Bundesverband der Deutschen Volksbanken und Raiffeisenbanken e. V.
Bundesverband deutscher Banken e. V.
Bundesverband Öffentlicher Banken Deutschlands e. V.
Deutscher Sparkassen- und Giroverband e. V.
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Die Deutsche Kreditwirtschaft

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Unsere Zeichen:

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Öffentliche Anhörung des Finanzausschusses des Deutschen Bundestages zu dem „Europäischen System der Finanzaufsicht" am 31. Mai 2017

26. Mai 2017

Anlagen: 1

Sehr geehrte Frau Arndt-Brauer,

zunächst bedanken wir uns für die Einladung zu der im Betreff genannten Anhörung des Finanzausschusses des Deutschen Bundestages. Wir begrüßen ausdrücklich, dass der Deutsche Bundestag damit eine aktive Rolle in den laufenden Diskussionen um die zukünftigen Aufgaben und Strukturen der drei europäischen Finanzaufsichtsbehörden EBA, ESMA und EIOPA (ESAs) einnehmen wird, die er bereits sehr frühzeitig mit dem Antrag Drs. 18/7539 vom 16. Februar 2016 zur effizienten Weiterentwicklung des europäischen Systems der Finanzaufsicht mitgestaltet hat. Viele der in dem Antrag zu Recht aufgeworfenen Aspekte waren auch jüngst Gegenstand einer Konsultation der Europäischen Kommission zur Tätigkeit der ESAs. Unsere Beantwortung der von der Europäischen Kommission im Rahmen der Konsultation aufgeworfenen Fragen fügen wir diesem Schreiben als Anlage bei. Da die Beantwortung der Konsultation allerdings nur in englischer Sprache erfolgt ist, möchten wir nachfolgend die wesentlichen Aspekte unserer Antworten und Einschätzungen noch einmal in deutscher Sprache zusammenfassen:

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I. Aufsichtliche Konvergenz

Grundsätzlich haben die ESAs zur kohärenten Auslegung des europäischen Rechts und einer verstärkten aufsichtlichen Konvergenz beigetragen. Zwar besteht – anders als bei nur regional tätigen Instituten - mit Blick auf grenzüberschreitend tätige Institute Raum für weitere Arbeiten. Die Konvergenz sollte jedoch allein die Beaufsichtigung bzw. einheitliche Anwendung des europäischen Rechts in den Mitgliedstaaten, nicht aber die Regulierung zum Gegenstand haben. Dabei sollten sich die Arbeiten zur aufsichtlichen Konvergenz verstärkt auf die Vermeidung widersprüchlicher Vorgaben zum gleichen Sachverhalt fokussieren (z.B. Kostentransparenz nach MiFID II und PRIIPs). Zudem sollte Konvergenz nicht nur auf dem höchsten Niveau als „best practice" hergestellt werden. Die Einhaltung von „good practices" muss ausreichend sein.

Insbesondere haben die ESAs die Vorgaben des europäischen Gesetzgebers auf Level 1 bzw. Level 2 zu beachten und diese technisch umzusetzen. Gerade ESMA hat bisher mehrfach versucht, selbst politisch in das Aufsichtsrecht einzugreifen und Entscheidungen des europäischen Gesetzgebers auf Level 1 in Frage zu stellen. Dies gilt sowohl für die Erarbeitung von Vorschlägen für Level 2-Maßnahmen (Anwendungsbeispiele: Zuwendungen und Product Governance), als auch in Bezug auf Level 3-Maßnahmen (Leitlinien und Empfehlungen).

Bei Level 3-Maßnahmen von EBA und ESMA ist bereits die hohe Anzahl problematisch. Dabei ist auch ein Trend der ESAs zur Selbstmandatierung auf Level 3 festzustellen, den wiräußerst kritisch sehen. Obwohl diese Instrumente keine formale Rechtsbindung besitzen, droht über den „comply or explain"-Prozess die Gefahr einer faktischen Bindungswirkung. Hinzu kommt, dass die ESAs gegenüber den nationalen Aufsichtsbehörden unmittelbar fordern, die unverbindlichen Vorgaben der ESAs in die nationale Aufsichtspraxis zu übernehmen. Zudem wird die Rechtsgrundlage für den Erlass von Level 3-Maßnahmen oftmals nicht eingehalten. Auch bezüglich Fragen & Antworten (Q&A) sollte in den ESA-Verordnungen zukünftig klargestellt werden, dass diese nicht verbindlich sind.

Aus rechtsstaatlicher Sicht bedenklich ist zudem, dass Level 3-Maßnahmen nicht justiziabel sind und auch keiner rechtlichen Überprüfung durch die Kommission bzw. den europäischen Gesetzgeber unterliegen. Wir sprechen uns daher für entsprechende Kontrollmechanismen (Beschwerde/Kontrolleinrichtung) bzw. echten Rechtsschutz gegen Maßnahmen der ESAs aus.

Eine Notwendigkeit für weitere Befugnisse und Instrumente der ESAs sehen wir nicht. Die bestehenden Instrumente sollten vielmehr mit Augenmaß angewandt werden. Auch neuen EBA-Kompetenzen zur Durchsetzung von Vorgaben stehen wir ablehnend gegenüber. Dies sollte weiter Aufgabe der zuständigen Aufsichtsbehörden sein. Aus unserer Sicht besteht keine Notwendigkeit, den ESAs über den bestehenden Umfang hinaus weitere Zugriffsrechte auf Daten von Marktteilnehmern zu geben. Insbesondere lehnen wir ein unmittelbares Abfragerecht gegenüber Instituten ab. Daten liegen regelmäßig bereits der EZB und nationalen Aufsehern vor.

Im Hinblick auf den Verbraucherschutz ist das Subsidiaritätsprinzip zu beachten. Die ESAs haben hier bereits zahlreiche Kompetenzen (u.a. Möglichkeit einer Produktintervention durch die ESMA). Eine Ausweitung ist nicht erforderlich. Im Gegenteil sollten die bestehenden und zum Teil noch nicht anwendbaren Regelungen auf ihre Wirksamkeit und Angemessenheit überprüft werden. So werden beispielsweise durch MiFID II / MiFIR zum 3. Januar 2018 zahlreiche neue anlegerschützende Bestimmungen Anwendung finden, deren Wirkung abgewartet werden sollte.

II. Strukturelle Änderungen der ESAs

Eine Verlegung des Sitzes der EBA nach Frankfurt ist aus unserer Sicht, auch wegen der Nähe zur EZB-Aufsicht und zum ESRB, zu begrüßen. Einer Fusion mit der bereits in Frankfurt ansässigen EIOPA stehen keine signifikanten Gründe entgegen.

Eine Aufwertung der ESMA durch weitere Kompetenzen im Verbraucherschutz lehnen wir aufgrund der Unterschiedlichkeit nationaler Märkte und des Subsidiaritätsprinzips ab. Für den Anleger- bzw. Verbraucherschutz ist das Zusammenspiel des Aufsichtsrechts mit dem Zivilrecht entscheidend. Letzteres ist national geprägt, auch durch die Rechtsprechung. Die Beaufsichtigung durch nationale Behörden ist hier zielführend, denn diese kennen den jeweiligen nationalen Finanzmarkt und verfügen über die nötigen aufsichtsrechtlichen Kompetenzen. Dagegen verfügt die ESMA über keinerlei praktische Aufsichtserfahrungen in Bezug auf Banken. Zudem lässt ESMA bei der Verfolgung des legitimen Ziels des Anlegerschutzes oftmals Besonderheiten nationaler Märkte und Geschäftsmodelle außer Acht. Dies wirkt sich auch wettbewerbsrelevant aus.

Bei EBA und ESMA fehlt es noch an einem ständigen Austausch mit Marktteilnehmern, wie er sich auf nationaler Ebene mit BaFin und Bundesbank bewährt hat. Durch solch einen Austausch könnte das Verständnis für die unterschiedlichen Märkte und Geschäftsmodelle gefördert werden und so eine praxistauglichere Regulierung ermöglicht werden. Außerdem könnte so vermieden werden, dass Marktteilnehmer erst im Nachhinein mit einem „fertigen Ergebnis" konfrontiert werden und einmal vorgenommene Weichenstellungen gar nicht mehr oder nur noch teilweise korrigiert werden können. Die diesbezüglich bereits bei den ESAs bestehenden Stakeholder Groups sind dem Ansatz nach positiv. Ihre Arbeit ist allerdings wenig transparent und kann Konsultationen nicht ersetzen.

III. Finanzierung der ESAs

Eine vollständige oder teilweise Finanzierung der ESAs durch die Institute ist aus unserer Sicht nicht sinnvoll. Im Gegensatz zur operativen Aufsicht nehmen die ESAs überwiegend regulatorische Aufgaben wahr, die sonst der Kommission zufallen würden. Bei einer Abkehr von der Mischfinanzierung durch nationale Behörden und den EU-Haushalt wären negative Auswirkungen auf die Budgetdisziplin der ESAs zu befürchten. Auch ist unverständlich, weshalb hier von anderen Regulierungsbereichen wie der Nahrungsmittelsicherheit oder dem Eisenbahnverkehr abgewichen werden soll. Schließlich ist die bereits bestehende Belastung der Institute mit den Kosten der Finanzierung nationaler wie europäischer Aufsichts- und Abwicklungsbehörden sowie der Bankenabgabe zu berücksichtigen.

Mit freundlichen Grüßen
für Die Deutsche Kreditwirtschaft
Bundesverband der Deutschen
Volksbanken und Raiffeisenbanken e.V.

i. V.

Gerhard Hofmann

Dr. Olaf Achtelik

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Die Deutsche Kreditwirtschaft

Anlage

Comments

by the German Banking Industry Committee on the public consultation on the operations of the European Supervisory Authorities

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I. Tasks and powers of the ESAs

A. Optimising existing tasks and powers

I. A. 1. Supervisory convergence

Question 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. The ESAs have made considerable improvements to the coordination between national supervisory authorities and have promoted a consistent application of Union law. The cross-country regulatory landscape seems less fragmented, i.e. has been standardized to a certain extent also by way of a uniform approach. Nonetheless, from a supervisory perspective further harmonizing steps are required to ensure a level playing field, which requires improved timing / speed of regulation too.

For the years since their establishment, given the enormous tasks to create a new layer of financial supervision in Europe, the ESAs have all in all performed well. We think that there is – with the focus on cross-border regulatory affairs - still ample room to go even further in fostering supervisory convergence among national authorities. As such, we would support continuing on that promising path, building on it and shaping it further. With regard to just regional active institutions, however, we have doubts about a further extending of the activities of the ESAs.

Furthermore, we would like to highlight the importance of legal certainty. The ESAs have visibly expanded their activities - apart from explicit Level 1 mandates - by issuing Level 3 guidelines and recommendations. It is important that those guidelines and recommendations are in line with the corresponding Level 1 and 2 measures. In the past, some Level 3 measures extended the framework established by Level 1 and 2. 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 prioritization intended by EU legislators. In addition, the great detail of many Level 3 measures has made a timely implementation extremely difficult. The ESAs should, therefore, focus on drafting feasible Level 3 measures with realistic implementation periods.

In addition, we would like to note, that the ESA regulations do not contain any provisions regarding the review of Level II 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.

As part of the convergence efforts, particular attention should be paid to avoiding incompatible regulations/provisions that affect the same issues (e.g., cost transparency in MiFID II and PRIIPs, cf. also our answer to Question 5). These pose considerable problems when implementing.

Ultimately ESMA should bear in mind that convergence does not need to be created at the highest level in the sense of "best practice". Compliance with good practice must suffice.

Specific comments relating to ESMA:

The creation of a standardised regulatory/supervisory culture can make sense in sub-areas, e.g., market infrastructure (cf. Question 19 below).

On the one hand, divergent national framework conditions have increasing relevant effect on competition. In this regard, we advocate more convergence in supervision, but not regulation. This should not, however, lead to the same treatment of different issues without consideration of the particular features of – for good reason, the different - Member States' financial markets. Therefore, the critical assessment: that ESMA has interpreted its mandate extremely widely and in the past repeatedly overstepped the authority conferred on it.

As a supervisory authority, ESMA has the task of "technically" implementing the instructions set by the Commission at Level 1 so as to contribute to a uniform supervisory culture. However, ESMA abandons this tight framework more and more frequently and itself intervenes politically in supervisory law. It has in part attempted to counteract the basic decisions issued by the European legislator at Level 1.

This applies i.a. to the preparation by ESMA of proposals for legislative measures at Level 2:

- The development of concretising the admissibility of inducements serves as a practical example. Here, there was an attempt at Level 2 to introduce a factual ban on inducements.
- The area of product governance is a further example. Level 1 lays down the concept that (only) the producer determines its target market, and in its sales activities the distribution unit takes this target market into account. In the Level 2 text, which is based on ESMA's final report, the impression is created that the sales units too should determine further target markets.

On the other hand, it applies also to the preparation of Level 3 measures. ESMA is using the tool of a guideline (by which ESMA ensures that existing European law is interpreted in a consistent way) by creating new regulations. For instance, ESMA's Guidelines on ETFs and other UCITS issues (ESMA/2014/937, para. 42 / 43j) deprived UCITS of their ability to access liquidity via repurchase agreements. UCITS shall treat the purchase price received under a repo as if it was collateral (considering all restrictions applying to collateral). One could say, measures like that undermine the legislation at Level 1, because EMIR increased liquidity requirements (mandatory collateralization / clearing) and in response ESMA has limited the already limited access to liquidity of UCITS.

Such a transgression of authority conferred by Level 1 leads to a situation in which ESMA's measures are not sufficiently legitimised. In particular, there is no kind of (parliamentary) control over ESMA's decisions. From a rule-of-law standpoint, this is very questionable.

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 ESAs' existing toolbox 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 reflecting 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.

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. Please elaborate on your response and provide examples.

In our view, no further tools are necessary. Rather, the existing tools appear to suffice in every respect. The uniform supervision must evolve step by step/organically anyway, and further review tools make it unnecessarily complicated, without resulting in any compellingly evident benefit. One should give the ESAs more time and first wait and see whether they can carry out their mandates with the tools that they already have at their disposal.

Against the background of the increasing use of convergence tools there arises the question of establishing control mechanisms (complaint/control instance).

Specific comments relating to ESMA:
In view of the myriad publications of guidelines and Q&As, we are against further tools and powers for ESMA. Rather, the existing tools should be used in moderation. With the establishment of Level 3 measures in particular, compliance with the concrete legal basis at Level 1/Level 2 should be observed (cf. also our answer to Question 1).

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

No comments.

I. A. 2. Non-binding measures: guidelines and recommendations

Question 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.

The central task of the EU financial supervisory authorities is to promote the uniform application of EU law in the Member States. In the past, however, the issue of guidelines and recommendations has taken on such dimensions that they were practically tantamount to legislation. This was, moreover, often done without the requisite legal empowerment. Since

neither the European Parliament nor the Council are provided with political scrutiny rights under the ESA Regulations, the democratic legitimacy of these activities is limited. One should, therefore, consider establishing such scrutiny mechanisms for Level 3 measures (in particular for guidelines).

The European supervisory authorities should concentrate their activities on reviewing the uniform implementation of supervisory regulations enacted by the EU legislator. Guidelines should therefore be used only with restraint.

In some cases, the ESAs' budget cuts have in the past been met with reprioritization of activities, including the postponement of standards and guidelines until after their prescribed delivery dates. Meanwhile, new own-initiative activities have been added even during times when there were budgetary restrictions in place. For example, the EBAs' 2015 Work Programme was amended by the EBA in April 2015 to reflect budget cuts by the European Commission. While 22 regulatory products were assigned lower priorities and their delivery dates postponed, 4 new own-initiative Guidelines in the areas of Deposit Guarantee Schemes and Liquidity Risk were added to the Work Programme.

While the ESAs' recent trend toward own-initiative work is in itself worrying from a political and a governance perspective, such activities in particular should 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 jeopardize the timely exercise of Level 1 mandates.

Nevertheless, in our view, the current tasks and powers in relation to Level 3 instruments are sufficient. We suggest better emphasis on their non-binding nature in the future. Currently, there is the danger that these instruments might be considered factually binding due to the comply-or-explain mechanism. Our practical experience is that the supervisory authorities expect mandatory implementation of/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 would be expected only by National Authorities which in turn 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. In addition, we refer to our response to Question 32.

Furthermore, it has to be considered that there are often different guidelines/recommendations from several regulatory standard setters which (i) 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 (ii) are partly unclear and could not serve supervisory convergence (because of the different board systems in the Member States) and (iii) the supervisory authorities expect to be complied with even before finalization.

In summary, Level 3 instruments should in our view be used less frequently by the ESAs and only within clearly defined boundaries. Instead, Level 1 and 2 measures should provide for more specific and definite provisions, thus making redundant any further clarifications at Level 3. Hence, we advocate a restrained application of such "non-legally binding" measures. The measures must on no account be used to exceed the will of the law maker and/or formal statutory regulations or even to counter act them. The general clause in Art. 16 of the current ESA-Regulation that authorises the supervisory authorities to issue guidelines should be less widely empowering and make clear that a guideline should be issued only for interpretation purposes, if these are absolutely necessary.

Specific comments relating to EBA:
Finally, it occurs to us that the Guidelines are used as a tool for implementing Basel's recommendations without involving a legislature. Only by initiating a regular legislative procedure through the European Commission is it guaranteed that the implementation within the Member States takes place in a homogeneous way. For that reason, we suggest decreasing or rather stopping the use of Guidelines.

Specific Comments relating to ESMA:
There is still room for improvement with respect to Q&A. Q&A are not regulated by law and the ESAs make use of Q&A to a different extent. In particular, ESMA uses Q&A to a large extent in order to enhance convergence within EU Member States. However, ESMA often uses this tool in order to implement policy decisions that should be taken by the European legislator on Level 1 and Level 2, but which have no place in Level 3 measures. Therefore, it should be emphasised in the respective ESA regulations that Q&A are not legally binding. The publication of Q&A should also benefit from a consultation process. This should not imply any binding character for Q&A.

I. A. 3. Consumer and investor protection

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.

Generally in relation to the ESAs:
We agree with the assessment in the consultation paper, according to which consumer protection matters fall within the common responsibility of the EU and Member States. For this reason, the subsidiarity principle should be followed too. A general observation: the ESAs

already have a great number of competencies in the area of consumer and investor protection. We have therefore not identified any shortcomings in the area of consumer and investor protection. In the past, it was questionable if the ESAs always acted according to the competencies conferred on them.

Moreover, from 3 January 2018 ESMAs and EBAs competences in this area will even be increased as, pursuant to Art. 40, 41 MiFIR, both will have temporary intervention powers. Therefore, it seems reasonable to evaluate the success of these new competences at a later stage.

It should be noted that consumer protection is also deeply rooted in the national legal systems, especially in civil law. Furthermore, also constitutional problems could arise. Accordingly, the role of the ESAs should focus only on coordination and cooperation.

Particularly in relation to ESMA:
In pursuing the legitimate objective of investor protection, ESMA often disregards the particularities of the national financial markets. The toying with idea of upgrading ESMA to a consumer protection and behaviour overseer - along the lines of the American Securities Exchange Commission (SEC) or the British Financial Conduct Authority (FCA) – should therefore be categorically rejected.

As an example, the issue of inducements can be used as an illustration here, too. Stricter rules on the acceptance of inducements/incentives have no practical effect in Member States (such as the Netherlands and England) whose national laws already provide for a ban on inducements, but have conversely had a significant impact in countries such as Germany, where inducement-based investment advice is a core business of the institutions. ESMA's proposals have thus meant interference in business models. Here, the European legislator had made the Level 1 decision for inducement-based investment advice and so-called independent investment advice to be offered and provided alongside each other.

An expansion of ESMA in the area of investor protection analogous to the SEC or the FCA would, constitutionally, be very questionable. While the U.S. and the British legal systems confer on their national supervisory authorities SEC or FCA extensive capital market legislative powers (sometimes even without specifying the content of such powers), such an approach would blatantly violate the principles of German constitutional law. So, a "blank-cheque empowerment" to issue legal regulations is according to German (constitutional) law out of the question. Rather, the German legislator must give instructions in terms of content, purpose and extent (Art. 80 para. 1 of 1 sentence 2 of the German Grundgesetz = Basic (Constitutional) Law). In Germany, moreover, only a delegation to federal government, federal minister or provincial governments comes into question; the supervisory authority (BaFin) can therefore not act in a legislative capacity until after further (sub)delegation as legislator.

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.

We take a critical view of aspirations to further widen the ESA's mandate in the area of consumer and investor protection. This would question or even overturn the constitutionally enshrined function of parliamentary decision making processes. It should ultimately be in the interests of the democratically legitimised bodies to legislate on issues that need regulation in the law-making process. Both the European legislator and the ESAs should, moreover, orientate themselves more strongly as closely as possible with the experiences and needs of the market players and use their expertise when structuring client-bank relationships. The quality of information, for example, should thus be at the forefront, not the quantity. A "too much" of information usually results in people not paying attention to the issues any more. An "all-round no worries package" for consumers is not compatible with the rightly accepted model of the responsible consumer and a dynamic and growth-orientated market development.

I. A. 4. Enforcement powers – breach of EU law investigations

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.

In our view, no further extension of the ESA's authority/powers is necessary. Rather, one should question whether after the assignment of responsibility for European bank supervision to the ECB direct rights of intervention by the ESA are still appropriate. As outlined, the EBA in particular is first and foremost a standard -setter (see also Question 17). To at the same time confer on it the right to execute these standards (and other legal principles) leads to demarcation difficulties and to a mingling of the legislative and executive.

I. A. 5. International aspects of the ESAs' work

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 the ESAs were 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 be shared also with the institutions. For international institutions, this is a main aspect for competition considerations and supervisory certainty. This should not, however, be at the expense of other primarily assigned duties; their performance has priority.

It would make sense to strengthen the ESA's powers in connection with equivalence decisions for third-country issues – be it in relation to the legislative process for the equivalence decision, the actual equivalence decision or also as a follow-up to the observation and implementation of an equivalence decision made by the Commission. For the determining of whether financial institutions of a third country have equivalent standards on their financial markets to those of the European Union, including the subsequent follow-up obligations, should be managed consistently.

At present, there is no such third-country regime. Rather, the structures differ, depending on the underlying legal act. Depending on the individual case, competent is, besides the national and European (supervisory) authorities, the EU Commission, which can decide by means of an equivalence resolution; a combination of various decisions is in part necessary too. A bundling of powers in this area therefore makes sense. The equivalence regime in particular gains new significance through Brexit.

At present, the principle "once equivalent, always equivalent" often applies, i.e., an equivalence decision in favour of a third-country financial institution will generally not be revisited anymore. Here, a more effective review process should be created that ensures that not only the regulatory framework is equivalent, but also that this is actually practised.

I. A. 6. Access to data

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 powers to access information enable them already to effectively and efficiently deliver on their mandates. Even more so in light of the upcoming extension of ESMA's access to information on 3 January 2018 (Art. 26 MiFIR). Consequently, we believe that the current status quo is sufficient and that there is no need to guarantee the ESAs additional powers to access to information. Access by ESMA to data even to the existing wide extent may in no event lead to the double-querying of data that were already collected by other authorities. This would mean unnecessary costs for the institutions too. Close coordination between the supervisory and standard setter/supervisors should obviate superfluous efforts. Finally, conclusions drawn from obtained data should be shared with 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 absolutely against the ESAs' directly accessing data from market players. The current way of trying to get primary information from national authorities should be preserved to avoid unnecessary regulatory costs for the market participants. The reporting and disclosure obligations and the various ad hoc queries by the competent authorities are already a considerable burden for the institutions. A further extension is therefore not tolerable any more. All the necessary data should, moreover, already be with the NCAs or the ECB. There is therefore no need for additional queries. On the contrary: more disclosure requirements should be prevented and existing requirements should be more consistent (same definitions and tools) and existing reporting/disclosure requirements should be scrutinised for overlaps.

Against the background of the increasing international networking of markets and trading infrastructures, a bundling of pan-European trading data in a shared data bank with the ESAs ("financial instruments reference data system" or "FIRDS" for short) could make sense. Such a common data bank could serve the European market players as an important source for the monitoring of their regulatory obligations.

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

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.

We would greatly welcome a reduction and streamlining of reporting requirements. As things stand, different sets of reporting requirements are defined by too many different parties. This has led to overlaps 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.

Particular relevance for the EBA:

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 disparities between reporting obligations and underlying regulatory requirements, unduly creating excessive implementation burden for institutions and their service providers.

We therefore strongly advocate accelerating the current adoption procedures seen in practice. 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 accelerate the current procedures, the current process of endorsement and adoption should not be replaced with a less democratically legitimate alternative.

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 able to prepare for future updates. The frequency of such reviews should be sufficiently long so as to avoid constant changes to FINREP (we suggest a minimum period of 3 years between reviews). This cycle should be interrupted only if absolutely necessary (current example: the introduction of IFRS 9).

Particular relevance for ESMA:

In the context of implementing MiFID II, all reporting processes are currently geared to the national supervisory authorities. An additional or alternative reporting line to the ESAs would not lead to a slimming down or simplification here, but to more work and should therefore be rejected.

ESMA is also required to issue an RTS on the implementation of a European Single Electronic Format (ESEF) for financial statements this year. According to ESMA, from 2020 onwards it should be mandatory to publish financial reports based on the IFRS Taxonomy. The IFRS Taxonomy does not reflect the specificities of preparing banks' accounts. Banks are already obliged to report financial information to supervisors in a structured electronic form (FINREP). Therefore, we recommend to allow banks to use FINREP Reports instead of applying the IFRS Taxonomy.

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.

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 involving 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 lead time for banks. It is essential to allow banks sufficient time both to respond to the EBA's proposals during the consultation phase and to implement new requirements once they have entered into force. Our experience to date has been that the EBA tends to set excessively short consultation deadlines, making it difficult for banks to submit an adequate response to its proposals. 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 not start until the publication of final regulations is available in all languages of the European Union.

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

However, the implementing acts should allow for equally sufficient political scrutiny of the respective guidelines and recommendations to avoid a quasi-legislative role by the EBA. An 'ex post objection period' could potentially be an adequate mechanism to achieve this; it should, however, be instituted only with a long enough time period for objection.

I. A. 8. Financial reporting

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 Germany, this approach has worked extremely well in practice. The German enforcement system is highly regarded in the marketplace and the German enforcer is widely seen as highly competent and effective.

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 GAAP financial statements and national specificities.

Supervision of statutory auditors and audit firms

The national supervisory regimes for statutory auditors have just been adapted to the amendments to Directive 2014/56/EU and Regulation (EC) No 537/2014. The supervisory regimes thus continue to converge with regard to their central elements. We currently see no reason for further changes and more convergence. The legal and institutional structures governing the supervisory regimes differ widely across Member States. Therefore, diversity among the supervisory regimes is inevitable. While the effectiveness of national supervisory regimes is crucially important, their uniformity is not.

At present, it is not appropriate to give ESMA a greater role in the supervision of auditors and audit firms. Only recently, the Committee of European Oversight Bodies (CEAOB) was established with the purpose of coordinating national supervisory regimes on the basis of Article 30, Regulation (EC) No 537/2014. ESMA is a member of CEAOB, while EBA and EIOPA can participate as observers in CEAOB meetings. Therefore, the ESAs are sufficiently involved.

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.

We believe that the current endorsement process is sufficiently effective and efficient. 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.

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.

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

I. B. 1. Approval of internal models under Solvency II

Question 16: What would be the advantages and disadvantages of granting EIOPA powers to approve and monitor internal models of cross-border groups?

No comments.

I. B. 2. Mitigating disagreements regarding own funds requirements for banks

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.

It shows that the current capital requirement framework, that allows competent authorities to approve CET1-instruments, is an effective process for each participating entity. A mandatory prior consultation with the ESAs for new capital instruments is neither necessary nor expedient:

It is not necessary because at the time of instruments' being issued the competent authorities apply the relevant law. Should it be established (ex post) - particularly by the EBA - that an issue does not comply with applicable law for capital eligibility, then there is nothing to stop its eligibility from being disqualified by the competent authority. Should the competent authority not follow the relevant indications from the EBA, then the EBA has ample instruments available to it to enforce compliance with European law.
Backed by this division of responsibilities between the EBA and the competent authorities, the framework takes into account several types of capital instruments within the different Member States.
By existing rules, the current validity of approved instruments is ensured as well as their compliance with stipulated requirements. In cases of ambiguity, the competent authorities are free to consult the EBA in advance. A mandatory consultation of the EBA ex ante would cause an unnecessary slowdown in approving CET1-instruments and decrease in flexibility. When issuing own funds/capital instruments, it is important that institutions can react in a timely manner to market situations. Already today, one can see that the processing time

by the competent authority takes, in part, months. The inclusion of further instances would considerably slow the process still more. This must be prevented.

In our opinion there is no advantage and, in particular, no need to adjust the current procedure.

In addition, we see no legal basis for implementing a mandatory consultation with the EBA for all new types of capital instruments. There is no article concerning AT1- or T2-instruments in the CRR which is comparable with article 26 (2). For this reason, we oppose extending the EBA's powers in this case.

In any event, one could think about a dialogue between the CA and EBA. In contrast, it would not be appropriate if the CA had to bear in mind the EBA's concerns. The CRR stipulates clear criteria that own funds instruments must meet. If these are fulfilled, the instrument is, for regulatory purposes, eligible for the own funds calculation. The judgment as to CRR-conformity is made by the NCAs/ECB as competent authority. It is, in our view, that for this reason the provisions of Art. 26 para. 3 CRR already exist, pursuant to which CET1 instruments must be included on an EBA list, and the EBA can, if necessary, raise concerns, in contrast to the principle-based approach of CRR.

We support the approach that EU law be uniformly exercised. In the assessment of supervisory practice and compliance with the regulations, however, there must not be an intermingling of the various competencies. As part of the executive and at the same time a standard-setter, the EBA should not conclusively decide on compliance with statutory regulations. Also, the contours of its actual supervisory activity, which includes the comparison of institutions' practice with legal regulations, must be drawn (more) clearly.

I. B. 3. General question on prudential tasks and powers in relation to insurers and banks

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 need to be complemented.

C. Direct supervisory powers in certain segments of capital markets

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.

With regard to ESMA:

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 best suited to deal with the different market structures of the Member States. The NCAs are the competent supervisory authorities in the field of securities regulation and investor protection issues. They have a sound knowledge of the particularities of the respective national financial markets and, therefore, the necessary supervisory expertise. On the other hand, ESMA has no practical supervisory experience whatsoever in relation to banks.

A widening of ESMA's competence can make sense in parts of trade and market infrastructure regulation. Besides the aforementioned bundling of pan-European trade data in a common/shared database at ESMA, here, one should consider the monitoring of systemic risks for the pan-European financial and economic system, as in the supervision of central counterparties (but cf. the constraint in Question 20) and the supervision of administrators of critical benchmarks. The transfer to ESMA of competencies of the national regulatory authorities, however, are to be firmly rejected. The national markets just are - for good reasons – very different. An efficient (pan-European) supervision is not possible.

A transfer of direct supervisory responsibilities to ESMA would, furthermore, contradict the principle of subsidiarity. The national supervisory authorities are familiar with their respective national market conditions and the business models on which these are based, but also the crucial interaction with civil law. In this respect, they have the supervisory competencies that ESMA lacks.

Question 20: For each of the areas referred to in response to the previous question, what are the possible advantages and disadvantages? Please elaborate on your responses providing specific examples.

Critical benchmarks have a pan-European dimension. Extending ESMA's direct supervisory competences in this area is thus an advantage because ESMA is better suited than NCAs to take into account the pan-European dimension in the supervision of administrators of critical benchmarks.

The effective supervision of CCPs is essential to ensure the integrity and stability of financial markets. As financial markets are interrelated, the supervision of CCPs has not only a

national but also a pan-European dimension. Therefore, it would be advantageous if ESMA competencies included the supervision of CCPs. With regard to this possible extension of ESMA's direct supervisory powers over central counterparties, however, particular attention would have to be paid so that, with a "communitarisation" of the supervision over central counterparties, the risk of liability for their failure did not end up at national level. In this case, an appropriate European security would therefore have to be provided for.

Question 21: For each of the areas referred to in response to question 19, to what extent would you suggest an extension to all entities or instruments in a sector or only to certain types or categories? Please elaborate on your responses to questions 19 to 21 providing specific examples.

We suggest an extension to only certain categories of entities or instruments in a sector in order to guarantee that only those with a pan-European dimension would be supervised by ESMA. This approach would still allow the taking into account the different market structures where necessary and thus reflect the principles of subsidiarity and proportionality. Accordingly, only administrators of critical benchmarks would be supervised by ESMA, while administrators of non-critical benchmarks would still be supervised by the respective NCA.

II. Governance of the ESAs

A. Assessing the effectiveness of the ESAs governance

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 don't see a lack of supranational interest orientation in the decision making process of the board. By contrast, we think that it is of the utmost necessity to have persons on the board who have an in-depth knowledge of their respective markets and can bring the various national aspects to bear. 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.

The national supervisory authorities know their respective national financial markets and have the necessary supervisory competence. Their wealth of experience should therefore be taken into account in ESMA's and EBA's decision-making processes. This should be regarded as a positive factor, rather than the lack of supranational orientation, as expressed in the consultation paper.

Therefore, when weighting the votes during voting on the Board of Supervisors, the size of the respective national financial markets should be considered accordingly. Because the larger the market, the greater is the expertise of the respective competent supervisory authority. This "increase in" experience must therefore be reflected in the weighting of votes on the Board of Supervisors too. In addition, it should be stipulated that Member States which are not affected by a regulatory measure may not vote on a decision about it.

The decision-making processes in the ESAs are basically very tedious. This is due to the large number of Member States and reflects the various backgrounds. To shorten this process by increasing the competencies and the number of staff, e.g., the secretariat, would not be appropriate, since these may not adequately represent the different views and not be able to weigh them up.

We cannot understand the criticism in the consultation paper "that the Board of Supervisors focuses too much on technical regulatory matters and too little on strategy and supervisory matters". The preparation of technical regulatory standards is one of the ESAs' core tasks (cf. Art. 8 para. 1 a) ESA Regulation). Strategy issues, however, are the job of the legislature.

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

No comments.

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

No comments.

Question 25: To what extent do you think would there be merit in strengthening the role and mandate of the Chairperson? Please explain in what areas and how the role of the Chairperson would have to evolve to enable them to work more effectively? For example, should the Chairperson be delegated powers to make certain decisions without having them subsequently approved by the Board of Supervisors in the context of work carried out in the ESAs Joint Committee? Or should the nomination procedure change? What would be the advantages or disadvantages? Please elaborate.

A delegation of powers, when clearly defined as to its purpose, contents and extent could help to speed up certain procedures, but at the same time it constitutes the risk of creating imbalance in the power structure within the ESAs, which in turn would weaken their effectiveness. Strengthening the rights of the chairperson alone would not ease the ESAs' in part tedious decision making processes and should therefore not be seen as a solution. This applies all the more because the bottleneck is often to be found in Commission's sphere of influence. It is more essential that the national supervisory authorities are adequately represented in the ESAs and that their opinions are heeded.

B. Stakeholder groups

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.

The provisions in the ESA Regulations are basically appropriate. 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. Although the existing ESA-stakeholder groups are involved on an ongoing basis, they do not 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 very much welcomed.

Regarding the transparency of the Stakeholder Group's work, the relevant meeting minutes (as well as those of the relevant ESA's Board of Supervisors (BoS)) are made available to the public. However, they are typically published about three months after the meetings, which is a significant time lag. Furthermore, published meeting minutes often offer insufficient information on the reasoning for a particular decision and the surrounding discussions that have taken place. GBIC [German Banking Industry Committee] therefore advocates significantly enhancing the content of all published meeting minutes (BoS, MB and Stakeholder Group) and making them available on the ESA's web site within one month after each meeting.

With particular regard to EBA:
In practice, however, it is necessary to include the BSG members in the decision making processes more effectively. E.g., by early involvement in consultations, earlier preparation of meetings/sending of documents and paying more in-depth content-related attention to the BSG's concerns.

With particular regard to ESMA:
From the perspective of the market participants, the work of the stakeholder groups is not transparent. In particular, a discussion of individual issues in the stakeholder groups is no substitute for a market consultation.

With regard to the appointment of the ESMA stakeholder group, representation of the different pillars of the banking system (cooperative, private, and public) should be factored in. This means, that representatives of all pillars of the banking system should be considered – as is already the case with the stakeholder group at EBA. Furthermore, one could consider introducing different stakeholder groups (e.g. for financial market participants, consumers, academics etc.).

There is still room for improvement as regards the involvement of market participants into the legislative process of ESMA. Currently, ESMA includes market participants only to an insufficient extent in the legislative process. They are often confronted with the "finished product" only after the event. The result of this is that once ESMA has adopted a course, corrections can be made only in part or not at all.

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

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.

With particular regard to EBA:

Closer locational proximity for the ESAs would, on grounds of efficiency, be much welcomed. This could be achieved, for example, by moving the European Banking Authority (EBA) to Frankfurt.

Furthermore, duplicities between EBA and the SSM should be reduced.

With particular regard to ESMA:

Firmly rejected should be deliberations to transfer competencies of the national supervisory authorities to ESMA. For good reason, the national markets just are very different. An efficient (pan-European) supervision is thus not possible.

A transfer of direct supervisory responsibilities to ESMA would, furthermore, contradict the principle of subsidiarity. The national supervisory authorities are familiar with their respective national market conditions and the business models on which these are based, but also the crucial interaction with civil law. In this respect, they have the supervisory competencies that ESMA lacks.

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 pooling of EBA and EIOPA appears to make sense to realise possible synergy effects. A merger should take place in a financial city location in order to facilitate access to personnel with the necessary expertise. An amalgamation at EIOPA's domicile in Frankfurt would be welcome. Regardless of their concrete future structure, the ESAs should not lose sight of regional and local features and interests (subsidiarity principle). In other words, they should work closely in and with the markets and a culture of dialogue should be promoted. Also, a risk-based approach as a fundamental principle of ESAs' work is definitely advisable. We don't see that assignments at Level 1 must be transformed into detailed regulation. In addition, we refer to our comments on Question 27, which apply here accordingly.

With particular regard to ESMA:
We reject a transfer of responsibilities of the national supervisory authorities to ESMA (cf. our detailed answer to Question 18).

IV. Funding of the ESAs

Question 29: The current ESAs funding arrangement is based on public contributions. Please elaborate on each of the following possible answers (a) and (b) and indicate the advantages and disadvantages of each option.

a) should they be changed to a system fully funded by the industry?

- ○ Yes
- ◉ No
- ○ Don't know / no opinion / not relevant

What are the advantages and disadvantages of option a)?

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 ideally exclusive public contribution to ESA funding:

1. The adoption of a funding model based on fees by market participants would constitute a discrimination against 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).

2. In many cases, financial entities are already contributing to ESA budgets via their NCA contributions. However, national funding models differ considerably across the EU. Introducing additional ESA fees on top of these funding models would only magnify the existing distortions.

3. The ESA's responsibilities are predominantly of a regulatory nature. If the ESAs' would not exist 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. 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 lacking in the ESA's case.

4. The control over the ESAs' budgets currently exercised by the European Commission, the European Parliament and the European Council has proven to be beneficial to maintaining budgetary discipline, whereas a transition to a fee-based financing would almost certainly lead to significant increases in the ESAs budgets. This is because the industry cannot defend itself against inappropriate budgetary increases in the way that the European Commission or Member States are able to do – the industry would very likely be accused of not cooperating with financial supervision.

In summary, the GBIC strongly suggests maintaining the current composition of ESA funding to ensure budgetary discipline and consistency with other sectors as well as to avoiding highly detrimental implications for budget governance. An overall and progressive increase in regulatory costs, including the financing of national and European supervisory and resolution authorities and contributions to the Single Resolution Fund, must be avoided not only to guarantee the functioning of the financial markets but also to safeguard the interests of market participants and their clients.

b) should they be changed to a system partly funded by industry?

- ○ Yes
- ◉ No
- ○ Don't know / no opinion / not relevant

What are the advantages and disadvantages of option b)?

Compare our answer to Question 29 a).

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

a) a contribution which reflects the size of each Member State's financial industry (i.e., a "Member State key")
b) a contribution that is based on the size/importance of each sector and of the entities operating within each sector (i.e., an "entity-based key")

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

As we oppose funding by the industry, (cf. answer to Question 29), the question of a method of funding does not present itself.

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

Should, despite our negative stance, a levying of fees by the ESAs be introduced, the existing fee burden on the institutions must not be increased, but must be cost-neutral. It must, in addition, be ensured that the institutions have a right of control over the authorities' budgets.

General question

Question 32: You are invited to make additional comments on the ESAs Regulation if you consider that some areas have not been covered above. Please include examples and evidence where possible.

<u>Transparency of ESAs' Work</u>

While there are several measures in place to inform the general public about the ESAs' work, transparency on decision-making processes and surrounding discussions could still be somewhat improved.

As an example, the ESA'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, which is a significant time lag.

Furthermore, published meeting minutes often offer insufficient information on the reasoning for a particular decision and the surrounding discussions that have taken place.

The GBIC therefore advocates significantly enhancing the content of all published meeting minutes and making them available on the ESA's web site within 1 month after each meeting.

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. In order to ensure a higher consistency and quality of public hearings, The GBIC suggests that the ESAs communicate general principles to their staff and 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 are feedback statements summarizing the inputs received during consultations. Brief summaries of public hearings and participants' statements, however, could serve to further enhance transparency.

Drawing from experiences with other institutions that provide web streams of their public hearings, GBIC advocates not introducing web streams to ESA hearings as a general practice or to switch from actual meetings to conference calls for some or all hearings.

Timing is often essential when it comes to the implementation of European law into national supervisory practice. Therefore, delays in the European rule making process should not lead to shortened implementation periods for financial institutions. Instead, one should take a "dynamic" approach, according to which implementation at national level is necessary only after a certain amount of time (e.g. 12 or 15 months) has elapsed after publication of the European text in the Official Journal.

The ESA regulations should provide for the necessity of a "cost-benefit-ratio", i.e., the ESAs should be required to consider the costs and benefits of all measures taken by them.

We would appreciate if the ESAs' consultations and other work were published in EU official languages, as small and medium sized institutions would face difficulties in understanding and implementing complex texts in English. It is also unreasonable that institutions have to have these texts translated at their own expense. Only a linguistic communications basis acceptable to both sides can establish legal security for market participants. The possibility of communication in the official languages of the European Union is a key principle of European law. Publications exclusively in English do not comply with this principle and result in a lack of democratic legitimacy and rule of law. Nevertheless, a publication in all EU official languages should not result in delayed publications, as timely publications are key.

Extent of regulatory packages

Given the current experiences with level 2 regulation in the wake of MiFID for both supervisors and market participants, we would propose that in future huge all-encompassing regulatory packets like MiFID be avoided and smaller packages brought forward and appropriately sequenced .

EBA's Q&A-process

In our view, the EBA's Q&A-process is an advantageous tool that helps supervised entities to obtain clarity on ambiguous regulations as well as the wording they contain. However, we see a need for improvement concerning the process after publication of the answers. Once the response by the EBA is given, there is no possibility to amend this. In some cases, the supervised environment has changed or there is a clash of views. We would therefore suggest a framework which facilitates the revision of obsolete responses by the EBA.

Moreover, with the intent to improve the transparency of the Q&A-process, we propose a mandatory publication of the questions at the time of drafting. This procedure, which was introduced initially, would ensure a more effective and simple monitoring.

ESMA's Q&As

Concerning Q&As issued by ESMA, there is still room for improvement. ESMA uses Q&As to a large extent to enhance convergence within EU member states. However, Q&As are not regulated by law, whereas ESMA often uses this tool to implement policy decisions. It is only within the competency of the European legislator to adopt policy decisions on level 1 and level 2. Therefore, it should be emphasised in the ESMA regulation that Q&As are not legally binding. The publication of Q&As should also benefit from a consultation process, which should not imply any binding character for Q&As.Fließtext