**TARGETED CONSULTATION ON THE SUPERVISORY CONVERGENCE AND THE SINGLE RULE BOOK**

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Executive summary:

* **Further convergence is needed at National, European and International level. Not only regulatory convergence**, but also supervisory convergence. We think there are too many regulators (ESAs, The Council, The Commission) and they often do not agree with each other. In addition, there are different supervisors with whom regulators should converge. The role of national authorities versus JST (SSM) should be clarified.
* **Resources**: The ESAs should have the resources needed to develop their functions in a timely manner, for example regarding national equivalence assessment.
* **Q&As**: The ESAs should improve their process making it more transparent and quicker. They should foster an effective dialogue on key Q&As, while impactful Q&As should have reasonable implementation timelines.
* **Third countries**: In general terms, the ESAs’ regulations do not consider their impact in third countries, which generates uncertainty and additional costs for EU cross-border groups. The impact on the local third country financial system through UE banking subsidiaries (in many cases, local systemic institutions) is not assessed, nor taken into account.
* **Tackling gold-plating is of crucial importance**. Activities should be regulated and supervised consistently across all Member States. We advocate promoting the homogeneous application of European laws at Member States’ level, avoiding national approaches that hamper the level playing field across the European Union. For example, once the European Guidelines on Outsourcing were published, the Spanish guidelines (which are stricter in some aspects) should have been adapted.
* The role of the ESAs to drive supervisory convergence must be a more central objective in current and future proposals on digital finance as part of the Commission strategy.

**GENERAL MESSAGES**

Wewelcome the opportunity to comment on the European Commission’s (Commission) published targeted consultation on the supervisory convergence and the single rule book and fully supports the overall goal of the document to enhance the framework for effective and efficient supervision.

The role of the ESAs has been and will continue to be key, and the current European supervisory set-up has proven to be efficient, maintaining market stability and integrity in times of market stress and after the COVID pandemic. Moreover, further harmonisation of the EU rules and supervisory convergence of financial markets and services is pivotal for the elimination of regulatory arbitrage between Member States in the exercise of their supervisory tasks, in order to accelerate market integration and to create internal market opportunities for financial entities and investors. This would help to improve the Capital Markets Union, which is of significant importance to foster growth and create a level playing field.

1. **Situation after the 2019 ESAS review**

* The final text is far from the Commission’s early-stage vision, as ESAs’ reform has not been able to change the strong role played by national authorities in many areas of supervision.
* Nevertheless, the general direction of changes points towards more consolidation of power at the ESA-level to reinforce coordination of supervision across the EU, extending direct capital markets supervision by ESMA, improving the governance of the ESAs and promoting sustainable finance and FinTech.
* On the relationship of ESAs with other bodies, we believe that coordination between the EBA and the SSM needs to be improved given the gap that arises between supervisory and regulatory discretion.
* We welcome the European Commission initiative for a unique AML supervisor authority in Europe (initiative presented on the Commission’s Action Plan of 7 May 2020 for a comprehensive Union AML policy, and ratified on November 2020 by member states’ finance ministers). A unique Supervisor would greatly facilitate cooperation between competent authorities covering the supervisory gaps and difficulties generated by member states applying individual AML supervision.

1. **Single Rule Book: EU Rulemaking processes and ESAs involvement.**

The role of the ESAs has been decisive to promote a common supervisory culture, to foster supervisory convergence and to clarify and complete EU legislation through the drafting of level 2 and level 3 texts. Regarding the latter, the ESAs have shed light in crucial matters and have achieved harmonized definitions to be applied in all Member States. Without the ESAs specifications, a homogeneous implementation of EU legislation would not be possible.

It would be **important to prioritise the use of regulations, rather than directives or guidelines**, in order to avoid different interpretations by national authorities that are not harmonised with other member states national authorities.

* + In those cases where transposition deadlines are not met, what should be done by institutions? How to converge the mandate given by a regulator versus the transposition of the national regulator/supervisor? A timetable for publication of second-level regulation would be useful.

In case of EBA guidelines, it is up to the national authorities to decide whether to adopt them or not. This leads to a lack of harmonisation between different member states.

However, the ESAs should have:

* A more prominent role in the development of level 1 legislations by, for example, giving them an observer status in the negotiations with the co-legislators, guaranteeing the independence of the latters.
* More independence when drafting level 2 legislation. Besides, the ESAs should have a reasonable amount of time to draft texts in order to enhance their quality.
* A more transparent process when drafting level 3 texts such as Q&As, guidelines and recommendations. These should always be developed once the corresponding level 2 documents are adopted and they should be fully aligned with level 1 and level 2 documents. In this regard, it is important that the ESAs do not deviate from their mandate when preparing level 3 texts (i.e., guidelines should focus on ensuring the common, uniform and consistent application of Union Law, and not emulate level 1 primary legislation). The industry and the stakeholder groups should be consulted prior to the enactment of level 3 texts, especially for those which have a material impact on the regulated entities. Stakeholders should have the opportunity to give input before they are being finalised.

Also, more transparency is required from the EBA and guidance/indications to institutions on how to address those cases where the planned regulatory developments are delayed. For example the RTS on article 318.3 of the CRR on conditions for the application of mapping to operational risk business lines was due to be submitted to the Commission by 31/12/2017 and it has not yet been put out for consultation.

* Regarding the Q&A process, there are still some challenges. Further transparency is needed on the evolution of the process, including indicative timelines and information on whether the question has been rejected or passed on to the Commission or to other authority.

**3. Focus on regulatory convergence & coordination**

* The ESAs work should focus on regulatory harmonization to ensure that supervisory practices converge towards the most efficient and effective configuration. The ESAs should guarantee the homogeneous application of EU law by, for example, promoting more frequent peer reviews. Also, it is crucial that the ESAs avoid any national gold-plating of rules in order to ensure a level playing field.
* The ESAs should have a prominent role in harmonising the supervisory criteria on issues related to practical implementation of the regulations. They should as a rule restraint gold plating of regulation, as the EU rules should be sufficient. Currently the Guidelines, Opinions and Q&As have differing degrees of practical effect in the Member States.
* We consider **further convergence is needed at National, European and International level**. Not only regulatory convergence, but also supervisory convergence. We think there are too many regulators (ESAs, The Council, The Commission) and they often do not agree with each other. In addition, there are different supervisors with whom regulators should converge. The role of national authorities versus JST (SSM) should be clarified. For instance:
  1. Q&As: Despite the fact that EBA’s Q&As are not binding, the SSM applies them as if they were mandatory. We do not know if this application is homogeneous (if it is the same for all Spanish banks, and/or if it is homogeneous for the rest of European institutions).
  2. MOCs: When considering the quantification of MOCs EBA guidelines on PD and LGD estimation (EBA GL 2017-16) indicate institutions should do it at the level of the calibration segment. On the contrary, when ECB Guidelines 2019\_07 considers the quantification of MOCs, that is requested to be done at grade/pool level.
  3. From a sustainability point of view, the European union is pushing for strong regulation leading to a greener economy. At this stage only information requirements will be mandatory at European level, therefore we consider same approach and timing should be requested at international level.
  4. Pre Contractual Documentation: Alignment of the documentation required in the Onboarding in the different countries of the European Union. Mifid brochure and Mifid contract are required just in some countries. Contract manually signed by the client is only requested in Spain.
  5. Reporting: ESMA guidelines should be considered the proper way of reporting a transaction. Sometimes, local regulators do not follow ESMA guidelines and request the reporting of trades in a different way than established in ESMA guidelines.
  6. Best Execution: Four fold test to prove that best execution is provided to clients is recognized by several NCA’s but not by Spanish NCAs (CNMV).
  7. Waivers Criteria: To verify that waivers apply in the same way in all European countries. Some NCA’s granted a waiver to not clear trades closed with UK pension funds. In other countries this decision is still under discussion.

**4. Governance, finance and resources**

To best promote and protect EU interests, the ESAs should have greater autonomy from National Competent Authorities (NCAs).

* The ESAs play a major role in the current European supervisory scheme. In a very short time since their creation, these authorities have carried out a great amount of technical work and their duties are likely to be increased in the following years. This makes it necessary to ensure that these authorities count with the necessary resources to develop their functions.
* Where activities are moved from NCAs to the ESAs, their related budgets should move to the ESAs as well and should not lead to an overall increase of charges to the industry.
* Until now, the ESAs have proven to be very efficient in managing their budget. We think that with a higher budget, the ESAs will be able to speed up certain tasks that are being delayed, such as the approval of the equivalence process with third countries for prudential purposes (which is the case of EBA). Particularly, the delay in the approval of the equivalence process is increasing capital requirements for banks and can ultimately affect the capacity of banks to finance the economy.

Lack of resources at the EBA prevents regulatory developments from being published on time, and furthermore, responses to Q&As are long overdue. For example, a Q&A submitted in 2018 on P2G has been published in March 2021

Some illustrative examples of timing issues are:

* Mifid Quick Fix: Directive published in February 2021, NCA have until November 2021 to local transpose the directive and until February 2022 to make it applicable. This means a significantly relief on Mifid regulatory requirements.
* RTS 27 (included in Quick Fix) the Directive included a two years relief of the obligation related to RTS 27 reports. Given the NCA have 1 year to make the Quick Fix Directive locally applicable, the relief itself was reduced to a 1 year period. The FCA published on March 19th, 2021 the non-applicability of this requirement, in Spain we should wait to the local transposition of the regulation expected by February 22th, 2021.
* Compliance Function Guidelines: Published in 2020, not coming into force until June 2021 because of the translation into different languages.
* Non-action relief letters to review approach of US regulators to provide relief on regulatory obligations.
* EMIR – expiry of temporary exemptions extended by ESMA requesting NCA to prioritized their supervisory actions in other topics:
  + VM temporary exemption over FX Forwards & FX Swaps
  + Margin phases, changes proposed but not immediately approved
  + VM and IM exemption over Single Stock Equity Options and Index Options

**5. Reporting Requirement & data collection:**

* In the EU divergent practices still coexist regarding the collection and publication of data to the detriment of their comparability and their reliability. Reporting twice (or more) the same data to different authorities is a time consuming task and represents an inconvenience for both firms and supervisors. An alignment of reporting practices is always desirable.

**6. Emergency situations and response to COVID-19 Crisis**

* We welcome the measures put forward by the regulatory authorities. The EBA also provided operational relief to financial institutions by postponing the 2020 stress test, and recommending authorities to use the flexibility embedded in regulation. It has also issued guidance on the treatment of public and private moratoria and other national measures.
  + This flexibility is much needed in the current environment, where the financial sector plays a key role to provide funds to the economy. Nevertheless, authorities need to continue supporting the banks while the removal of the support measures. For example, banks need a clear timeframe for the replenishment of the buffers or other measures to deal with NPLs to surge after the removal of moratoria.

**7. Role of the ESAS with regard to third countries:**

**Third- Country Equivalence**

* The 2019 ESAs review text mentions that they should play a more significant role in the third country equivalence process (which we support), but gives no further details on their powers.
* The methodology currently used to assess equivalence is too rigid and narrow. For example, equivalence is frequently determined on an almost article by article comparison of different countries’ regimes. Equivalence decisions should be based on compliance with international standards and peer reviews by standard setting bodies, favouring regulatory dialogue and international supervisory cooperation.
* A country that has been rejected in the past should be reassessed as soon as the country has formally adopted the relevant provisions in order to maintain the right incentives and to avoid a too long process.
* To achieve equivalence decisions in a more timely and predictable manner, it is essential that the EBA is granted more resources. In addition to that, the EBA functions should be clarified and distinguished from those of the Commission, as the current framework is not completely clear.

**Impact in third countries**

* In our view, in general terms regulations published by the ESAs do not consider their impact on third countries, so they create uncertainty and additional costs for EU headquartered financial cross-border groups. The impact on the local third country financial system through EU banks’ subsidiaries (in many cases, local systemic institutions) is not assessed nor taken into consideration.
* If the third country is Basel compliant, that should be taken into account instead of trying to impose the CRR.

Some illustrative examples are:

* 1. Significant EBA guidelines, such as the Moratoria Guidelines, do not take into account the situation of third countries, affecting millions of clients sometimes of less developed countries.
  2. The SMEs supporting factor contemplated in the CRR is designed under a EU approach, not considering the features of third countries’ SMEs. The ESAs should help make an appropriate interpretation of the CRR for these cases.
  3. The New Definition of Default EBA guideline introduces thresholds in Euros or not calibrated for higher interest rates countries.
  4. The EU ESG principles are not applicable to third countries, in particular those related to Social and Governance.
  5. We would welcome the EBA to point out that EU groups under the Multiple Point of Entry (MPE) resolution strategy face several difficulties in this regard. For example the LCR ratio is required on a consolidated basis, not considering the decentralization of liquidity management of MPE banks.
  6. The EBA should help improve the treatment of minority interest in third countries’ subsidiaries, as it is another example of the unintended impacts of the rules on the capital allocation and capital use of banks, which differs in MPE and Single Point of Entry (SPE) groups.
  7. The fact that the current interpretation of the CRR does not allow banks to compute at group level certain asset classes (hybrids) issued at local capital markets does not incentivise the development of those markets, as banks are not willing to issue.
  8. The ESAs should issue a different and specific set of rules for third countries (guidances, Q&As, etc.).
* The ESAs should be more actively involved in international fora and spend more resources on establishing strong dialogues and continuous engagement with third countries’ authorities. This could be strengthened by establishing Memoranda of Understanding that could formalise basic bilateral relations such as exchanges of information.

**8. National implementing measures (outsourcing)**

**Tackling gold-plating is of crucial importance**. Activities should be regulated and supervised consistently across all Member States. We advocate promoting the homogeneous application of European laws at Member States’ level, avoiding national approaches that hamper the level playing field across the European Union.

* **Transparent transposition process of the EU rules is crucial** . The ESAs could work in this regard. The ESAs mandate is to contribute to developing the Single Rulebook, sove cross-border problems and promote supervisory convergence. The ESAS should have a prominent role in harmonising the supervisory criteria on issues related to practical implementation of the regulations. Currently the Guidelines, Opinions and Q&As have differing degrees of practical effect in the Member States
* **Regarding Guidelines specificall**y, the ESAs should bear in mind that regulating in excessive detail might actually hamper harmonisation of EU Law, for in many cases guidelines refer to directives which Member States have transposed in different ways in order to accommodate their legal/corporate structures, and thus need to be broad enough to allow for their implementation by all competent authorities in different Member States. - Their practical effect must be harmonized across Europe, and its nature clarified, as they have become a sort of “soft regulation”.
* NCAs regulation should not overpass the EU legislation. One of the examples is the outsourcing authorization procedure. Even if the majority of countries have adopted the EBA guidelines there are still some legacy rules at national level, like in Spain, which are sometimes very similar to the European ones.
* For example, in Spain outsourcing rules are stricter. While the guidelines require to ‘adequately inform competent authorities in a timely manner’ regarding the planned outsourcing of critical services, the obligation established in Rule 43 of Circular 2/2016 of Bank of Spain is that entities ‘formally inform beforehand, with a minimum period of one month, any planned outsourcing of critical services’. This results in a de facto approval procedure that brings to a halt any outsourcing process until the conformity (as a 'non-opposition') of the supervisor is received. We believe that this creates an unlevel playing field for Spanish banks requiring therefore the need to adapt national legislation (i.e.: RD 84/2015 and Circular Bde 2/2016) to European rules (EBA/GL/2019/02).

9. Digital finance

* Supervisory convergence is essential to enable the digital transformation of financial services across the EU, promoting a true Single Market in digital financial services and enabling innovative business models to scale.
* We do believe that there is room for improvement in how supervisory convergence is achieved in the EU. The Commission 2020 digital finance strategy is therefore a welcomed and significant step towards greater supervisory convergence, such as the proposals for standard rules on crypto-assets (MiCA and DLT pilot regime) and digital operational resilience (DORA).
* The success of these oversight frameworks, for example those that DORA or MiCA aim to establish, rely on the capacity of the ESAs to provide clear guidance and push NCAs in order to achieve supervisory convergence.
* Under DORA’s proposed Critical Third-party Oversight Framework, the ESAs should ensure that NCAs execute the follow up on the Lead Overseer’s recommendations in a coherent and convergent way, to prevent fragmentation due to a disparity of interpretations of the same recommendation across the EU.
* Another area where supervisory convergence needs to be improved refers to the procedures to begin operations in different countries:
  + Supervisory authorities in different countries often follow divergent practices as regards authorisation and licensing. On the one hand, businesses willing to operate in several jurisdictions often find language barriers and different or rigid formats and communications methods.
  + Financial service providers often find difficulties in exercising passporting rights, especially without a physical establishment. In most EU member states, authorities require compliance with local prudential or AML/CFT rules, although as a passported entity the applicable framework is the one from the home Member State. As a result, the cost of having to comply with local rules (e.g. need to hire local law firms or ad-hoc compliance studies when rules are not adequately harmonized), in addition to the aforementioned language barriers, can make the scale up to other jurisdictions unaffordable or unattractive for the providers.
* Also, we wish to note that across the EU banks and non-banks often face different intensity of supervision even when performing the same activities, and differences across Member States are also evident. While the supervisory regime for larger banks operates at an EU level with the European Central Bank as single supervisor, other institutions such as payments and e-money institutions are licensed and supervised nationally. The nationally licensed and supervised institutions can offer their services in other Member States through the EU passporting system. Absent adequate harmonization and convergence in the supervision of these activities, supervisory fragmentation or even competition might appear, and more stringent de-facto requirements are applied on banks as a result.
  + As the importance of non-bank providers of financial services grows, it is essential to ensure an equally effective monitoring of compliance with relevant rules for all players, to adequately prevent AML/CFT, market integrity or consumer protection risks. The ESAs should revamp their efforts to ensure an adequate coordination between relevant supervisory authorities, as well as harmonize requirements to minimize divergent interpretations.
  + In the area of consumer lending, we believe this higher harmonization requires the establishment of a common framework that guarantees minimum requirements being applied to all credit providers across the EU.

10. Sustainable issues

* We consider essential that there be coordination between the ESAS and the rest of the European authorities on sustainable finance issues, especially in reporting and disclosing practices.
* The alignment of reporting and disclosing practices would be highly desirable at the EU but also outside the EU. We consider sustainable reporting and disclosing sustainable finance is maturing from an open topic based on market practices (ICMA, Climate Bonds Initiative, LMA,...) and private initiatives (SASB, WEF-IBC, TCFD,...) towards being embedded into the regulatory framework (EU taxonomy, NFRD, Pillar 3 disclosures on ESG risk). Ensuring an adequate interaction between market and regulatory initiatives is a must. Data quality needs to be significantly improved, and this takes time. In this sense, we remind that the information needs not only to be available, comparable but also standardized and assured to ensure its reliability and usefulness. The real opportunity is to launch an international standards setting process in order to report and disclose to stakeholders and supervisors on sustainability performance.