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EACB comments on the Review of the European Supervisory Authorities

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A. Introduction

The European Association of Co-operative Banks (EACB) has taken note of the EC proposal for the Review of the European Supervisory Authorities (ESAs) and welcomes the efforts of the EC to examine the operations of the ESAs, reframe them and adjust them where necessary, as there are indeed some areas that need improvement and clarification when it comes to the powers of the ESAs and the way they operate.

Safe, efficient and competitive financial markets are of key importance to the EU, and even more so with the challenges linked to the Brexit.

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 when working together as the Joint Committee.

The EACB has closely followed the different ESAs work streams and has pursued to contribute to the fulfilment of their tasks sharing ideas and concerns. It is true that the ESAs work is highly challenging and complex and the ESAs have managed significant achievements.

Having said that, the EACB does not consider that such a far-reaching approach adopted by the Commission is justified. In our view, some of the EC proposals would make the existing framework more complex without any obvious benefits in terms of integration and/or efficiency. Even if we consider that the EC proposal provides for some meaningful additions to the competencies of the ESAs in some instances where pan-European topics are concerned (such as the direct oversight of ESMA of administrators of critical benchmarks) it should be borne in mind that granting direct and indirect supervisory competences to ESMA, EBA and EIOPA might blur the lines between the supervisory function and the role of regulation setter. However, these roles should be kept distinct to ensure the coherence and the clarity of the European institutional framework. Moreover, enforcing convergence must also take into account the principle of subsidiarity. We consider that Article 114 TFEU, which is used as the legal basis for the Commission's proposals, is not always sufficient – in particular, with regard to the additional responsibilities and the planned shift of the financing of the ESAs.

Our comments are structured as follows: First, we discuss EC proposals that are relevant for all three ESAs (with reference to some specificities of the ESAs where and if necessary). Secondly, we discuss some points that have to do with ESMA and its new powers and responsibilities. Finally, we touch upon issues that are not addressed in the EC proposal but we consider that should be tackled within the ESA review, as they are critical for an efficient regulatory framework.

Please find them below:

B. EACB specific comments

1. THE EC PROPOSALS FOR ADDITIONAL RESPONSIBILITIES OF THE ESAS - POINTS RELEVANT FOR ALL ESAS

1.1. No super-supervisory authority / ESAs as "supervision of supervision"

The EC proposal provides for additional responsibilities of the ESAs. Among others, all ESAs should develop and maintain an up to date Union supervisory handbook and best practice proposals on the supervision of financial market participants in the EU together with a tri-annual plan ("Strategic Supervisory Plan") to define prudential priorities and identify "microprudential trends", risks and vulnerabilities. On this basis, the national supervisory authorities will then annually submit a draft annual plan to the ESAs for the coming year. If the ESAs, after verifying that the plan does not comply with the requirements of the supervisory plan, adopt "recommendations" to the national supervisory authorities to adapt the plan, the national authorities must take into account these recommendations in the revision of their annual plan. In addition to investor protection, the ESAs should also promote consumer protection in the future.

However, the EACB has the following concerns:

- These proposals represent the first step towards direct oversight of the ESAs vis-à-vis national supervisors creating a kind of “supervision over supervision". The national financial markets and their supervisory structures are very different for good reasons. The ESAs do not know well enough the respective markets and therefore cannot formulate strategic goals and priorities. In addition, the ESAs do not have the required practical experience. We consider that it is "redundant" to create additional structures here alongside the existing (and tested) national supervisory structures, which will make supervisory framework more complex.
- The proposals lead to a mixing up of supervisory and regulatory functions. These functions should be clearly distinguished and the tasks of the ESAs should be clearly outlined.
- Also the new task for EBA – similar to the supervisory handbook – to develop a handbook in the area of resolution will make things more difficult and will lead to definition problems between resolution authorities and the EBA as a supervisory authority. Therefore, also this proposal should be rejected.
- The same stands for the Strategic Supervisory Plan, which could lead to additional resources and duplication of work for financial institutions (e.g. having issues foreseen by EBA in the SSP may not be the ones the ECB plans to treat annually).
- Finally, at the same time, the proposals for the supervision plan are not concrete enough. It remains unclear whether and to what extent national supervisory authorities are included in the drafting of this Supervisory Plan and whether and to what extent national the national specificities of the respective markets are taken into account.

1.2. The proposed changes for delegation arrangements with third countries detrimentally impact depositary banks

The new powers of ESAs on outsourcing / delegation of material activities to third country entities constitute a disproportionate requirement creating uncertainty and additional costs for EU and non-EU financial cross--border groups.

This is particularly relevant for the activity of depositary banks, which usually delegate to third parties certain tasks relating to the safekeeping of investment funds' assets. The conditions for delegation of safekeeping duties are covered extensively by the UCITS V and the AIFM Directives, and by Level 2 regulation. A second layer of verification by ESMA would create undue costs, regulatory complexity and legal uncertainty that would harm the competitiveness of the EU banking industry. This is all the more problematic as there is no objective reason to assume that National Competent Authorities' decisions to authorise delegation to third countries' entities do not comply with EU rules, especially considering the current ESMA consultation system for delegation / outsourcing arrangements. In order to operate efficiently along their business model and their organisation, banks indeed need prompt and straight decisions from National Competent Authorities that should not be potentially challenged by a third authority.

1.3. Additions to the envisaged procedure for the adoption of Level 3 measures

In future, the ESAs should in principle be obliged to hold public consultations before the adoption of guidelines and recommendations (see, for example, Article 3 (7) (b)) that replaces the current Article 16 (2) of Regulation (EU) No 1095/2010 (ESMA Regulation)). This is very much welcomed. The same stands for the new obligation of the ESAs to conduct a cost-benefit analysis in the future. However, it is unclear on what conditions a public consultation and a cost-benefit analysis can be waived ("save in exceptional circumstances"). This needs to be clarified.

In general, we believe that the powers of the ESAs should be defined in a more stringent manner along the principle of conferral so that the limits of their mandates become evident. Their competences, tools (including the nature and use of Q&As), and procedures used to fulfil their role need to be clarified, bearing in mind the original objectives of their establishment.

Moreover, it needs to be ensured that the ESAs do not overstep their respective mandates and that delegated acts, implementing acts, technical standards, guidelines and Q&As strictly comply with the provisions of the Level 1 texts on which they are based. It is of utmost importance that the hierarchy between Level 1, Level 2 and Level 3 is fully respected by all EU authorities involved. It is equally crucial to have legal certainty and to avoid that Level 1 legislation is "corrected" or that "add-ons" are created by Level 2 or Level 3 measures. The tendency of the ESAs to act without prior mandate from the legislator (e.g. elaborating own-initiative guidelines) is problematic, as the democracy of the process is not fully ensured. Consistency between the work of the legislator, the regulator and the supervisor is key to good governance.

With this in mind, we would like to propose the following:

- Introduce an amendment requiring that a right to object to guidelines or recommendations is granted to the European Parliament (EP) and to the Council before the guidelines or the recommendation are published (same procedure as the one for the RTS), as it has been already been proposed in the EACB's response to the consultation on the ESAs. In particular, we consider the proposed control of a decision of an executive authority by another executive authority to be problematic. In such cases, the European Parliament and Council should rather be included as a democratically legitimated body. This applies in particular to situations in which the ESAs are not authorised in a Level 1 or Level 2 legal act for the adoption of Level 3 measures. In these cases, the ESAs should notify to the European Parliament and the Council their action in advance and give them the opportunity to control it.
- Introduce the right of legal review Level 3 measures (legal recourse).
- Finally, we consider that it is important that market participants are involved throughout the preparation of the draft proposals – that is already in the drafting process, and not just with the "finished result" that is in many cases presented with consultations - and maintain a continuous and open dialogue with the market. This will allow both the ESAs to have a better understanding of the actual market functioning and reality and market participants to be better prepared for implementation.

In addition, the ESAs review proposal provides that when the Stakeholder Groups (SGs) consider that the Level 3 measures (Guidelines and Recommendations) go beyond Level 2 or Level 1 they will have the possibility to address an opinion to the Commission (see for example Art. 3 (7) (d) supplementing Article 16 of Regulation (EU) No 1095/2010 (ESMA Regulation) by a new additional paragraph). Prerequisite for this should be a majority of two-thirds of the members of the respective SG. If the Commission agrees with the SG's assessment of a competence overrun, it may oblige the ESA to withdraw the guideline or recommendation. The Commission decision must be published. This procedure, which aims to ensure that guidelines or recommendations remain within the scope of the ESAs mandate and are in line with Level 1, is a positive idea and constitutes some improvement in principle.

However, in our view it is not an adequate tool to achieve the stated objective. , as in practice, it could be difficult to reach a 2/3 majority of the members of the Stakeholders Group.

For that reason, we would propose at the following amendments to this article:

- Replace the 2/3 majority of the members by the simple majority of the members or at least absolute majority. Indeed, the proposed 2/3 majority, especially in view of the highly heterogeneous composition of SGs, is too high a threshold, which would make it much more difficult to use the mechanism in practice.
- Introduce an obligation on the European Commission to adopt an implementing decision requiring the relevant ESA to withdraw the guidelines or recommendations concerned where the European Commission considers that the relevant ESA has exceeded its competence. Thus,

the proposal should be amended (replace “may” by “shall”) to require the Commission to withdraw the guideline or recommendation in such cases. For reasons of transparency, the Commission should also be required to give reasons for its decision and to publish it.

- Introduce a time frame within which the EC has to request explanations from the relevant ESA (e.g. 1 month), a time frame within which the EC has to take its decision (e.g. 2 months) and a suspension period during the time within which the EC has to take its decision when the EC receives an opinion that the relevant ESA has exceeded its competence during the “comply or explain” period.

These amendments are very important considering that we have in many cases seen that the ESAs tend to overstep their mandate.

1.4. Direct requests for information from the ESAs

The proposals provide for direct access rights of the ESAs to market participants who can be fined up to € 200,000 (see Art 20 for the insertion of new Art. 35a to 35h in the Regulation (EU) No. 1093/2010 (EBA-Regulation) and Article 3 (21) for the insertion of new Articles 35a to 35h into Regulation (EU) No 1095/2010 (ESMA Regulation)).

Such requests for information from the ESAs should be rejected. In general, we consider that there is a need to reduce as much as possible ad hoc requests, especially if the same information has already been produced for reporting purposes and are available / can be found/ requested at the level of national authorities. There is already extensive reporting from banking institutions, both for regulatory and non-regulatory purposes, to ECB and other competent authorities. Frequent data requests are operationally burdensome to manage and they present no obvious added value for financial stability.

Moreover, the relevant provision is written in a very broad way so one might wonder what kind of info the ESAs can request, while fines are also imposed for not conforming to the request. These fines provided for even for cases of negligence is disproportionate. Further to that, what would constitute “incorrect or misleading” would need to be clearly defined in the level 1 text to avoid misunderstandings. Another point of concern when it comes to fines is the lack of separation between the regulatory and sanctioning functions within the ESAs (the final decision rests with the Board of Supervisors) which in some cases constitutes a setback compared to the NCAs’ own procedures (in France for instance, the ACPR has an independent sanctioning college, comprised of judges and a jury). In this regard, the procedure should be reviewed so that a distinct college is put in place which would grant individual financial institutions a right to be heard.

In addition, there is the latent danger that the actually directly subordinate information requirements will in practice become a regulatory system and dilute the responsibilities of national supervision in this regard.

1.5. Governance

The Commission proposes to transform existing ESAs' Management Boards into so-called Executive Boards to be filled by the relevant ESA's Chair and several full-time members, which will be appointed by the European Council, which should increase their importance within the ESAs.

Transferring key decisional powers (e.g. breaches of Union law, settlement of disagreements between National Competent Authorities, outsourcing / delegation to third countries) from the Board of Supervisors to the Executive Board questions the principle of separation of powers between the executive body and the supervisory body of EBA. This principle, which is universally applied to banking and non-banking undertakings, is a fundamental element of sound governance. Furthermore, unlike the Commission, we believe that the actual Board of Supervisors is the adequate decision-making body, since the presence of national authorities ensures that both the EU view and national specificities are taken into consideration. It is worth noting that the governing structure of the SSM has been successfully established along this same pattern.

We understand the Commission's rational in proposing the setting up Executive Boards with full-time members. However, this must not lead to a situation where the national characteristics of the Member States, their markets and the different supervisory structures that may exist are disregarded. The ESAs are authorities that are supported by the supervisory authorities of the Member States. Against this background, we have reservations towards the proposal to set up an Executive Board that acts independently from the representatives of the national supervisory authorities.

Should this proposal be maintained, we would make the following suggestions:

Decisions taken by an independently appointed Executive Board on key issues of indirect supervision, such as Strategic Supervisory Plan or interventions to ward off serious negative consequences for the internal market and the real economy (Article 22 ESA Regulation) should require the approval of the Board of Supervisors.

It should also be provided that Member States which are not affected by a regulatory measure should not be allowed to vote on them.

Finally, we would like to point out the following specific aspects, of which one has to do with EBA and the other with ESMA:

- The proposed set-up does not recognise the SSM reality for the Banking Union

Moreover, this proposal ignores the substantial harmonisation progresses made since the creation of the SSM, which is successfully deploying a true European and independent supervision. In this context, it would be redundant to grant to EBA sanctioning powers and the power to override decisions taken by Competent Authorities (including the ECB for Significant Institutions) on outsourcing / delegation of material activities to third countries. It would be also misleading to grant to EBA the capacity to set EU-wide supervisory priorities against which Competent Authorities would be assessed. More broadly, no new institutional layer should overlap with the recent reforms establishing the Banking Union (the SSM and the SRM) or with forthcoming ones (e.g. the European Deposit Insurance System): the banking industry now needs a stable and clear institutional set-up.

- ESMA Stakeholder Group:

In addition, we would have a particular comment for the ESMA Stakeholder Group: The latter should also take account of (decentralized) banking associations (such as savings banks and cooperative banks), as is already the case with the EBA Stakeholder Group. In this context, the number of industry representatives should be increased.

1.6. Funding

The EU Commission proposes the introduction of industry contributions to finance the ESAs. According to this, at least 60% of the ESA budgets will in the future be borne by fees from directly and indirectly supervised market participants. The remaining financing requirement of a maximum of 40% is to be compensated for downstream by the EU budget. In addition, the possibility of voluntary payments to the ESAs should be created so that national supervisory authorities can, for example, facilitate specific ESA projects.

The EACB is against this fee financing proposal and in favor of maintaining the existing simple and clear financing model (60% national supervisory authorities, 40% EU budget) and against fee financing. This is the only way to avoid significant budget expansions of the ESAs that would be expected if funded by financial institutions. Financing supervisors with a fixed EU budget ensures budget control and prevents escalating expenditure. Being partly financed by the European Union budget is an additional guarantee that national interests do not prevail over the commitment to EU interests and furthering the single market; At the same time, the control currently exercised by the European Commission, the European Parliament and the European Council over the ESAs' budgets has proven to be beneficial to maintaining budgetary discipline, while a transition to fee-based financing would almost certainly induce significant expansions of the ESAs budgets.

Indeed, the present drafts already show the first expansive effects of the targeted fee financing: For example, in anticipation of a future participation of the institutes in the ESA budgets, some 220 new posts are already being offered for the ESAs. It is true that the supervisory body must be adequately equipped to perform its tasks properly. However, it must under no circumstances lead to further burden on the financial institutions. This is especially true against the background that the ESAs are undertaking tasks which would otherwise be the responsibility of the Commission under the scrutiny of the European Parliament and European Council. In contrast to the supervisory activity - such as with the ECB supervision - there is no concrete link to the individual institution. Moreover, with regard to the work (to date) of the ESAs in converging and aligning microprudential oversight at EU level, the ECSAs believe that there is a necessary public good involved in oversight by public authorities.

We suggest thinking about the use of industry secondment, to provide practical expertise for the ESAs without incurring significant additional cost.

Another point of concern is that increased costs might exacerbate the concentration of the banking sector. It is worth keeping in mind that the excessive increase of the current supervisory costs will proportionally penalise more small and medium-sized institutions, the capacity of which to absorb the regulatory burden is more limited than that of bigger players. We see there a real risk that small and medium-sized institutions be pushed out of the market, thus fostering further concentration in the banking sector. It is widely accepted that excessive concentration is detrimental to financial stability because it aggravates the "too big to fail" issue. Conversely, the diversity of the banking sector in terms of banks' business models and size contributes to financial stability, and it should not be put at risk by the uncontrolled inflation of supervisory costs.

Finally, withstanding the fact that the EACB is against the EC proposal for the funding of the ESAs, there are some unclarified that, if this proposal were to be maintained, would need to be addressed. In particular:

The proposal provides that the revenues of the ESAs will also consist of voluntary contributions from MS or observers as well as charges for publications, training and other services requested by competent authorities. There is a lack of precision regarding the scope of these contributions and services that can be charged.

The notion of "indirect supervision" is unclear. Level 1 would need to define the ESAs supervisory mandate for which funding is requested.

The EC proposal provides that the Commission will lay down (in a delegated act) the criteria to determine the annual contributions by individual institutions based on their size to reflect their importance in the market (Art.62 (a)). We believe that the size criteria should be totally removed while the criteria to calculate the annual contributions from individual institutions should be included in level 1, rather than in a delegated act.

2. POINTS RELEVANT FOR ESMA

2.1. Amendments to Regulation No 1095/2010 (ESMA Regulation) - Complementing the scope of ESMA's activities

2.1.1. Direct Supervisory Powers

The EU Commission proposes to extend the direct supervisory powers of ESMA. In particular, ESMA should become competent supervisory authority for special fund companies (EuVECA, EuSEF and ELTIF funds). In addition, ESMA will be entrusted with the approval of certain categories of prospectuses. ESMA will also become the competent authority for certain data provision services, as well as providing expertise in the coordination of market abuse procedures and of "critical benchmarks". Furthermore, ESMA's existing powers in the field of third-country equivalence process (and product intervention for certain funds) will be strengthened.

In certain cases with strong pan-European elements granting additional competences of ESMA could indeed help create a uniform approach which would be beneficial and makes sense. For example, the supervision of administrators of critical benchmarks, the supervision of data reporting services and the greater involvement in third-country equivalence are to be welcomed due to the "pan-European" aspect which is dominant in such cases.

However, we have reservations against this approach when it comes to prospectuses and fund supervision. In these cases, we consider that effective supervision is always best guaranteed at national level where national supervisory authorities are close to the respective markets and take into account the relevant national market conditions. This includes the interaction with (national) civil law and the relevant implications. This approach is already reflected in the recently adopted Prospectus Regulation. It should also be noted that the vast majority of securities are offered in one or a few Member States. Therefore, the approval of the prospectus by the national supervisory authorities is more appropriate as they very well know the specificities of their national market. The situation is similar with funds.

For these reasons, we consider that it does not make sense to create completely new structures and require additional resources at ESMA level in these areas, as supervisory convergence is already adequately ensured with the existing tools (e.g. by conducting peer reviews and issuing guidelines).

2.1.2. Supplementing the scope of ESMA's - inclusion of Accounting Directive

The proposal for a regulation on the reorientation of the ESAs will include an inclusion of Accounting Directive 2013/34 in the scope of ESMA activities (see Article 3 (1) (a) for amending Article 1 (2) of Reg. 1095/2010 (ESMA Regulation)). Already during the previous consultation phase for the ESAs review, ESMA's competence in accounting and auditing was discussed intensely and rejected by many industry representatives as the current framework is efficient and effective and there is no necessity for extending ESMA’s competence in that regard.

Against this background, it is unclear which activities are planned by ESMA which require the inclusion of the Accounting Directive in ESMA’s mandate and the proposed wording is very broad in that regard. In our view, the inclusion of the Accounting Directive 2013/34 should be waived.

2.1.3. Supplementing a coordinator role of ESMA with regard to contracts, transactions and activities with significant cross-border implications

In the future, ESMA should exercise a coordinating role in relation to national supervisory authorities in respect of contracts, transactions or activities with significant cross-border impact that could jeopardise the proper functioning of financial markets and financial stability in the EU. For this purpose, ESMA amongst others set up a data collection point (see, for example, Article 3 (16) for the insertion of a new Article 31b in Regulation (EU) No 1095/2010 (ESMA Regulation)).

We have reservations towards this proposal. First of all the exact background of this proposal is not clear. According to the recital, this function should be relevant in the context of market abuse (page 21 of the Commission proposal). However, there are already far-reaching obligations of the national supervisory authorities to cooperate with each other, already foreseen by Art. 24, 25 Regulation (EU) No 596/2014 on Market Abuse (Market Abuse Regulation) as well as with ESMA. In addition, the relevant provision contains a large number of unspecified legal terms without any examples, so it is unclear which competences ultimately lie with ESMA and which with the national supervisory authorities.

We fear that this provision could be used as a kind of "general clause" of ESMA to acquire further competences.

2.2. Amendments to Regulation (EU) No 600/2014 on markets for financial instruments (Article 6 of the Commission proposal)

2.2.1. Extension of the powers for product intervention

The powers of the national supervisory authorities and ESMA for product intervention under MiFIR are to be extended to UCITS, UCITS management companies and AIFMs (see Article 6 (25)), supplementing Article 1 of Regulation (EU) No 600 / 2014).

We have reservations towards this proposal. An extension of the powers is not required to fulfil the regulatory purpose. MiFIR provides for product intervention rights against intermediaries. The UCITS Directive and the AIFMD Directive already provide the national supervisory authorities with far-reaching powers, which also include banning of sales under specific circumstances.

With regard to ESMA, it should also be borne in mind that, under Art. 40 MiFIR, it already has in any case powers in the area of product intervention in the event that the respective national supervisory authorities have been inactive or do not manage to address the threat with the measures taken (Article 40 (2) (c) MiFIR and Article 41 Para. 2 lit. c MiFIR). Therefore, we do not consider that ESMA's "emergency skills" need to be further expanded. The proposal does not meet the proportionality principle and should be deleted.

2.2.2. Realignment of Transaction Reporting - immediate notification to ESMA

Pursuant to Article 6 (28) of the proposal for amending Article 26 of Regulation (EU) No 600/2014, MiFIR transaction reporting should be directly addressed directly to ESMA.

The EACB does not support this proposal .The reporting system serves a specific function: in particular, it should enable the creation of market transparency and the detection of market-abuse behavior. The primary responsibility regarding this lies with the national supervisory authorities rather than ESMA so that the reports should be addressed to them. In addition, the implementation of any new reporting infrastructures to comply with this proposal would be accompanied by considerable - above all technical - expenditure, which in the specific case would not be matched by adequate benefits. Above all, market participants, especially small institutions, will continue to rely on qualified contact persons at the national supervisory authorities in order to be able to clarify everyday questions quickly and to ensure the proper functioning of the reporting system. For these reasons we consider that Article 26 MiFIR should remain unchanged in that transaction reporting should (continue to) be done at the level of the competent authority competent authority This is all the more so, since reporting requirements under MiFIR have only been implemented since on 3 January 2018 and any further reorganisation of the reporting in such a short period of time should in any case be avoided. Reporting obligations are already a major operational burden that should not be increased further.

Having said that, we understand that the European Commission is currently looking at the efficiency, inconsistencies, complexity and cost of the current EU reporting frameworks and has launched a Fitness Check of existing supervisory reporting requirement, an initiative that is very much welcomed by EACB. In this context, we consider that a more centralised EU approach to reporting, including harmonisation of data reporting between different sets of legislation and the development of EU-wide database(s). Such an approach will enhance the ability of EU and National Authorities to collect and effectively use data regarding transactions in financial instruments to fulfil their objectives, will reduce duplication of data collection and processing by multiple authorities, and will make it more process and cost efficient for firms reporting this information. We are indeed in favour of an approach that follows the principle that market participants should only have to report the relevant information once, to one single authority, in one format. Nevertheless, of course this exercise needs to be well thought and designed. Considering this ongoing work stream which is expected to affect reporting requirements to a significant extent, it important to avoid any intermediate changes and costs for adopting systems for a very short period of time that would need to change again soon after.

2.3. Amendments to Regulation (EU) No 2016/1011 on indexes used as reference value or to measure the performance of an investment fund in financial instruments and financial contracts and amending Directives 2008/48 / EC and 2014/17 / EU and Regulation (EU) No. 596/2014 (Article 8 of the Commission proposal)

Article 8 (12) provides for a complete replacement of Article 40 of Regulation (EU) No 2016/1011, which deals with the powers of the competent authorities. The new rule will give these powers predominantly to ESMA. In that regard, we believe that it is urgently necessary to make a distinction as follows: Insofar as ESMA is to be responsible for the supervision of administrators of critical benchmarks (see Article 8 (12) (a) of the Commission proposal), we agree with the delegation of powers to ESMA. Critical benchmarks affect the EU-wide financial market; ESMA maintains its register and should also be responsible for supervision. One example is the Euribor, whose administrator is supervised by the Belgian regulator, which is an anachronism. The same applies to the endorsement of the third-country benchmark administrators.

On the other hand, we do not agree with ESMA being responsible for the supervision of contributors (see Article 8 (12) (b) of the Commission proposal.) For these financial institutions, supervision by the national supervisory authorities is more appropriate.

3. POINTS MISSING FROM THE EC PROPOSAL

3.1. Role of national supervisory authorities

The competences of the national supervisory authorities are not sufficiently mentioned in the proposal. Essentially, the ESAs are authorities that are supported by the supervisory authorities of the Member States. Against this background, the proposal to set up an Executive Board, which acts independently from the representatives of the national authorities, should be carefully assessed (see also our comments above).

3.2. Adequate deadlines and timeframes

Another important point that needs to be duly considered in the design of the regulatory framework is the timing factor. 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 2 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. In addition, 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.

Along the same lines, communication between banks and the Commission or supervisors is essential, which is why we would 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 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 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.

At the same time, co-legislators should be ready to quickly suspend the enforcement of regulatory requirements for certain (limited) time period in order to improve the speed with which it can respond to pressing market issues/implementation situations and ensure supervisory convergence.

In addition to that, we do consider that an extension of the consultation periods would be beneficial for both 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.

3.3. Legal protection against Level 3 measures

From a legal point of view, it is questionable whether Level 3 measures are subject to judicial control. The proposed control over Level 3 measures as envisaged in the proposal is a first step. However, we are in favour of introducing real legal control and legal recourse mechanisms against ESA measures.

3.4. Q&As

In particular, when it comes to Q&As the EC proposal does not provide any clarification about their nature and process. We consider that there is an urgent need to clarify and improve the Q&A-process. For example, the three ESA regulations should make it clear that Q&As are not legally binding - a fact that the ESAs themselves do not deny. We suggest creating a more regulated Q&A process that also creates transparency regarding the origins and base of Q&As and potentially the introduce a public consultation prior to the publication or review of Q&As.

3.5. Translation into EU working languages

We support a translation of all texts of the ESAs into the working languages of the European Commission, including consultation drafts. Especially with small and medium-sized institutions, an understanding of the complex English-language texts cannot be expected.