EUROPEAN COMMISSION

DIRECTORATE-GENERAL FOR FINANCIAL STABILITY, FINANCIAL SERVICES AND CAPITAL MARKETS UNION

# CONSULTATION DOCUMENT

**TARGETED CONSULTATION**

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

Taking stock of the framework for supervising European capital markets, banks, insurers and pension funds

**Disclaimer**

This document is a working document of the Commission services for consultation and does not prejudge the final decision that the Commission may take.

The views reflected on this consultation paper provide an indication on the approach the Commission services may take but do not constitute a final policy position or a formal proposal by the European Commission.

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You are invited to reply **by 21 May 2021** at the latest to the **online questionnaire**

available on the following webpage: <https://ec.europa.eu/info/publications/finance-consultations-2021-esas-review_en>

Please note that in order to ensure a fair and transparent consultation process **only responses received through the online questionnaire will be taken into account and included in the report summarising the responses**.

This consultation follows the normal rules of the European Commission for public consultations. Responses will be published unless respondents indicate otherwise in the online questionnaire.

Responses authorised for publication will be published on the following webpage: <https://ec.europa.eu/info/publications/finance-consultations-2021-esas-review_en>

**INTRODUCTION**

There has been considerable progress on both supervisory convergence and the single rulebook since the three [European Supervisory Authorities (ESAs)s](https://ec.europa.eu/info/business-economy-euro/banking-and-finance/financial-supervision-and-risk-management/european-system-financial-supervision_en) were created in 2011. Nevertheless, both require continued and appropriately targeted efforts to make further progress. In this context, the Commission’s capital markets union (CMU)1 action plan published on 24 September 2020 includes the following action:

[**CMU action plan**](https://ec.europa.eu/info/business-economy-euro/growth-and-investment/capital-markets-union/capital-markets-union-2020-action-plan_en) - Action 16: *The Commission will work towards an enhanced single rulebook for capital markets by assessing the need for further harmonisation of EU rules and monitoring progress towards supervisory convergence. It will take stock of what has been achieved in Q4 2021 and consider proposing measures for stronger supervisory coordination or direct supervision by the European Supervisory Authorities.*

*The Commission will also carefully assess the implications of the Wirecard case for the regulation and supervision of EU capital markets and act to address any shortcomings that are identified in the EU legal framework.*

The [CMU](https://ec.europa.eu/info/business-economy-euro/growth-and-investment/capital-markets-union_en) is the EU's plan to create a truly single market for capital across the EU. It

aims to get investment and savings flowing to the companies and projects that need them across all Member States, benefitting citizens, investors and companies, regardless of where they are located. The CMU provides new sources of funding for businesses, helps increase options for savers and makes the economy more resilient.

Without well-developed and integrated capital markets, there can be no economic prosperity. And without supervision, capital markets could not contribute to economic prosperity. Supervision is an essential condition for a well-functioning CMU. This will be particularly relevant in a post-Brexit world with multiple financial centres across the EU. Gradual progress towards more integrated capital markets supervision will be indispensable.

It is essential for people and firms to have confidence in the financial system and also for the providers of financial services to operate in a stable and fair environment. Supervision should ensure that divergences in outcomes of supervisory practices in Member States do not undermine confidence, stability, investor protection and fairness in the Single Market. The three European Supervisory Authorities (ESAs) are mandated to ensure the convergence of supervisory practices among the national competent authorities2. In addition, the [European Securities Markets Authority](https://www.esma.europa.eu/), is responsible for direct supervision of some market activities and market operators. However, supervisory convergence reaches its limits where the national rules that supervisors have to apply and enforce differ between Member States or where the common European rules leave room for interpretation or too much discretion to Member States for its transposition, application and enforcement. The ambition for a European single rulebook therefore seeks to reduce differences between national laws and to provide more detailed rules where it is important for stability and fairness in the single market. Taken together,

1 The EP adopted an own initiative report on further development of the CMU on 8 October and the Council adopted its conclusions on the Commission’s CMU AP on 3 December 2020.

2 Within the [banking union,](https://ec.europa.eu/info/business-economy-euro/banking-and-finance/banking-union_en) the [single supervisory mechanism](https://ec.europa.eu/info/business-economy-euro/banking-and-finance/banking-union/single-supervisory-mechanism_en) ensures uniform supervision of banks. For banking resolution, the [single resolution board](https://ec.europa.eu/info/business-economy-euro/banking-and-finance/banking-union/single-resolution-mechanism_en) is directly responsible for resolution planning and decisions for all significant banks and cross-border ones.

supervisory convergence and the single rulebook provide the framework for effective and efficient supervision.

The input to this consultation, which seeks to take stock of what has been achieved so far, will feed into the preparation of the report required by the CMU action plan which will cover the review3 required under the ESAs founding Regulations as well. This consultation seeks targeted views on certain aspects related to the 2019 ESAs review4 and contributes to a wider debate on supervisory convergence and the single rulebook.

Please note that not all questions are relevant for all stakeholders and that you are not expected to reply to each question. Please indicate the ESA for which the reply is intended.

3 Article 81 of the [ESAs founding Regulations](https://ec.europa.eu/info/business-economy-euro/banking-and-finance/financial-supervision-and-risk-management/european-system-financial-supervision_en#legislation) requires the Commission to review the functioning of the ESAs every 3 years, and next time by end 2021.

4 The ESAs founding Regulations were amended in 2019. These recent legislative changes entered into force in January 2020 ([Regulation (EU) 2019/2175, which reviews the powers, governance and funding](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32019R2175) [of the ESAs.](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32019R2175))

* [EBA Regulation consolidated version 01/01/2020](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02010R1093-20200101)
* [EIOPA Regulation consolidated version 01/01/2020](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02010R1094-20200101)
* [ESMA Regulation consolidated version 01/01/2020](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02010R1095-20200101)

**CONSULTATION QUESTIONS**

1. **QUESTIONS FOR THE ASSESSMENT OF THE EUROPEAN SUPERVISORY AUTHORITIES (ESAS) AND THE RECENT CHANGES IN THEIR FOUNDING REGULATIONS.**
2. How do you assess the impact of each ESA’s activities on the aspects below? Please rate the ESAs impact on each aspect from 1 to 5, 1 standing for "less significant impact” and 5 for "most significant impact”:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  | 1 | 2 | 3 | 4 | 5 | No opinion |
| The financial system as a whole |  |  |  | X |  |  |
| Financial stability |  |  |  |  | X |  |
| The functioning of the internal market |  |  |  | X |  |  |
| The quality and consistency of supervision |  |  |  | X |  |  |
| The enforcement of EU rules on supervision |  |  |  | X |  |  |
| Strengthening international supervisory coordination |  |  |  | X |  |  |
| Consumer and investor protection |  |  | X |  |  |  |
| Financial innovation |  |  | X |  |  |  |
| Sustainable finance |  |  |  | X |  |  |

Please explain your answer

Concerning Statement 7: The mandate of the ESAs to perform their tasks related to consumer protection is limited for good reasons. This topic should not be in the focus of their supervisory activities as consumer protection falls under the primary responsibility of the Member State’s consumer protection authorities.

1. In your view, do the ESA(s)’ mandate(s) cover all necessary tasks and powers to contribute to the stability and to the well-functioning of the financial system? If you think that there are elements which should be added or removed from the mandate, please provide a substantiated answer.
   * YES
   * NO

No elements should be added to the ESAs’ mandates as they already contain all necessary tasks and powers to contribute to the stability and to the well-functioning of the financial system.

Concerning the ESAs’ mandates to implement technical standards (level 2), a huge number of such – partially far-reaching – mandates already exist in the comprehensive legal banking supervisory framework. One example for this overload follows for illustration purposes: The RRM-package of 2019 alone provides around 100 (!) new mandates under CRR II/CRD IV/BRRD II for the EBA. When exercising a mandate via technical standards (level 2) or guidelines (level 3), it’s of utmost importance that the ESAs do not exceed their legal power which is based on the relevant level I texts. An exceedance of the conceded legal power would constitute an infringement of Union law.

1. In your view, do the ESAs face any obstacles in delivering on their mandates? If the answer is yes, please explain what you consider to be the main obstacles.
   * YES
   * NO

# The supervisory convergence tasks of the ESAs

* 1. Common supervisory culture/supervisory convergence:
     1. To what extent the ESAs do contribute to promoting a common supervisory culture and consistent supervisory practices? Please rate in a scale from 1 to 5 (“5” being the most significant contribution and “1” the less significant contribution). Please explain your answer and indicate if there are any areas for improvement.

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  | 1 | 2 | 3 | 4 | 5 | No opinion |
| Promote a common supervisory culture and  consistent supervisory practices |  |  |  |  | X |  |

* + 1. To what extent the following tasks undertaken by the ESA(s) have effectively contributed to building a common supervisory culture and consistent supervisory practices in the EU. Please rate each task from 1 to 5, 1 standing for "less significant contribution" and 5 for "most significant contribution”:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  | 1 | 2 | 3 | 4 | 5 | No opinion |
| Providing opinions to competent authorities |  |  |  | X |  |  |
| Promoting bilateral and multilateral exchanges of information between competent authorities |  |  |  | X |  |  |
| Contributing to developing high quality and  uniform supervisory standards |  |  |  |  | X |  |
| Contributing to developing high quality and  uniform reporting standards |  |  |  | X |  |  |
| Developing and reviewing the application of  technical standards |  |  |  | X |  |  |
| Contributing to the development of sectoral legislation by providing advice to the  Commission |  |  |  | X |  |  |
| Establishing (cross)sectoral training  programmes |  |  |  |  |  | X |
| Producing reports relating to their field of  activities |  | X |  |  |  |  |
| Conducting peer reviews between competent  authorities |  |  |  |  |  | X |
| Determining new Union strategic  supervisory priorities |  |  |  | X |  |  |
| Establishing coordination groups |  |  |  |  |  | X |
| Developing Union supervisory handbooks |  |  |  |  |  | X |
| Monitoring and assessing environmental,  social and governance-related risks |  |  |  |  | X |  |
| Adopting measures using emergency powers |  |  |  | X |  |  |
| Investigating breaches of Union law |  |  |  | X |  |  |
| Coordinating actions of competent authorities  in emergency situations (e.g. Covid-19 crisis) |  |  |  |  | X |  |
| Mediating between competent authorities |  |  |  |  |  | X |
| Monitoring the work of supervisory and  resolution colleges |  |  |  |  |  | X |
| Publishing on their website information  relating to their field of activities |  |  |  | X |  |  |
| Monitoring market developments |  |  |  | X |  |  |
| (Only for the EBA) Monitoring liquidity risks  in financial institutions |  |  |  | X |  |  |
| (Only the EBA) Monitoring of own funds and eligible liabilities instruments issued by  institutions |  |  |  | X |  |  |
| Initiating and coordinating Union-wide stress  tests of financial institutions |  |  |  |  | X |  |
| Developing guidelines and recommendations |  |  |  | X |  |  |
| Developing Q&As |  |  | X |  |  |  |
| Contributing to the establishment of a  common Union financial data strategy |  |  |  |  |  | X |
| Providing supervisory statements |  |  |  | X |  |  |
| Other instruments and tools to promote  supervisory convergence, please indicate |  |  |  |  |  | X |

Please add any qualitative comments you may wish to explain your reasoning.

Concerns about ESAs overstepping their mandates:

* There is an impression, that in some cases the EBA oversteps its mandate (see Loan origination GLs and the introduction of ESG-factors within the creditworthiness assessments)
* More coordination between ECB and EBA would improve supervisory convergence and consistency for market participants – this would lower costs (for financial institutions and supervisory authorities) and avoid unnecessary overlaps of requirements

We would also like to raise the following concerns:

**Product oversight and governance arrangements for retail banking products (POG):** Those guidelines are based on Art 16 [Regulation (EU) 1093/2010 (EBA)]. Authorities are active in the area of retail banking without prior mandate resulting, for instance, from a directive. However, the guidelines on POG regulate the life circle of retail banking products in greatest detail. Above all, these EBA draft guidelines do not seem entirely convincing in view of the principle of proportionality. Retail banking products of rather low complexity such as savings deposits, payment accounts, payment services or payment instruments which predominantly cover basic needs have been regulated in great detail and in a uniform manner. The POG guidelines do not consider the mainly low level of complexity of retail banking products.

See Court of Justice of the European Union PRESS RELEASE No 64/21: “The Advocate General proposes that the Court should find that the Guidelines on product oversight and governance arrangements for retail banking products should be declared invalid in so far as the EBA has acted outside the powers bestowed upon it by Regulation No 1093/2010“

**Cross-selling:** Another example for excessive activity, in this case from the ESAs, are the guidelines on cross-selling. The ESAs have to comply with the third sub-paragraph of Article 24 (11) of MiFID II which requires ESMA, in cooperation with the EBA and EIOPA, to develop guidelines for the assessment and the supervision of cross-selling practices. However, this requirement has not yet been included by EU institutions in legislation referring to cross-selling such as the ‘Directive on credit agreements for consumers relating to residential immovable property’ or the ‘Payment Accouns Directive’ (PAD). It is questionable whether the ‘stretching’ of the investment product regulation to all retail bankng products is appropriate and whether the guidelines do not go beyond the prerogatives allocated by the EU institutions in MiFID II. The guidelines aim at establishing a coherent and effective approach in supervising firms that offer cross-selling options so as to enhance protection of EU customers. It seems problematic, that the guidelines seem to introduce a kind of individual suitability assessment on the adequacy of components of bundle products which does not consider the principle of proportionality. Fact is that European Parliament, Council and Commission had discussed and rejected such a suitability assessment as not being appropriate for products such as mortgage and consumer credits. However, the argument used by the European legislator is even truer for payment accounts and any other payment services which are considered to be a fundamental prerequisite for financial inclusion, and whose offer is mandatory according to Directive 92/2014. The guidelines go beyond what has been agreed at “level 1”. Therefore, it is questionable whether such a ‘stretching’ of the investment product regulation to all retail banking products is appropriate.

**Deposit Guarantee Scheme Directive (DGSD):** The EBA Guidelines for Cooperation Agreements are not backed by a DGSD mandate. Instead, the DGSD explicitly states that the EBA may issue opinions and may be referred to if there is a dispute between designated authorities or DGSs about the interpretation of an agreement. There is good reasoning for the level 1 text to restrict the EBA in its level of involvement: since the DGSs can neither influence the content nor the contractual parties of the agreement, there is no factual basis for the EBA to establish an obligation to enter into the multilateral framework (MFA).

* + 1. One of the roles of the ESAs is to promote and facilitate the functioning of supervisory colleges, where established by sector legislation, and foster the consistency of the application of Union law among them. Please rate the ESAs’ contribution to the objectives below from 1 to 5, 1 standing for "less significant contribution" and 5 for "most significant contribution”. Please explain your reasoning.

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  | 1 | 2 | 3 | 4 | 5 | No opinion |
| Promote the effective and efficient  functioning of colleges of supervisors |  |  |  |  |  | X |
| Foster consistency in the application of  Union law among colleges |  |  |  |  |  | X |
| Promote converging supervisory practices  among colleges. |  |  |  |  |  | X |

* + 1. In the framework of the 2019 ESAs review. How do you assess the new process for questions and answers (Article 16b)?

We support the aim of supervisory convergence via ESA Q&As in the Union, but we would like to share some points we believe impede this goal and require action in the upcoming review:

* ESAs should not cover legal fields in their Q&As that are not in their scope according to the respective Regulation. For example, the EBA should refrain from addressing civil or corporate law issues in Q&As. It should focus on banking regulation as intended by the legislator. It needs to be ensured that ESAs do not overstep their mandates and Q&As comply with the provisions of the Level 1 texts on which they are based. Furthermore, it is crucial to have legal certainty and to avoid that Level 1 legislation is „corrected” or „add-ons” are created. On top of that, the Authority shall issue an opinion to the Commission if a majority of the relevant ESA Stakeholder Group considered that the ESAs have exceeded their competences when issuing Q&As. In such a case, the Commission shall assess the scope of the Q&As and may require the relevant ESA to withdraw the relevant Q&As.
* We advocate for an appropriate consultation process as Q&As are directly addressed to institutions. The increasing importance of supervisory convergence and growing impact of Q&As should therefore also be acknowledged through an opportunity for institutions to comment.
* Timeline and transparency - we are in favour of accelerating the Q&A process and believe quick answers are more beneficial for supervisory convergence. Regarding rejected Q&As, we advocate for more transparency and believe the access to rejected Q&As should be possible for a longer time period.
* At the same time, it would be appropriate to set a deadline where Q&A become effective. Sufficient time after publication is important as technical arrangements are necessary before the Q&A becomes effective, as this takes time and resources. We believe that 3-month time period after publication would be appropriate and ensure enough time for consideration and a smooth integration.

In general, the adapted Q&A process pursuant to Article 16b EBA-Regulation can be seen as an improvement in comparison to the procedure in the past. In particular, we welcome the clarification in Article 16(2) EBA-Regulation according to which the answers by the authority in the course of the Q&A process shall be non-binding.

* + 1. In your view, does the new process for questions and answers allow for an efficient process for answering questions and for promoting supervisory convergence?
       - YES Please identify areas for improvement, please explain
       - NO

Please give reasons.

In (too) many cases it takes too long until the final answer is published (e.g. more than one year in some cases). Hence, there’s definitely room for improvement.

* 1. No action letters
     1. In the framework of the 2019 ESAs review. In your view, is the new mechanism of no action letters (Article 9a of the ESMA/EIOPA Regulations and Article 9c EBA Regulation) fit for its intended purpose? Please justify your answer.
        + YES
        + NO

No action letters have just been implemented in the ESAs’ legal framework which is applicable since 1 January 2020. At present, there’s not enough experience to issue an opinion on that.

* + 1. In the framework of the 2019 ESAs review. How does the new mechanism, in your view, compare with “no action letters” in other jurisdictions?
    2. In the framework of the 2019 ESAs review. Could you provide examples where the use of no action letters would have been useful or could be useful in the future?

EU Taxonomy Regulation: banks were requested to disclose their ESG strategy, although the development of L2-texts for the Disclosure Regulation is delayed. In every area where the application deadlines have been set by L1 texts ambitiously and subsequently, it turns out that the development of L2-tests needs more time then foreseen at L1. No action letters would provide market participants with the necessary and needed legal certainty.

* 1. Peer reviews
     1. Please specify to what extent peer reviews organised by the ESAs have contributed to the convergence outcomes listed below.

According to Article 30 EBA-Regulation the authority shall periodically conduct peer reviews of some or all of the activities of competent authorities, to further strengthen consistency and effectiveness in supervisory outcomes. Hence, this question is mainly addressed to the NCAs.

Please distinguish between the situation before the 2019 review and afterwards. Please rate each outcome from 1 to 5, 1 standing for "less significant contribution” and 5 for "most significant contribution”:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Situation before the 2019 ESAs review** | 1 | 2 | 3 | 4 | 5 | No opinion |
| Convergence in the application of Union law |  |  |  |  |  |  |
| Convergence in supervisory practices |  |  |  |  |  |  |
| More wide spread application of best  practices developed by other competent authorities |  |  |  |  |  |  |
| Convergence in the enforcement of  provisions adopted in the implementation of Union law |  |  |  |  |  |  |
| Further harmonization of Union rules |  |  |  |  |  |  |
| Other, please indicate |  |  |  |  |  |  |

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Situation after the 2019 ESAs review** | 1 | 2 | 3 | 4 | 5 | No opinion |
| Convergence in the application of Union law |  |  |  |  |  |  |
| Convergence in supervisory practices |  |  |  |  |  |  |
| More wide spread application of best practices developed by other competent  authorities |  |  |  |  |  |  |
| Convergence in the enforcement of provisions adopted in the implementation of  Union law |  |  |  |  |  |  |
| Further harmonization of Union rules |  |  |  |  |  |  |
| Other, please indicate |  |  |  |  |  |  |

Please explain your reasoning/give examples.

* + 1. How do you assess the impact of each of the changes below introduced by 2019 ESAs review in the peer review process? Please rate each change from 1 to 5, 1 standing for "less effective” and 5 for "most effective”

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  | 1 | 2 | 3 | 4 | 5 | No opinion |
| Ad-hoc Peer Review Committees (PRC) composed of ESAs’ and NCAs’ staff and chaired by the ESA are responsible for  preparing peer review reports and follow-ups. |  |  |  |  |  |  |
| The peer review report is now adopted by written procedure on non-objection basis by the Board of Supervisors. |  |  |  |  |  |  |
| Transparency provisions: if the PRC main findings differ from those published in the report, dissenting views should be transmitted  to the three European Institutions. |  |  |  |  |  |  |
| PRC findings may result in recommendations to NCAs under Article 16 of the ESAs Regulations that are now distinguished from guidelines, addressed to all NCAs. The use of this type of individual recommendations entails the application of the “comply or  explain” mechanism and allows a close follow-up. |  |  |  |  |  |  |
| Mandatory follow-up to peer reviews within two years after the adoption of the peer  review report. |  |  |  |  |  |  |
| The possibility to carry out additional peer reviews in case of urgency or unforeseen events (fast track peer reviews). |  |  |  |  |  |  |
| The Management Board is consulted in order to maintain consistency with other peer reviews reports and to ensure a level playing  field. |  |  |  |  |  |  |

Please explain your reasoning

* + 1. Do you think mandatory recurring peer reviews, covering also enforcement aspects, could be introduced in some sectoral legislation? If the answer is yes, please specify the piece of legislation and concrete provision under which mandatory peer reviews could be introduced.
       - YES
       - NO
    2. Are there improvements that could be made to the peer review process? Please specify which ones.
       - YES
       - NO
  1. Other tasks and powers
     1. In your view, is the collection of information regime (Art 35 ESAs Regulations) effective? If you identify areas for improvement, please explain.
        + YES
        + NO

Pursuant to Article 35 EBA-Regulation at the request of the authority the NCAs shall provide EBA with all the necessary information to carry out the duties assigned to it by the EBA-Regulation, provided that they have legal access to the relevant information and that the request for information is necessary in relation to the nature of the duty in question.

So this question is mainly addressed to the NCAs.

* + 1. In the framework of the 2019 ESAs review, in you view, are the new Union strategic supervisory priorities an effective tool to ensure more focused convergence priorities and more coherent coordination (Article 29a ESAs Regulations)? If you identify any areas for improvement, please explain.
       - YES
       - NO

The publication of the Union strategic supervisory priorities (at least every three years) has just been implemented in the ESAs’ legal framework in 2019 applicable from 1 January 2020. At present, there’s still not enough experience to issue an opinion on that.

* + 1. Do you think there is the need to amend or add a tool to the toolkit of the ESAs for achieving supervisory convergence? If yes, which ones.
       - YES
       - NO

The new supervisory tools and powers are just applicable since 1 January 2020. It’s too early to issue a final opinion on that. It’s wise to wait for more practical experience on the new toolkit before hastily amending it.

* + 1. Please assess in a scale from 1 to 5 the significance of the new ESAs’ task of fostering and monitoring the supervisory independence of national competent authorities (“5” being the highest rate and “1” the lowest rate). Please explain.

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  | 1 | 2 | 3 | 4 | 5 | No opinion |
| fostering and monitoring supervisory  independence |  |  |  |  |  |  |

* + 1. What criteria would be the most relevant, in you view, for the ESAs to perform effectively their new task of fostering and monitoring supervisory independence of national competent authorities? Please rate the relevance of each criteria in a scale from 1 to 5 (“5” being the most relevant criteria rate and “1” less relevant criteria).

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  | 1 | 2 | 3 | 4 | 5 | No opinion |
| operational independence |  |  |  | X |  |  |
| financial independence |  | X |  |  |  |  |
| appointment and dismissal of governing body |  |  | X |  |  |  |
| accountability and transparency |  | X |  |  |  |  |
| adequacy of powers and ability to apply them |  |  |  | X |  |  |
| other, please specify |  |  |  |  |  | X |

* + 1. What are, in your view, the main remaining obstacle(s) to allow for a more effective supervisory convergence?

A more effective supervisory convergence needs a further enhancement of the coordination among all supervisory authorities in the Union in order to avoid unnecessary duplication of supervisory authorities’ activities. Overlaps in work with other authorities, particularly EBA with the ECB, should be avoided. Regarding ESMA, well-functioning national (approval) procedures should remain on national level. Know-how and staff in competent national authorities should be utilized as it would minimalize administrative burden and costs.

The transparency of the EBA decisions such as in the binding mediation (between resolution authorities) should be adapted to the needs of market participants, i.e. increased transparency of the information shared and consulted with the institutions (being subject to the resolution plan) to the best extent possible. In this context we see room for improvement regarding the following points:

* Clear and uniform rules for the identification of impediments to resolvability should be worked-out by the EBA. Currently, the respective decisions are left strongly to the discretion of the respective resolution authority (SRB and local ones) and are not always comprehensibly understandable for the affected institutions.
* Uniform EU-wide systems & rules for identifying the impediments to resolvability should be created in order to ensure a level playing field.
* Criteria need to be specified to determine when an impediment to resolution exactly exists and a clear justification consistently across jurisdictions and countries must be provided.
* The resolution plan should be made fully accessible to the institutions in scope of the resolution plan. The fact that the institutions concerned are not given a detailed insight is a significant disadvantage, as they have no way of checking the accuracy of the data contained therein. This would also lead to an improvement in the content of the resolution plans.
* In general, it would make sense to strengthen the EBA vis-à-vis resolution authorities such as the SRB in order to ensure external control, so that all decisions of the resolution authorities (SRB and local ones) can be reviewed by EBA and, if necessary, amended.
  + 1. Do you consider that the ESAs ensure that enough information on their activities and on financial institutions is available? If not, what changes should be made in this area?
       - YES
       - NO

The extent of information provided by the ESAs to the credit institutions seems appropriate and sufficient. However, all legal texts should contain guidance on how the principle of proportionality should be applied by competent authorities.

* + 1. Do you consider that the purpose and outcome of inquiries under Article 22.4 is clear? If the answer is no, please indicate what role such inquiries should play.
       - YES
       - NO
    2. In your view, is there the need to add any tools or tasks in order to enhance supervisory convergence towards digital finance? If your answer is yes, please explain.
       - YES
       - NO
    3. Please assess the effectiveness of supervisory convergence tools developed by the ESAs (e.g. common supervisory actions, real case discussions, etc.) for achieving supervisory convergence:

4 – rather effective

* 1. Breach of Union law and dispute settlement
     1. Do you think that the ESAs’ powers in relation to breaches of Union law (Article 17 ESAs’ Regulations) and binding mediation (Article 19 ESAs’ Regulations) are effective? Please explain your answer.
        + YES
        + NO

The comprehensive changes of Article 17 and 19 are just applicable since 1 January 2020. It seems too early to issue a final opinion on their effectiveness. The European legislator would be well-advised to wait for more practical experience instead of amending both Articles (again).

* + 1. Do you think that the use of the breach of Union law procedure by the ESAs is adequate? Please consider both before and after the 2019 ESAs’ review and explain your answer.

Before 2019 ESAs’ review

* + - * YES
      * NO

After 2019 ESAs’ review

* + - * YES
      * NO
    1. Should there be other instruments available to the ESAs to address instances of non-application or incorrect application of Union law amounting to a breach ex-post? If the answer is yes, what would be those instruments?
       - YES

X NO

* + 1. Do you think that the new written non-objection procedure by the BoS and the new independent panels for the decisions on breaches of Union law and dispute settlements introduced in the 2019 ESAs’ review have improved these decision making processes? Please explain your answer.
       - YES
       - NO
    2. Do you think that the ESAs have always acted, where needed, under Article 17 and Article 19 of the ESAs’ Regulations? If the answer is no, please give concrete examples where you consider that the ESAs should have taken relevant action under these Articles.
       - YES
       - NO
    3. Could you provide concrete examples where the introduction of further binding mediation provisions in sectoral legislation would be useful?
    4. Why do you think the use of these ESAs’ powers has been limited? Please explain how these processes could be improved.
  1. Emergency situations and response to COVID-19 crisis
     1. Please rate the impact of the ESAs’ response in the context of the COVID-19 crisis from 1 to 5, 1 standing for "less significant impact” and 5 for "very significant impact”. Please explain your answer.

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  | 1 | 2 | 3 | 4 | 5 | No opinion |
| ESAs’ response to the Covid-19 crisis |  |  |  | X |  |  |

* + 1. Please rate in a scale from 1 to 5, the effectiveness of the ESAs’ follow-up actions on the European Systemic Risk Board (ESRB) recommendations below in the context of the COVID-19 crisis. Please explain.

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  | 1 | 2 | 3 | 4 | 5 | No |
|  |  |  |  |  |  | opinion |
| Market illiquidity and implications for asset  managers and insurers |  |  |  | X |  |  |
| Impact of large scale downgrades of corporate bonds on markets and entities  across the financial system |  |  |  |  |  | X |
| System-wide restraints on dividend  payments, share buybacks and other pay-outs |  |  | X |  |  |  |
| Liquidity risks arising from margin calls |  |  |  |  |  | X |

* + 1. Do you think the coordinating activities carried out by the ESAs have successfully contributed to address the challenges posed by the COVID-19 crisis? If the answer is yes, please explain. If the answer is no, please give examples.
       - YES
       - NO

For example, the EBA guidelines on the pragmatic 2020 SREP and on payment moratoria constituted a prudent release and support for the institutions to combat the crisis.

* + 1. Do you think that the ESAs have always acted effectively, where needed, in the context of the COVID-19 crisis? If the answer is no, please give concrete examples where you consider that the ESAs should have taken relevant action.
       - YES
       - NO

The restrictions on dividend payments should be an exceptional measure against the background of an unpredictable severe economic crisis. Hence, they should expire on 30 September 2021 at the latest. Furthermore, there are legal opinions that come to the conclusion that the undifferentiated restriction on dividend payments can even have a negative effect on the equity of banks.

The ESAs Delegated Acts under the SFDR (EU/2019/2088) were published in February 2021 though the SFDR entered into force already in March 2021. This was too late and caused legal uncertainty among financial market participants.

* + 1. Do you think Article 18.2 of the ESAs Regulation (declaration of an emergency situation) is fit for its intended purpose? Please explain your answer. If the answer is no please suggest potential changes.
       - YES
       - NO
    2. In case you identified areas for improvement in the ESAs’ powers in emergency situations, do you have any suggestions on how to address them?
  1. Coordination function (Art 31 ESAs’ Regulations)
     1. Do you think the coordination role of the ESAs is effective? If you identify areas for improvement, please explain.
        + YES
        + NO

It’s highly relevant that all supervisory authorities can exchange data that has already been reported once by an institution in order to avoid double reporting obligations for the institutions concerned. Even the EBA (in its consultation on an integrated reporting system) admits that the current decentralised way of defining the reporting requirements and collecting data at EU level is (too) complex and leads to inefficiencies in the reporting process (such as data duplications).

* + 1. Do you see a need for greater coordination between the ESAs and/or with other EU and national authorities as regards developing data requirements, data collection and data sharing? If yes, please explain your answer and indicate what changes you propose.
       - YES
       - NO

Please see our answer above on the necessary exchange of data between all supervisory authorities. We would also like to refer to the [EBA Discussion Paper](https://www.eba.europa.eu/sites/default/documents/files/document_library/Publications/Discussions/2021/Discussion%20on%20a%20Feasibility%20Study%20of%20an%20Integrated%20Reporting%20System%20under%20Article%20430c%20CRR/963863/Discussion%20Paper%20on%20integrated%20reporting.pdf) (8.1.2 Data access and data sharing on page 125) and the corresponding explanations - in  our view these adequately encompass the argumentation and meaningfulness of a cooperation model between the supervisory authorities - it is important that this also applies analogously to ESMA. Data requests regarding the insurance sector should be channelled through NCAs respecting possible sectoral differences.

* + 1. 2019 ESAs’ review. Please rate the effectiveness, in your view, of the tools below in order to fulfil the new coordination role of the ESAs facilitating the entry into the market of actors or products relying on technological innovation. (“5” being the most effective and “1” the least effective tool)

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  | 1 | 2 | 3 | 4 | 5 | No opinion |
| exchange of information and best practices |  | X |  |  |  |  |
| adopt guidelines |  |  |  | X |  |  |
| adopt recommendations |  |  |  | X |  |  |

2019 ESAs review. [specific for ESMA]. Do you think ESMA’s new coordination function (Article 31b ESMA Regulation) in relation to orders, transactions and activities that give rise to suspicions of market abuses and have cross-border implications for the integrity of financial markets or financial stability in the EU is an effective tool? If the answer is yes, please provide examples where this new function has been or could be useful. If the answer is no, please explain the reasons.

* + - * YES
      * NO
    1. 2019 ESAs review. Do you think the new coordination groups (Article 45b of the ESAs Regulations) are effective tools to coordinate competent authorities regarding specific market developments? If the answer is yes, please provide examples where the new provision could be useful. If you identify room for improvement in this new provision, please explain.
       - YES
       - NO

Based on Article 45 EBA-Regulation the Management Board may set up coordination groups on its own initiative or upon the request of a competent authority on defined topics for which there may be a need to coordinate having regard to specific market developments. Hence, this question is mainly addressed to the supervisors involved.

* + 1. In your view, does the coordination function of the ESAs, ensuring that the competent authorities effectively supervise outsourcing, delegation and risk transfer arrangements in third countries, work in a satisfactory way? Please explain your answer. If your answer is no, please indicate how the coordination function of the ESAs should be adjusted.
       - YES
       - NO
  1. Tasks related to consumer protection and financial activities.
     1. What are, in your view, the ESAs’ main achievements in the consumer and investor protection area?

Please see our answer on page 5 already: The mandate of the ESAs to perform their tasks related to consumer protection is limited for good reasons. This topic should not be in the focus of their supervisory activities as consumer protection falls under the primary responsibility of the Member State’s consumer protection authorities. Hence, legal acts that have heavily reached into the area of consumer protection (such as the EBA Guidelines on loan origination and monitoring) were heavily discussed among the affected stakeholders.

Consumer Protection Days: The “Joint ESAs Consumer Protection Day” by the “Joint Committee” is a welcomed initiative. The initiative raises awareness for consumer protection issues in the financial services area. We also appreciate that this initiative also contributes to the goal of strengthening cooperation and ensuring cross-sectoral consistency between the European Banking Authority (EBA) and European Securities and Markets Authority (ESMA). However, due to the diverging sector specific legislative environment in the insurance sector ideas and approaches to strengthen cross-sectoral cooperation in this field of consumer protection (e.g. horizontal legislative initiatives,) are not appropriate. This could be as well misinterpreted in supporting political ideas to bundle ESAs consumer protection competences in a single authority (as this was the case in the preparation phase of the EC proposal for the last ESAs-Review).

The power to warn about or even ban products in case of (potential) threats to consumers; e.g. EBA warning on virtual currencies/crypto assets

* + 1. Please assess the impact of the ESAs’ work on analysis of consumer trends, reviewing market conduct, developing indicators, contributing to level playing field, financial literacy and follow up to work in this area. Please rate the ESAs impact on each item from 1 to 5, 1 standing for "less significant impact” and 5 for "most significant impact”. Please explain:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  | 1 | 2 | 3 | 4 | 5 | No opinion |
| analysis of consumer trends |  |  | X |  |  |  |
| reviewing market conduct |  |  | X |  |  |  |
| developing indicators |  |  | X |  |  |  |
| contributing to a level playing field |  | X |  |  |  |  |
| financial literacy | X |  |  |  |  |  |
| follow up to work in this area |  | X |  |  |  |  |

* + 1. 2019 ESAs review. The ESAs can now, where sectoral legislation enables them, use their product intervention powers for practices and products that cause consumer harm and after two prolongations of six months, an automatic one-year prolongation of the prohibition is possible (Article 9.5). In your view, are these powers effective for their intended purpose? Please explain your answer.

X YES

* + - * NO
    1. Would you consider it useful if the ESAs could adopt acts of general application in cases other than those referred to in Article 9(5) of the ESAs Regulations?
       - YES Please specify which ones

X NO Please give reasons

Product intervention powers shouldn't lead to an undesired excess of power of the ESAs. ESAs remit lies in the oversight of compliance and application of Union Law. We are opposed to more legislative powers for the ESAs as long as there is no adequate voice for stakeholders (e.g. banks) which is mandatory in the legislative procedures under Union law (cf. Art. 294 TFEU).

ESAs rather shall set measures in order to steer against adverse developments (within their scope as foreseen in Art 1.2) that jeopardise the financial markets.

* + 1. Could you provide concrete examples where enabling the use of the product intervention powers in sectoral legislation would be useful?

2019 ESAs’ review. [specific for EBA]. Under the expanded scope of the competences as regards the consumer credit directive and the payment account directive, EBA will also be able to look at consumer issues across a range of activities, for example lending practices. How do you assess this change?

We consider it as problematic as long as there is no adequate consultation of the stakeholders who have to apply the measures of the ESAs.

* + 1. 2019 ESAs review. Please rate the new ESAs’ task to coordinate mystery shopping activities of competent authorities, if applicable, according to its relevance to promote consumer protection at EU level (1 standing for "less relevant” and 5 for "most relevant”). Please explain your answer and indicate whether you consider enhancing national competencies for conduct supervision may be beneficial for the overall coordination of mystery shopping activities.

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  | 1 | 2 | 3 | 4 | 5 | No opinion |
| EU-level coordination of mystery shopping |  | X |  |  |  |  |

* + 1. What are, in your view, the main strengths and weaknesses of the current framework on consumer protection (Article 9 ESAs Regulations) and what would you suggest to address any possible shortcomings?
    2. Are there areas for improvement in the toolkit of the ESAs when it comes to coordinating supervisors in the area of consumer protection? Please explain your answer.
       - YES

X NO

* 1. International relations.
     1. How do you assess the role and competences of each ESA in the field of international relations? Are there additional international fora in which the ESAs should be active? Please specify.
     2. 2019 ESAs’ review. How do you assess the new ESAs’ role in monitoring the regulatory and supervisory developments, enforcement practices and market developments in third countries for which equivalence decisions have been adopted by the Commission?
     3. Are the powers and competences in the field of international relations as set out in Article 33 of the ESAs’ Regulations adequate in light of the tasks conferred on each of the ESAs? If you identify areas for improvement, please specify.

X YES

* + - * NO
    1. How do you assess the role of each ESA in the development of model administrative arrangements between national competent authorities and third-country authorities? Should this role be further specified?
  1. The role of the ESAs as enforcement actors/enforcers.
     1. Under Articles 17 (*breach of Union law*), 18 (*action in emergency situations*) and 19 (*settlement of disagreements between NCAs in cross-border situations/binding mediation*), in case a competent authority fails to ensure that a market participant or financial institution complies with requirements directly applicable to it, the ESAs have the power to investigate the alleged breach or non-application of Union law and, following a specified procedure and under certain conditions, adopt an individual decision towards the market participant or financial institution requiring it to comply with EU law. How do you assess the role of each ESA under these articles of the founding Regulations?
     2. Do you see room for improvement in the way each ESA could ensure that competent authorities enforce more effectively EU rules towards market participants/financial institutions? Please explain your answer.
        + YES

X NO

* + 1. In your view, are the powers of the ESAs to enforce EU rules towards market participants/financial institutions under Articles 17,

18 and 19 ESAs Regulations well balanced, adequate and effective? Please substantiate your answer.

X YES

* + - * NO
    1. Do you think the respective roles of the ESAs and of the Commission are clearly defined in Article 17, 18 and 19 ESAs Regulations? Please substantiate your answer.

X YES

* + - * NO
    1. Do you think the use of sanctions laid down in the EU acquis by competent authorities in case of non-compliance of market participants/financial institutions with EU rules is, in practice, sufficiently dissuasive or disproportionate? If not, what role could sectoral legislation and each ESA play in improving the situation? Please substantiate your answer and give examples.
       - Sufficiently dissuasive
       - Disproportionate

X Other, please explain

The question seems unclear. Use of sanctions is sufficiently dissuasive and furthermore in certain cases disproportionally high compared to the infringement.

# Governance of the ESAs.

* 1. General governance issues
     1. Does the ESAs’ governance allow them to ensure objectivity, independence and efficiency in their work/decision making? Please explain. If you consider that there should be differences in governance between different types of tasks, please indicate.
        + YES
        + NO
     2. 2019 ESAs’ review. In your view, has the new provision in Article 42 of the ESAs’ Regulations according to which the Board of Supervisors members must abstain from participating in the discussion and voting in relation to any items of the agenda for which they have an interest that might be considered prejudicial to their independence, improved the decision making process? Please explain your answer.
        + YES
        + NO
     3. 2019 ESAs’ review. Do you think the requirements in Articles 3 and 43a of the ESAs’ Regulations are sufficient to ensure accountability and transparency? If you identify areas for improvement, please explain.
        + YES
        + NO

EBA should ensure that conflict of interests are properly identified, managed and disclosed.

* + 1. 2019 ESAs’ review. To what extent the recent enhancements in the role of Chairperson improve the decision making process? Please rate each change from 1 to 5, 1 standing for "less significant improvement" and 5 for "most significant improvement”. Please explain your answer.

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  | 1 | 2 | 3 | 4 | 5 | No |
|  |  |  |  |  |  | opinion |
| Request to the Board to establish internal committees for specific tasks |  |  |  |  |  |  |
| Set the agenda to be adopted by the Board and table items for decision |  |  |  |  |  |  |
| Call a vote at any time |  |  |  |  |  |  |
| Propose the composition of independent panels for breach of Union law investigations and dispute settlements. |  |  |  |  |  |  |
| Propose the composition of peer review committees for peer reviews |  |  |  |  |  |  |
| Propose a decision to launch an inquiry and convene an independent panel for the purposes of Article 22 (4) ESAs Regulation |  |  |  |  |  |  |
| Vote in the Board of Supervisors (except on matters that are decided on the basis of qualified majority voting) |  |  |  |  |  |  |
| Other, please indicate |  |  |  |  |  |  |

* + 1. Should the role of the Chairperson be strengthened in other areas? If so, in which areas (please substantiate).
       - YES

X NO

* 1. Decision-making bodies and preparatory bodies
     1. Does the current composition of the Board of Supervisors (BoS) and of the Management Board (MB) ensure that decisions are taken efficiently and independently? If you identify areas for improvement, please explain.
        + YES
        + NO
     2. Do the current voting modalities (e.g. simple majority, qualified majority…) of the BoS ensure efficient decision making? Please explain. If the answer is no please indicate how voting modalities could be streamlined.
        + YES
        + NO

[Only for EBA]. Does the current voting system that, for some decisions, requires additional simple majorities from competent authorities participating and not participating in the Banking Union ensure efficient and balanced decision making? Please explain.

* + - * YES
      * NO
    1. Does the current allocation of tasks between the BoS and the MB ensure that the ESAs are run effectively and perform the tasks conferred on them? If you identify areas for improvement, please explain.
       - YES
       - NO
    2. 2019 ESAs’ review. To what extent the enhanced role of the Management Board has improved the decision making process. Please rate each change from 1 to 5, 1 standing for "less significant improvement" and 5 for "most significant improvement”. Please explain your answer.

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  | 1 | 2 | 3 | 4 | 5 | No opinion |
| The MB can give opinions on all matters to be  decided by the Board of Supervisors. |  |  |  |  |  |  |
| The MB ensures the consistent use of a  methodology for all peer reviews conducted |  |  |  |  |  |  |
| The MB proposes a peer review work plan every  two years. |  |  |  |  |  |  |
| The MB can set up coordination groups on its own initiative |  |  |  |  |  |  |

* + 1. Should the role of the Management Board be strengthened in other areas? If so, in which areas (please substantiate).
       - YES

X NO

* + 1. 2019 ESAs’ review. Do you think the written non-objection procedure for core convergence tools (breaches of Union law, dispute settlements and peer reviews) is effective for achieving its objective? Please substantiate your answer. If your answer is yes, please indicate if there should be more decisions taken under this procedure and in which areas.

X YES

* + - * NO
    1. Do you think ad hoc committees composed of staff of the ESAs and members from the competent authorities (e.g. peer review committees) are effective tools to improve the decision making process? If your answer is yes, please indicate if there should be more decisions taken under this procedure and in which areas.
       - YES
       - NO
    2. Do you think the functioning of preparatory/supporting bodies of the ESAs (e.g. technical working groups, standing committees, task forces etc.) is effective and efficient? If you identify any shortcomings please specify how these could be addressed.

X YES

* + - * NO
    1. Please assess the impact of the work undertaken by preparatory/supporting bodies of the ESAs (e.g. technical working groups, standing committees, task forces etc.) on the ESAs’ overall work and achievements. Please rate the impact from 1 to 5, 1 standing for "less significant impact” and 5 for "most significant impact”: If you identify any shortcomings please specify how these could be addressed.

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  | 1 | 2 | 3 | 4 | 5 | No opinion |
| Standing committees and other permanent  committees |  |  |  |  |  |  |
| Other preparatory bodies (e.g. technical working  groups |  |  |  |  |  |  |
| Committee on consumer protection and financial  innovation |  |  |  |  |  |  |
| Proportionality Committee |  |  |  |  |  |  |

(only for ESMA) Should there be a different governance in case of direct supervisory decisions in ESMA (for example, similar to the new governance for CCPs)? If the answer is yes, please indicate your suggestions for improvements and the expected benefits.

* + - * YES
      * NO
  1. Financing and resources.
     1. Do you consider the provisions on financing and resources for the general activities of the ESAs appropriate to ensure sufficiently funded and well-staffed ESAs taking into account budgetary constraints at both EU level and the level of Member States? Please explain your answer. If the answer is no, please indicate what other sources of finance could be considered.
        + YES
        + NO

The current financial and human resources of the ESAs are sufficient and should be used in an economical way.

* + 1. Do you think that the ESAs have sufficient resources to perform their tasks? Please explain.
       - YES
       - NO

See answer above. EBA has 208 employees (as per January 2021) and a budget of EUR 54 million (as at 31 December 2019). This high number of employees and the substantial financial means are more than appropriate to fulfil all the tasks properly.

* + 1. Do you think there are enough checks and balances for how the ESAs spend their budget? Please explain.
       - YES
       - NO
  1. Involvement and role of relevant stakeholders
     1. In your view, are stakeholders sufficiently consulted or, on the contrary, are there too many consultations? Please explain your answer.
        + YES
        + NO
        + Too many consultations

Consultations are highly appreciated to involve the stakeholders in ESAs’ proposals. To ensure a certain quality of the responses a sufficiently long consultation period is of utmost importance.

Public hearings of the ESAs are highly appreciated as well (such as for example the EBA public hearing on its consultation on the Pillar 3 disclosure of ESG risks).

* + 1. Please assess in a scale from 1 to 5 the quality, in your view, of the consultations launched by the ESAs (5 standing for the highest quality). Please explain your answer.

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  | 1 | 2 | 3 | 4 | 5 | No opinion |
| General consultations launched by the ESAs |  |  | X |  |  |  |
| Specific consultations when developing data  collection requirements |  |  | X |  |  |  |

In general we appreciate the quality of the ESA´s consultations. In our view, the level of engagement of the ESA with stakeholders is good, as it allows the ESA to get valuable insights into different national approaches / systems and practices, which should be considered when drafting technical standards and guidelines. This is especially important in cases where national systems differ.

Additionally, we would like to point out a few areas where some improvement would be appreciated (particularly in reporting):

* Existing terms should be used for certain existing topics, regardless of whether those terms stem from regulatory or accounting sources (no new terms)
* Future planning of reporting requirements should be based on a forward-looking roadmap based on a common and coordinated approach between the banking sector and European and local authorities.
* Harmonization of the “regulatory language”: different structure of the requirements, different approaches to consultations and different formulations often lead to interpretations / discussions. We therefore suggest not just introducing a data model based on a common “data language”, but also the introduction of a single “regulatory language” for all reporting obligations, as defined by various competent authorities.
  + 1. Are the ESAs sufficiently transparent and accessible for stakeholders to ensure effective and efficient interaction? Please explain your answer.

X YES

* + - * NO
    1. Please rate in a scale from 1 to 5 the impact of stakeholders groups within the ESAs on the overall work and achievements of the ESAs (1 standing for “less significant impact” and 5 for “very significant impact”). Please explain your answer.

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  | 1 | 2 | 3 | 4 | 5 | No opinion |
| EIOPA Insurance & Reinsurance Stakeholder  Group |  |  |  |  |  |  |
| EIOPA Occupational Pensions Stakeholder  Group |  |  |  |  |  |  |
| ESMA Securities and Markets Stakeholder Group |  |  |  |  |  |  |
| EBA Banking Stakeholder Group |  |  |  |  |  |  |

* + 1. 2019 ESAs’ review. Please assess the significance of the recent changes in the composition, selection, term of office and advice of

the stakeholders groups (Article 37 ESAs Regulations)? Please rate each change from 1 to 5, 1 standing for “less significant” and 5 for “most significant”. Please explain your answer.

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  | 1 | 2 | 3 | 4 | 5 | No opinion |
| Composition of stakeholders groups |  |  |  |  |  |  |
| Selection of members |  |  |  |  |  |  |
| Term of office |  |  |  |  |  |  |
| A third of its members can issue a separate advice |  |  |  |  |  |  |

* + 1. Does the composition of stakeholders groups ensure a sufficiently balanced representation of stakeholders in the relevant sectors? Please explain your answer.
       - YES
       - NO
    2. In your experience, are the ESAs’ stakeholders groups sufficiently accessible and transparent in their work? If the answer is no, please indicate the areas where the transparency could be improved.
       - YES
       - NO
  1. Joint bodies of the ESAs
     1. Please assess the aspects described below regarding the Board of Appeal (BoA) of the ESAs. Please rate the effectiveness of each aspect from 1 to 5 (1 least effective, 5 most effective). If you identify areas for improvement, please explain.

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  | 1 | 2 | 3 | 4 | 5 | No opinion |
| Organisation |  |  |  |  |  |  |
| Functioning and time limits |  |  |  |  |  |  |
| One joint Board of Appeal for the 3 ESAs |  |  |  |  |  |  |
| The composition of the BoA |  |  |  |  |  |  |

* + 1. Please assess the aspects described below regarding the Joint Committee of the ESAs. Please rate the effectiveness of each aspect from 1 to 5 (1 least effective, 5 most effective). If you identify areas for improvement, please explain.

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  | 1 | 2 | 3 | 4 | 5 | No opinion |
| Functioning |  |  |  |  |  |  |
| Working methods |  |  |  |  |  |  |
| Ensuring cross-sectoral cooperation |  |  |  |  |  |  |
| Ensuring consistent approaches |  |  |  |  |  |  |
| Decision making process |  |  |  |  |  |  |
| The legal structure (no legal personality) |  |  |  |  |  |  |

* + 1. Please assess the work of the Joint Committee of the ESAs in the areas below. Please rate each area from 1 to 5 (1 least significant contribution, 5 most significant contribution). If you identify areas for improvement, please explain.

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  | 1 | 2 | 3 | 4 | 5 | No opinion |
| Consumer Protection and Financial Innovation |  |  |  |  |  |  |
| Coordination and cooperation for bi-annual Joint  Risk Reports, published in spring and autumn |  |  |  |  |  |  |
| Financial Conglomerates |  |  |  |  |  |  |
| Securitisation |  |  |  |  |  |  |
| European Forum of Financial Innovators |  |  |  |  |  |  |

# Direct supervisory powers.

* 1. How do you assess ESMA’s direct supervisory powers in the field of:
* Credit Rating Agencies
* Trade Repositories under EMIR
* Trade Repositories under SFTR
* Securitisation Repositories (STS)
  1. Please assess ESMA’s performance as a direct supervisor of the entities referred to in question 3.1 in a scale of 1 to 5 (1 lowest rate, 5 highest rate). If you identify areas for improvement please explain.

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  | 1 | 2 | 3 | 4 | 5 | No opinion |
| Credit Rating Agencies |  |  |  | X |  |  |
| Trade Repositories under EMIR |  |  | X |  |  |  |
| Trade Repositories under SFTR |  |  | X |  |  |  |
| Securitisation Repositories |  |  |  |  |  | X |

* 1. How do you envisage the future scope of direct supervisory powers of ESMA or any other ESA? What principles should govern the decision to grant direct supervision to the ESAs? If you see room for improvement, please provide evidence where you see weaknesses of the current set-up.
  2. Have you identified any areas where supervision at EU level should be considered? If your answer is yes, please explain.
* YES
* NO

# The role of the ESAs as regards systemic risk.

* 1. Please assess the aspects described below regarding the role of each ESA as regards systemic risk in a scale of 1 to 5 (1 lowest rate, 5 highest rate). If you identify room for improvement, please specify how this could be addressed.

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  | 1 | 2 | 3 | 4 | 5 | No opinion |
| The quality of the analysis of market  developments |  |  | X |  |  |  |
| The quality of the stress test and transparency exercises that were initiated and coordinated by  the ESAs |  |  |  | X |  |  |
| The interaction between the ESRB and ESAs on the development of a common set of quantitative and qualitative indicators to identify and measure  systemic risk |  |  |  |  |  | X |
| The cooperation within the European System of Financial Supervision (ESFS) to monitor the interconnectedness of the various subsectors of  the financial system they are overseeing |  |  |  |  |  | X |
| The broader cooperation between the ESRB and  the ESAs within the ESFS |  |  |  |  |  | X |
| The contribution of the ESAs to facilitating the  dialogue between micro- and macro-supervisors |  |  |  |  |  | X |

# 

# QUESTIONS ON THE SINGLE RULEBOOK

1. **The ESAs work towards achieving a rulebook**
   1. Do you consider that the technical standards and guidelines/recommendations developed by each ESA have contributed sufficiently to further harmonise a core set of standards (the single rulebook)?

* YES If you have identified areas for improvement, please explain
* NO Please give reasons.
* Other
  1. Do you assess the procedure for the development of draft technical standards as foreseen in the ESAs Regulations effective and efficient in view of the objective to ensure high quality and timely deliverables? Please explain your answer. If you identify areas for improvement, please indicate.
* YES
* NO

X Other

Not least because of democratic considerations banking supervisory law should be set by the European legislator at level I (legislation agreed by the co-legislators) to the greatest possible extent and not by the ESAs on the basis of level 2 (technical standards). The European legislator mustn’t transfer its tasks primarily based on the TFEU to the ESAs. In addition, the timely delivery of draft technical standards is not always guaranteed.

* 1. When several ESAs need to amend joint technical standards (e.g. PRIIPs RTS) and there is a blocking minority at the Board of Supervisors of one of the ESAs, what would you propose as solution to ensure that the amendment process runs smoothly?

The establishment of a Conciliation Committee analogous to Art. 294 TFEU as well as deadlines for the decision would be useful to ensure a smooth amendment process.

* 1. In particular, are stakeholders sufficiently consulted and any potential impacts sufficiently assessed? Please explain your answer. If you identify areas for improvement, please indicate.
* YES
* NO
* Other

Consultations are highly appreciated to involve the stakeholders. To ensure a certain quality of the responses a sufficiently long consultation period is essential.

Public hearings of the ESAs are highly appreciated as well (such as for example the EBA public hearing on its consultation on the Pillar 3 disclosure of ESG risks).

* 1. Can you provide examples where guidelines and recommendations issued by the ESAs have particularly contributed to the establishment of consistent, converging, efficient and effective supervisory practices and to ensuring the common, uniform and consistent application of Union law?
  2. Would you consider it useful if the ESAs could adopt guidelines in areas that do not fall under the scope of legislation listed in Article 1 (2) of the ESAs founding Regulations and are not necessary to ensure the effective and consistent application of that legislation?
* YES Please specify which ones

X NO Please give reasons.

[exclusively for ESMA] If you think of the Wirecard case as an example, how could supervision be improved in the field of auditing and financial reporting?

* Including Regulation (EC) No 1606/2002 [IAS Regulation] and Directive 2013/34/EU [Accounting Directive] in Article 1(2) of the ESMA Regulation
* Other, please explain
* No improvements are needed.

For the Audit Directive and Audit Regulation a supervisory structure already exists that coordinates the uniform, EU-wide procedure for the supervision of auditors. This should be retained. In order to achieve an improvement, however, an obligation under EU law would have to be ensured on the cooperation between market and auditor supervisory authorities, as well as a cooperation between the supervisory authorities and the law enforcement authorities. Since the essential fundamentals for this are based on a Directive, these would also have to be drawn up on the basis of a Directive. In this context, however, it would be more important to finally move forward with the adoption of the ISA (International Standards on Auditing) and to remove the approaches for EU auditing standards, some of which are contradictory, from the Audit Regulation.

We would also like to point out the audit system of decentralised banking sectors. Cooperative Auditing Associations and the Savings Bank Audit Associations contribute to financial stability and economic prosperity due to the following reasons.

* The Statutory Audit of the financial statement according to ISA and of the management’s performance is a core function.
* Cooperative Auditing Associations and the Savings Bank Audit Associations are not limited to financial audit but have to extend their work on governance, organisation and functioning of their members.
* Cooperative Auditing Associations and the Savings Bank Audit Associations are part of public oversight and form an integral pillar of the sectoral early warning systems contributing to the stability of their members.
* Over decades Cooperative Auditing and the Savings Bank Audit Associations has contributed to the stability of the economic development of the cooperative banking sector in Austria.

Cooperative Auditing Associations and the Savings Bank Audit Associations are independent:

* Cooperative Audit: In Austria the cooperative must not choose the auditor; the auditor is chosen by the cooperative association. The auditors have an unlimited employment contract which can only be terminated by the audit association due to special reasons (eg quality of work performed by the auditor). The auditor is not bound by instructions of the cooperative or of the cooperative association.
* Savings Bank Audit: Sparkassen-Prüfungsverband (Savings Bank Audit Association – S-PV) is a non-profit-making public corporation and has been erected under public law. Its sole purpose is to audit the Austrian savings banks and to act as an integral pillar of public oversight over Savings Banks. S-PV has a permanent mandate; Pursuant to Sec. 2 Savings Bank Act Savings Banks are member of S-PV under national law. Therefor Savings Banks cannot choose an alternative auditor.

Cooperative and savings banks' audit goes beyond the conventional annual audit and guarantee that a cooperative or savings bank does not become insolvent. The professional reputation of cooperative audit and savings banks audit is the main reason why cooperative and savings banks have been so successful for decades in Austria. Cooperative and savings banks themselves are small and medium-sized banks with a focus on small and medium-sized undertakings. Inappropriate burdens and regulations on cooperative and savings banks' audit associations can jeopardise the existence of cooperative banks' audit and the savings banks audit, and as a consequence can have an impact on the well-financed SME industry in Austria.

The proved audit systems of decentralised sectors are characterized by the principle of permanent statutory mandate and member audits which would be jeopardised by mandatory rotation (Art 17 Regulation No 537/2014 on specific requirements regarding statutory audit of public-interest entities, Audit Regulation) as discussed currently with regard to the Wirecard case.

Therefore, the abovementioned Audit Regulation has implemented the following special exemption clause for cooperative banks' audit and savings banks’ audit that should maintain unchanged:

**Article 2(3) Audit Regulation:** This provision states that the Member States may decide that the Audit Regulation or certain provisions of it shall not apply to cooperative (and savings) banks which are required under national provisions to be a member of a non-profit-making auditing entity.

* 1. Do you think that the role of ESMA with regard to Directive 2004/109/EC (Transparency Directive) could be strengthened? For example, by including a mandate for ESMA to draft RTS in order to further harmonize enforcement of financial (and non-financial) information.

X YES Please explain and specify how.

By amending the Transparency Directive, the EU Commission mandated ESMA in Article 1, paragraph 3, of Directive 2013/50/EU to draft a regulatory technical standard for making financial statement information available in a uniform electronic format throughout the EU as of January 1, 2020. There have been various consultations and field tests. If there is a stakeholder consultation, we can imagine such an approach in other areas as well.

A uniform procedural model could be advantageous, as it could eliminate certain inadequacies of the procedure. However, this would have to give room to the two-stage process, which is currently only practiced in Austria and (still) in Germany. In any case, the transparency of the decisions of the ESMA and the enforcers that are coordinated by ESMA, should be improved, because the decisions and their transparency with regard to decision-making are currently inadequate.

* NO Please give reasons.
  1. Do you think that Directive 2004/109/EC (Transparency Directive) should require ESMA to annually report on the supervision and enforcement of financial and non-financial information in the EU on the basis of data provided by the national competent authorities regarding their supervisory and enforcement activities? Please explain your answer.

X YES

* NO

However, we see a danger of the obligation to publish sensitive data

* 1. Do you think that ESMA could have a role with regard to Directive 2006/43/EC (Audit Directive) and Regulation 537/2014/EU (Audit Regulation)?
* YES Please explain and specify how.

X NO Please give reasons.

* 1. What is your assessment of the work undertaken by each ESA regarding opinions and technical advice?

# General questions on the single rulebook

* 1. Which are the areas where you would consider maximum harmonisation desirable or a higher degree of harmonisation than presently (rather than minimum harmonisation)?

Please give your reasons for each

* 1. Which are the areas where you consider that national rules going beyond the minimum requirements of a Directive (known as “gold- plating”) are particularly detrimental to a Single Market? Please identify the relevant sectoral legislation, examples of gold plating and give reasons for each.

|  |  |  |  |
| --- | --- | --- | --- |
| Sector: | Specific piece of legislation | Example of gold- plating | Please explain |
| Banking | X | CCD and MCD | When CCD was first published, there was not yet an MCD in Austria. Austria decided to apply the CCD rules also on mortgage loans, which lead to when MCD was finally published, as we had to re-adapt all our forms (ESIS, SECCI..) which was costly.  Article 25 MCD entitles the creditor to fair and objective compensation, where justified, for possible costs directly linked to the early repayment. The Austrian implementation act (Hypothekar- und Immobilienkreditgesetz - HIKrG) capped this compensation fee detrimentally for the creditor's side. Such a cap was not foreseen in MCD. |
|  |  | Consumer Guarantees Act (VGG) | The draft version of Section 923 (2) Austrian General Civil Code (ABGB) regarding the Consumer Guarantees ACT (VGG) standardizes that the updating requirements for digital content and digital services shall also apply in general contract law. This exceeds the updating requirements provided for in Directive 2019/770 on certain contractual aspects of the provision of digital content and digital services (Digital Content Directive; in Austria implemented in Digitale-Inhalte-RL-DIRL). The first point to be considered is that this represents an over-implementation of the Directive since it leads to an unobjective extension of the personal scope of application, which according to Art. 1 and 3 DIRL is limited to contracts between entrepreneurs and consumers. The second point is that the draft does not contain exceptions to its material scope of application, as provided for in Art 3 (5) DIRL and also in Section 1 (2) Consumer Guarantees Act (VGG). As a result, consumers and businesses relying on these provisions of the Austrian General Civil Code (ABGB) are entitled to a higher level of warranty protection than intended. Such an approach also contradicts Art 4 DIRL, according to which national law may not maintain or introduce regulations that deviate from the Directive. |
| Insurance |  |  |  |
| Asset management |  |  |  |
| Market infrastructure (CCPs, CSDs) |  |  |  |
| Market organisation (MiFID, MIFIR, MAR) |  | MiFID | The implementation of Art 25 MiFID through the „Austrian Securities Supervision Act 2018” (Wertpapieraufsichtsgesetz 2018 - WAG 2018) brought stricter requirements in Austria. Concretely the FMA (Austrian NCA) obliged investment advisors via Circular 02/2017 under Section 3 point 37 to educate themselves continuously on a yearly basis for at least 15 hours. |
| Other |  |  | The above-mentioned examples are exemplary and not exhaustive. |

* 1. Do you consider that the single rulebook needs to be further enhanced to reach the uniform application of Union law or rules implementing Union law and efficient convergent supervisory outcomes? Please explain your choice. Where appropriate, please support your response with examples.
* YES
* NO

A further enhancement of the single rulebook is not desirable as this approach does not (appropriately) consider national specifities and the principle of proportionality.

* 1. Questions regarding the appropriate level of regulation.
     1. In your view, are there circumstances in existing EU legislation where level 1 is too granular, or for other reasons, would rather be preferable to have a mandate for level 2, or guidance at level 3? Please specify the area (and if possible, specific piece of legislation) and explain why (e.g. in order to have appropriate flexibility to adapt the specifics of the regulation in case of change of circumstances)?
        + YES

X NO

* + 1. On the other hand, in your view, could **reducing divergences in rules** at level 1 (legislation agreed by the co-legislators), as well as rules regarding delegated acts (regulatory technical standards) or implementation at level 2, (implementing acts and implementing technical standards) and/or level 3 (‘comply or explain guidance’ by ESAs) further enhance the single rulebook?
       - YES

X NO

* + 1. Which of the three levels and/or a combination thereof are more effective in building the single rulebook? (multiple choices allowed)

X Level 1 (legislation agreed by the co-legislators)

X Level 2 (e.g. delegated acts and technical standards)

X Level 3 (‘comply or explain guidance’ by ESAs)

* 1. Generally speaking, which level of regulation should be enhanced/tightened in order to ensure **uniform application** of the single rulebook? (multiple choices allowed). Please explain and substantiate with examples, where possible.
* Level 1(legislation agreed by the co-legislators)
* Level 2 (e.g. delegated acts and technical standards)
* Level 3 (‘comply or explain guidance’ by ESAs)
  1. In your view, what, if anything and considering legal limitations, should be improved in terms of determining application dates and sequencing of level 1, level 2 and level 3?

Please explain

The current level of regulation is sufficient

* 1. Please indicate whether the following factors should be considered when deciding on the need for further harmonisation in rules (attribute 1 to 5 to each factor, 1 being the least important and 5 being the most important):

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  | 1 | 2 | 3 | 4 | 5 | No opinion |
| Strong interlinkages with areas of law which  remain non-harmonised (e.g. CRIM-MAD and national criminal law) |  |  | X |  |  |  |
| Broad discretion left to national authorities and frequent use of that discretion by these national authorities |  |  |  | X |  |  |
| High level of gold plating by national rules |  |  |  | X |  |  |
| High degree to which supervision of the same type of actors and/or activities render divergent outcomes across Member States |  |  |  |  | X |  |
| All of the above |  |  |  |  |  |  |
| None of the above |  |  |  |  |  |  |
| Other aspects, if so which ones: Please provide concrete examples |  |  |  |  |  |  |

* 1. As part of the Commission’s work on enhancing the single rulebook under the Capital Markets Union project, do you consider that certain EU legislative acts (level 1) should, in the course of a review, become more detailed and contain a higher degree of harmonisation? Would any of those legal frameworks currently contained in Directives, or any part therein, benefit from being directly applicable in Member States instead of requiring national transposition?

X YES Please specify which one

|  |  |  |  |
| --- | --- | --- | --- |
| Sector: | Specific piece of legislation | Example | Please explain |
| Banking |  |  |  |
| Insurance |  |  |  |
| Asset management |  |  |  |
| Market infrastructure (CCPs, CSDs) |  |  |  |
| Market organisation (MiFID, MIFIR, MAR) | MiFID II |  | MiFID II is a broad Level I framework, with countless empowerments for Level II and Level III legal acts. For the next review, it would be desirable to have more specifications already at Level I. |
| Other |  |  |  |

* 1. Do you consider that on the basis of existing mandates, additional/more detailed rules at level 2 should be introduced to provide the supervised entities and their supervisors with more detailed and clearer guidance?
* YES Please specify legislation and what these rules at level 2 should regulate

X NO

Not least because of democratic considerations banking supervisory law should be set by the European legislator at level I (legislation agreed by the co-legislators) to the greatest possible extent and not by the ESAs on the basis of level 2 texts (technical standards). The European legislator mustn’t transfer its tasks to the ESAs.

* 1. Against the objective of establishing the single rulebook for financial services, how would you increase the degree of harmonisation of EU financial legislation?

X Across the board (e.g., via an Omnibus act which amends multiple sectoral acts at the same time. However, only within sectors and not in a horizontal approach between sectors)

X In a targeted manner through individual sectoral reviews

More content in Level I legislation. More regulations instead of directives.