Authorities who subsequently would need to transpose into their body of supervisory regulation those rules they are willing to be compliant with. That would also allow for a clear recourse to the courts, which is an essential element of the rule of law.

Furthermore it has to be considered that there are often different guidelines/recommendations of several regulatory standard setters which partly diverge and imply a huge additional administrative burden for institutions with little or no added value (e.g. the guidelines mentioned above, ECB guide to fit & proper assessments and BCBS guidelines on internal governance for banks) and that those guidelines are partly unclear and could not serve supervisory convergence (because of the different board systems in the Member States) while adherence is expected by supervisory authorities even before finalisation.

- Some thought about Q&As:

Another related major concern is the increasing use by the ESAs of Q&As as a regulatory instrument. For example ESMA has introduced a Q &A tool. ESMA justifies the use of Q&A with supervisory convergence. However, there is no legasl basis for Q&As and no consultation of stakeholders is needed. Although Q&A's are not legally binding, NCA's normally follow the interpretations stated in Q &As. In the end, supervised entities and institutions have to comply with the requirements as a result of these interpretations, which produces a de-facto binding character. The Q&As of the ESAs increasingly become a new set of Level 3 regulation with a very high level of detail/ ESAs should restrain themselves on using Q&As. This taking into consideration the level 1/ Level 2 regulation and level 3 guidelines there are already in place.

- To sum up:

Level 3 instruments should in our view be less frequently used by the ESAs and only within clearly defined boundaries. These measures must in no case be used to go beyond the will of the co-legislators or formal legal regulations or even to contradict them. The general clause of Article 16 of the relevant ESA Regulation authorising the supervisory authorities to draw up guidelines should be reformulated to a clearly set the boundaries of such powers and limit its used only when it is absolutely necessary and under specific circumstances.

Moreover, as recommendations, guidelines and Q&A impact third parties (market participants) we consider that the, the European Parliament and Council should at least have an opportunity to exercise control and even reject them.

In addition the "explain or comply" principle should allow to take into consideration that the existing national laws already achieve the same objectives- and allow to take into account the principle of proportionality which is crucial for cooperative banks.

The democratic process, the hierarchy of norms as defined by the Treaties and the subsidiarity and proportionality principles must be respected throughout the legislative process and throughout the different levels.

Question 6. What is your assessment of the current tasks and powers relating to consumer and investor protection provided for in the ESA Regulations and the role played by the ESAs and their Joint Committee in the area of consumer and investor protection? If you have identified shortcomings, please specify with concrete examples how they could be addressed.

- No additional ESAs powers or tasks are necessary relating to consumer and investor protection.- Need to abide to the subsidiarity principle:

This is the primary task of European and national consumer protection authorities.

Consumer protection often can be better dealt with on national level and should be in line with national law, jurisprudence developed by national courts and consumer complaints tribunals. For this reason, the subsidiarity principle must also be observed. Indeed, consumer protection is so deeply rooted in the national legal system, especially in civil law. Wider therefore constitutional problems could arise. Accordingly, the role of the ESAs should be a focus on coordination and cooperation.

The EACB considers that 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 is already sufficient and no additional tasks and powers in this area are necessary.

Having said that, it is worth noting that as of 3 January 2018 ESMAs and EBAs competences in this area will even be increased as, in accordance with Art. 40, 41 MiFIR, both will have temporary intervention powers. It is too early to comment on the effects of these changes but it seems reasonable to evaluate the success of these new competences at a later stage.

- ESMA should not become a consumer protection market conduct regulator/ supervisor:

When it comes to ESMA in particular, the latter often ignores the specificities of the national financial markets when pursuing the legitimate aim of investor protection. We take the example of tightened rules when it comes to inducements: These rules might not have practical implications in Member States that already prohibit inducement-based advice at national law (such as the Netherlands and the UK), but they have a significant impact in countries where such rules do not exists and where investment-based inducement advice is a core business of the institutions. The ESMA's proposals would interfere with business models, in contradiction to the

European legislations which provides for a bank's choice whether to offer inducement-based and/ or the so-called independent investment advice.

It is therefore essential to reject ESMA as a consumer protection and behavioural supervisor. An expansion of ESMA in the area of investor protection analogous to the SEC or the FCA would also be a very serious legal order issue. While the U.S.-American and British legal systems grant their national supervisory authorities, SEC and FCA, respectively, very far-reaching capital-authority powers for standardization (sometimes without any substantive requirements), such an approach in the EU would violate the principles of other MS constitutional law.

- Increased amount of information requirements intended to protect consumers may have unintented consequences

Increased amount of information requirements intended to protect consumers result in a much increased amount of information to be read by consumers, which in some cases could risk being counterproductive.

In addition, in the further development of information requirements in the field of consumer and investor protection the ESAs should take greater account of other also recognised objectives, in particular that of a "cost-efficient Europe".

Question 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.

None. Consumer protection should essentially remain a national prerogative, taking into account the structure and specificities of the local market: Critical efforts are being made to expand ESA's general mandate in the area of consumer and investor protection but we do not consider this necessary or useful. This is the primary task of European and national consumer protection authorities. It should not be in the interests of the democratically legitimate organs to regulate matters which need regulation in the legislative process. Furthermore, both European legislators and ESAs should orient themselves as closely as possible to the experience and needs of the market participants and use their expertise in designing the customer-bank relationship. For example, the quality of the information should be the focus, not the quantity. An "excess" of information regularly leads to the fact that the contents are no longer well thought through or efficient and it is not in line with a dynamic and growth-oriented market development. As stated above, consumer protection should essentially remain a national prerogative, taking into account the structure and specificities of the local market. ESAs should only intervene when there are difficulties in a significant number of member States in application of the subsidiarity principle. (Please see our response to Q6.)

Question 8: Is there a need to adjust the tasks and powers of the ESAs in order to facilitate their actions as regards breach of Union law by individual entities? For example, changes to the governance structure? Please elaborate and provide specific examples.

We do not see any need to expand the ESA's competences. Rather, what should be considered is whether, after allocation of responsibility for European banking supervision to the ECB, direct enforcement rights of the ESAs are still appropriate. As stated, the EBA is mainly a standard setter (see also question 17). At the same time

assigning EBA the right to enforce these standards (and other legal bases) leads to delimitation difficulties and to the mixing of the legislative and the executive powers.

Question 9: Should the ESA's role in monitoring and implementation work following an equivalence decision by the Commission be strengthened and if so, how? For example, should the ESAs be empowered to monitor regulatory, supervisory and market developments in third countries and/or to monitor supervisory co-operation involving EU NCAs and third country counterparts? Please elaborate and provide examples.

We would appreciate if ESA`s would be empowered to monitor regulatory, supervisory and market developments in third countries and/or monitor supervisory co-operation involving EU NCAs and third country counterparts, provided that such information would be shared also with market participants. This is for international market participants a main aspect due to competition considerations and supervisory certainty. However, this must not be at the expense of other primarily assigned tasks; whose fulfillment is the priority.

The determination of whether financial institutions of a third country have similar standards on their financial markets, such as the European Union, should be done in a consistent manner. Currently there is no uniform third country regime. Rather, the design differs according to the underlying legal act. In addition to the national and European (supervisory) authorities, the Commission is responsible, depending on the individual case. In terms of an equivalence decision; Sometimes a combination of different decisions is required. A concentration of competences in this area therefore makes sense.

Question 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.

We are of the opinion that the ESAs already existing powers to access information enable them to effectively and efficiently deliver on their mandates. Even more so in light of the upcoming extension of ESMAs access to information which will come into force on the 3 January 2018 (Art. 26 MiFIR). Consequently, we believe that the current status quo is sufficient and that there is no need to grant the ESAs additional powers to access to information.

Access to data by the ESAs, even in the existing, sufficient extent, must not in any event result in double-checking the data already collected by other authorities. This would also create unnecessary costs for the market participants.

Close coordination between the supervisory and standard setter/supervisors should avoid redundancy. Indeed, as already stated in our response to Q1 it is necessary to streamline Reporting to Supervisory Authorities: It is important that the SRB can directly find the necessary info at the level of the competent ESAs rather than at the level of individual market participants. Indeed, in the current daily practice the interaction and the (insufficient) cooperation between the ESAs, the SRB and the national competent authorities is a massive problem for market players. This is for example particularly evident with regarding to the reporting requirements for institutions where an exchange of information between the supervisory does not or does not exist to a sufficient degree. In this context we strongly oppose the consideration of the EC to reflect on whether the ESAs should be empowered to obtain information directly from market participants in specific cases and without first having to exhaust every other means of getting information (see section 6 on page 12 - access to data).

Finally conclusions drawn from obtained data should be shared with financial institutions.

Question 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.

We are clearly opposed to the idea of giving powers to the ESAS to require information directly from market participants. The current way of doing this is to get the first information from the national authorities. The reporting and disclosure requirements as well as the various ad hoc inquiries from the competent authorities are already a considerable burden on the market participants. In addition, all the data required should already be available at the NCAs or the ECB. No additional queries are required. A further extension is neither necessary nor acceptable.

Against the background of the increasing international interconnectedness of markets and trade infrastructures, a collection of all-European trading data in a common database could be useful for the ESAs ("Financial Instruments Reference Data System" or "FIRDS"). Such a common database could also serve as an important source for European market participants to monitor their regulatory obligations.

Question 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.

- **There is a need to streamline and reduce reporting requirements**: We would warmly welcome a streamlining and reduction of reporting requirements. Currently, different sets of reporting requirements are defined by too many different parties. This has led to overlaps, duplication of reporting and a general “inflation” of requirements. Our aim is to achieve an efficient reporting regime in Europe. Therefore, we are interested in an Europeanwide coordinated reporting regime, as a way of reducing the reporting burden for banks, so that ultimately data will only need to be collected once and duplicating reporting requirements will be avoided. In our opinion, a preliminary study supported by the banking industry should examine the most efficient way of collaborating with the NCAs and ESAs for determine harmonised reporting requirements and collecting supervisory data.

  We would also like to note that within the scope of the MiFID II implementation, all reporting processes have been assigned to the national supervisory authorities (NCAs).We consider that in this context any reporting line to the ESAs would not lead to a streamlining or simplification, but only to an increase in the number of costs.

- Need to manage delays in the adoption **of the Technical Standards regarding reporting requirements:** With regard to EBA reporting standards, there have been numerous delays in the adoption of ITSs by the Commission in the past. In some cases, it took up to 23 months from submission to publication of particular reporting ITSs. These delays in endorsement and adoption have more than once led to mismatches between reporting obligations and underlying regulatory requirements, unduly creating excessive implementation burden for institutions and their service providers.

  We therefore strongly advocate to align the adoption process of the ITS with the entry into application of the regulatory requirements. While the EBA has suggested a fast-tracking of reporting standards in which the EBA would publish binding ITSs on its own (Opinion of the European Banking Authority on improving the decision-making framework for supervisory reporting requirements under Regulation No

575/2013; EBA/Op/2017/03), we believe the proposed 'ex post objection period' of one month would be too short. Whatever measure should be chosen to make the current procedures more efficient the current process of endorsement and adoption should not be replaced with a less democratically legitimate alternative.

In addition, as of today, the EBA is already entrusted with a coordination role on FINREP. The introduction of periodic reviews of these reporting requirements could be beneficial to credit institutions as they would be better enabled to prepare for future updates. The frequency of such reviews should be sufficiently long as to avoid constant changes to FINREP (we suggest a minimum period of 3 years between reviews). This cycle should only be interrupted if absolutely necessary (current example: the introduction of IFRS 9).

- We would particularly welcome the creation of a standard data model. A prerequisite for centralisation, however, is that national requests for data are dropped. National interests should play no role in determining the scope and scale of reporting; nor should the reporting regime be inflated by specific national requests for information.

Question 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.

As already stated above there is a need to simplify reporting and the process for adopting the technical reporting specifications, while allowing market participants sufficient time both to respond to the EBA's proposals during the consultation phase and to implement new requirements once they have entered into force.

In particular we would like to share the following views:

- With regard to FINREP, such measures could in general be adequate to streamline the adoption procedure. Giving the EBA the authority to issue technical reporting specifications could shorten implementation periods. This would be a welcome development, in our view.

- We nevertheless consider it essential to continue to involve the European Commission as an oversight mechanism when changes are made. The Commission should be given an adequate period of time to raise objections. We would consider a mandatory period of three months appropriate. If no objections were raised within this period, the draft would be regarded as approved. Such an arrangement would speed up the process while retaining the oversight function of the European Commission.

- On no account, however, should this procedure be used to shorten the implementation time for banks. It is essential to allow banks sufficient time both to respond to the EBA's proposals during the consultation phase and to implement new requirements once they have entered into force. Our experience to date has been that the EBA tends to set excessively short consultation deadlines, making it difficult for banks to submit an adequate response to its proposals. In respect of the implementation period, it has to be clear, that with presentation of the final draft, this draft has to be published in all languages of the European Union. In other words, the implementation period should only be starting with the publication of final regulations in all languages of the European Union.

- We are in favour of freeing implementing acts from minutiae and of sticking to main lines. That would also help in an environment which is bound to face swift technological changes. The more detailed regulation is, the less well regulation can adapt to these changes.

Question 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.

As things stand, enforcement is a task carried out by individual national authorities. At the same time, the EECS provide a good platform for promoting both an exchange of information and coordination between national enforcers. In many MS, this approach has worked extremely well in practice.

On the other hand, we see some merits in activities by ESMA to achieve convergence in financial reporting enforcement across the EU. A uniform European enforcement process is desirable when it comes to enforcing IFRS financial statements. One way of achieving the desired convergence, in our view, would be to apply the basic principle of the SSM to enforcement. The existing, tried and tested enforcement agencies should continue to perform their tasks under standardised guidance issued by ESMA. National enforcement is nevertheless still required, especially concerning nGAAP financial statements and national specificities.

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

- The current endorsement process of the international accounting standards into EU legislation works effectively and efficiently. It is important to preserve the efficiency of the endorsement process to ensure all standards are endorsed before their mandatory effective date.

- We also support EFRAG's role in giving endorsement advice to the European Commission. The endorsement process has proved its worth and we see no reason to make any adjustments. There is no need for ESMA to have an advisory role in the endorsement process as well. Its current role as an observer in EFRAG is appropriate given the importance to keep the standard setting process and enforcement clearly separated to avoid conflict of interest.In our view, standard-setting and enforcement are two different tasks (see above) and should be clearly separated. Setting and interpreting IFRS is the job of the IASB and the IFRS Interpretations Committee, whilst enforcement aims at ensuring that the standards are applied uniformly. Combining the two would lead to a conflict of interest, in our view.

- The rules-based nature of IFRS should be maintained: While we support greater harmonisation of accounting practices, the rules-based nature of IFRS should be maintained; any additional jurisdictional guidance would impair the global and principles-based character of IFRS. Any additional guidance, in the form of guidelines or interpretations provided on a local or regional level, could can impair comparability and transparency. Any issues with standards, from ESMA or national enforcers, should be reported to the IASB and IFRS IC for consideration at a global level.

- Need to take into account the interaction between accounting and prudential reporting,Moreover, we would like to note that although the objectives of financial reporting and prudential regulation are

different, there is significant interaction between the two, as the accounting figures usually form the basis for calculating regulatory capital and regulatory risk positions.

As a key criterion for an IFRS standard to be endorsed in the EU is to be conducive to the European public good, the effect on capital and prudential ratios as a result of the adoption of a new IFRS should also be considered. At the current endorsement process, EFRAG is not considering the effect of IFRS on capital or prudential ratios of regulated entities given that it is not in the competence of EFRAG to respond to the capital consequences of the new accounting standards. It would be advisable that the impact of new accounting changes on prudential capital should be investigated to ensure that the envisaged changes to the prudential framework or transitional arrangements take effect simultaneously with the effective date of the revised accounting standard.

Question 17: To what extent could the EBA's powers be extended to address problems that come up in cases of disagreement? Should prior consultation of the EBA be mandatory for all new types of capital instruments? Should competent authorities be required to take the EBA's concerns into account? What would be the advantages and disadvantages? Please elaborate and provide examples.

We consider the existing competences of EBA are already sufficient: Pre-consultation of the EBA for new capital instruments is neither necessary nor useful.

- **Competent authorities apply the relevant law at the time of issuing instruments**. If it is established (ex-post, in particular by the EBA) that an instruments does not qualify as capital for prudential purposes, there is nothing to prevent the competent authority from recognising this. If the competent authority does not comply with the relevant guidance given by the EBA, the EBA has sufficient tools at its disposal to enforce compliance with European law. **The prior consultations of the EBA is counterproductive, mainly because it will considerably delay the process of issuing new instruments.** When issuing own funds, it is important that institutions can react promptly to market conditions. It is already apparent today that the duration of the processing by the competent authority takes several months. The inclusion of other authorities would further slow down the process considerably. and this should be prevented.

- We see **no legal basis for implementing a mandatory consultation of the EBA for all new types of capital instruments.** There is no article concerning AT1- or T2-instruments in the CRR which is comparable to article 26 (2). The CRR sets clear criteria that equity instruments must meet. If these are met, the instrument can be calculated for prudential purposes. The assessment of CRR compliance is carried out by the NCAs or the ECB as the competent authority. From our point of view, therefore, the existing provisions on Article 26 (3) CRR, which stipulate that the CET1 instruments must be listed on an EBA list and that the EBA may have reservations, is in contradiction to the principle-based approach of the CRR.

For all these reasons we are against extending the EBA's powers in that regard.

Question 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.

We see no further tasks and powers of the ESAs in the areas of banking which must be complemented.

Question 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? Please elaborate on your responses providing specific examples.

- In our view, the current system of securities supervision which is based not only on ESMA but also on the national competent authorities (NCAs) should generally remain in place because it is suited best to deal with the different market structures of the Member States.

- At the same time, it is important to reject the idea of transferring to ESMA responsibilities of the national supervisory authorities, which could lead to direct supervision of small and medium-sized institutes. The national markets are very different for good reasons. Effective (pan-European) supervision is therefore not possible. Moreover, any such transfer of direct supervisory powers to ESMA would be contrary to the principle of subsidiarity. A single European banking supervisory system makes sense only for system-relevant institutions, which can pose a threat to stability across Europe and to taxpayers in other European countries. In addition, there is no need to include under the supervision small and medium-sized institutions, which are currently under the supervision of the national supervisory authorities, for a joint supervision of the securities business. The national supervisory authorities know the respective national market conditions as well as the business models based thereon, but also the decisive interplay with civil law. In this respect, NCAs have the necessary supervisory competences which ESMA does not always have.

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

We do not see a lack of supranational interest orientation in the decision making process of the board. By contrast, we think that it is of upmost necessity to have persons on the board who have a deep knowledge of their respective markets and can bring in the diverse national aspects. Knowledge of the markets and business models is essential for good regulation. In this respect we believe that the current setting with members stemming from the national authorities should in principle remain.

Their experience must therefore be taken into account in the decision-making processes of ESMA and EBA. This should be seen as a positive factor and not as a lack of supranational orientation, as expressed in the consultation paper.

In general, the decision-making processes in the ESAs are very lengthy. This is due to the multitude of Member States and reflect the different backgrounds. It would not be appropriate, however, to shorten this process by expanding the competencies and the number of staff, for example the Secretariat, as they cannot adequately assess the various views.

We do not understand the criticism contained in the consultation paper that "the board of supervisors focus too much on technical regulatory matters and too little on strategy and supervisory matters". The elaboration of technical regulation standards is one of the core tasks of the ESAs (see Art. 8 para. 1 a) ESA regulation). Strategies are, however, a task of the legislators.

Question 26. To what extent are the provisions in the ESA Regulations appropriate for stakeholder groups to be effective? How could the current practices and provisions be improved to address any weaknesses? Please elaborate and provide concrete examples.

- We consider that an **increased transparency of the work and processes of the stakeholders groups is desirable, as there is little transparency from the point of view of market participants**. While there are several measures in place to inform the general public about the ESAs' work, transparency on the functioning of stakeholder groups, the process of selection and appointment of its members, the decision-making processes and surrounding discussions could still be improved.
  As an example, the EBA's Board of Supervisors' and the EBA's Banking Stakeholder Group's meeting minutes are made available to the public. However, they are typically published about three months after the meetings, creating a significant time gap. Furthermore, published meeting minutes often offer insufficient information on the reasoning for a particular decision and the surrounding discussions that have taken place.
  Therefore, we would suggest significantly enhancing the content of all published meeting minutes and to make them available within 1 month after each meeting on the ESA's web site.
  Moreover, the banking and financial industry should be better represented with an aim to foster a pragmatic vision and share its expertise.
  We would support the more active participation of these stakeholder and consultative groups in the decision-making process, provided that they are reframed in terms of their functioning and constitution.

  Morever, a discussion of individual issues in the stakeholder groups cannot replace a market consultation.

- **Apart from the "formal" stakeholder groups, the ESAs should strive for an ongoing participation of stakeholders which is already best practice in the member states**. At the moment, only several market representatives are involved in dialogues with the ESAs via the stakeholder groups. Whereas the existing ESA-stakeholder groups are involved on a continuous basis, they do not (always) act as representatives of the markets as a whole. Consultations of the market participants on the other hand take place at a comparatively late stage of the regulatory process. We therefore need an effective culture of standing dialogue between the ESAs and the full range of their stakeholders. National Authorities may pave the way for such a third channel in the national jurisdictions. We can see some developments in that direction which is welcomed very much.

- **Given the current experiences with Level 2 regulation in the wake of MiFID II for both supervisors and market participants, we would propose for the future to avoid huge all-encompassing regulatory packets like MiFID II and bring forward smaller packages and sequence them appropriately.**

- **With regard to public consultations and hearings, experience has shown that the willingness to pay attention to stakeholders' concerns and suggestions varies substantially depending on the topic and the ESA staff involved but on the mode de employ of each ESA in general**. In order to ensure higher consistency and quality of public hearings, the EACB would suggest that the ESAs to communicate general principles to their staff and to introduce a mandatory evaluation process, giving participants an opportunity to provide feedback.

  It should be positively noted that presentation slides and further documents used in public hearings are usually published on the respective ESA's web site as well as feedback statements summarizing the

inputs received during consultations. Brief summaries of public hearings and participants' statements could however serve to further enhance transparency.

Question 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.

What is important is to reject the idea of transferring ESMA responsibilities to the national supervisory authorities, which means direct supervision of small and medium-sized institutes. The national markets are very different for good reasons. Effective (pan-European) supervision is therefore not possible. At the same time any such transfer of direct supervisory powers to ESMA would be contrary to the principle of subsidiarity. A single European banking supervisory system makes sense only for system-relevant institutions, which can pose a threat to stability across Europe and to taxpayers in other European countries. In addition, there is no need to include under the supervision of small and medium-sized institutions, which are currently under the supervision of the national supervisory authorities, for a joint supervision of the securities business. The national supervisory authorities know the respective national market conditions as well as the business models based thereon, but also the decisive interplay with civil law. In this respect, they have the necessary supervisory competences which ESMA does not always have.

Question 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?

A merger between EBA and EIOPA appears to be useful in terms of possible synergy effects. Independent of the ESA's future structure of the ESAs they should not lose sight of regional and local features and interests (subsidiarity principle). A risk-based approach as a fundamental principle of ESAs' work is definitely advisable.

In addition, we reject any transfer of the powers of the national supervisory authorities to ESMA (see in detail our answer to question 18).

Question 29. The current ESAs funding arrangement is based on public contributions:
a) should they be changed to a system fully funded by the industry;
b) should they be changed to a system partly funded by industry?
Please elaborate on each of (a) and (b) and indicate the advantages and disadvantages of each option.

The EACB does not support funding of the ESAs by the banking sector. While the financial crisis may have created political pressure to make financial entities contribute more heavily to their regulation and supervision, there are strong reasons in favour of an at best exclusive public contribution to ESA funding:

- The ESA's responsibilities are overwhelmingly of regulatory nature. Without the ESAs, their respective tasks would largely have to be carried out by the European Commission itself and under the European Parliament's and the European Council's scrutiny. In working on regulatory technical standards or implementing technical standards the ESAs are, in fact, performing tasks that should normally be performed by the European Commission pursuant to Articles 290 and 291 of the TFEU;

While, for example, the European Central Bank's fee-based funding model within the Single Supervisory Mechanism may be justified by the direct relation between supervision costs and an entity's size and riskiness, such a relation is absent in the EBA's case.

- With regard to the work (to date) of the ESAs in converging and aligning microprudential oversight at EU level, the EACB believes that there is a necessary public good involved in oversight by public authorities and believes it is important that the European Union budget continues to support the agencies that fall under the responsibility of the EU institutions;

- Being partly financed by the European Union budget, it is an additional guarantee that national interests do not prevail over the commitment to European interests and furthering the single market;
- It is a known fact that banks – apart from the significant implementation costs- have been facing a substantial increase of their funding contributions to regulators, and therefore should not be burdened with additional layers of substantial financial contributions. This is also because in practice we do not expect that a new fee to be paid to the ESA's will be compensated by lower fees to be paid to the NCA's. Therefore this will mean another increase of supervisory fees to be paid.

- If the ESAs would be financed directly by market participants this would have unacceptable negative impacts on the budgetary control. The currently exercised control by the European Commission, the European Parliament and the European Council over the ESAs' budgets has proven to be beneficial to maintaining budgetary discipline, while a transition to a fee-based financing would almost certainly induce significant expansions of the ESAs budgets. This is because the industry cannot defend itself against inappropriate budgetary expansions in the way that the European Commission or Member States are able to – the industry would likely be accused of not cooperating with financial supervision.

- The adaption of a funding model based on fees by market participants would constitute a discrimination against actors in other sectors as it would be in stark contrast to the general practice in regulation and supervision. Most EU agencies are fully or mostly funded by the EU budget, for instance the European Food Safety Authority (EFSA), the European Railway Agency (ERA) and the European Global Navigation Satellite Systems Agency (GNSS).

Should any potential change in funding sources materialise, the EACB is of the strong opinion that the financial institutions themselves should at least be part of their governance. This should be an essential feature of the reshaped funding structure, for instance through industry expert groups which would beneficially complement the already-established high-level stakeholder groups.

Contact:

The EACB trusts that its comments will be taken into account.

For further information or questions on this paper, please contact:

- Ms Marieke van Berkel, Head of Department (m.vanberkel@eacb.coop)
- Ms Ilektra Zarzoura, Senior Adviser, Financial markets (i.zarzoura@eacb.coop)