

BNP Paribas response to EC targeted consultation on Supervisory Convergence and the Single Rule Book

Executive Summary

May 2021

BNP Paribas welcomes the opportunity to respond to the Commission's targeted consultation on Supervisory Convergence and the Single Rule Book. As a leading European financial services group, we believe the mandates of the European Supervisory Authorities (ESAs) are critical to promoting a single EU financial market that is competitive and efficient as well as to advancing the Capital Markets Union.

While some progress has been made in recent years towards achieving these goals, we continue to see significant obstacles to convergence in the uniform application of regulations across Member States as well as weaknesses in the governance of the ESAs and their use of the supervisory tools at their disposal.

As a general principle, we regret that the ESAs are not yet fully empowered European institutions capable of delivering European decisions, which is indispensable to ensure European convergence of rules. National Competent Authorities (NCAs) are still weighing too much in the decision-making process, when they should be focusing on direct supervision where they have a true know how and legitimacy.

Moreover, for ESMA, most of them do not have significant homegrown capital markets nor a large financial industry and consequently have relatively little expertise to provide regarding the ESMA's decisions. The governance is clearly at stake.

Another important weakness in the current framework is the lack of trust in the financial sector. As a result, many if not most of the recommendations made by the sector – even commonly shared- are not taken into account and the industry's involvement is not readily sought from the start (except through a formal consultation process the result of which often does not feed into the final drafting of rules). The quality of regulation would certainly be more effective (meeting the objectives but without unnecessary burden sharing) if the ESAs presented from the very start the targets they want to achieve and worked with the industry on the way to meet them.

Convergence:

Regulations rather than directives at Level 1 are the best way to ensure regulatory convergence as they limit the room for divergence including at Level 2. Stakeholder engagement is an important tool to promote supervisory convergence in Europe. Market participants are often active in several jurisdictions across Member States and can hence contribute in detecting inconsistencies and fragmentation across Europe. A streamlined and effective decision process at the ESAs' level could be a way to enhance further their status as true European institutions.

The ESAs already have many tools available to promote a common culture and common supervisory practices that can be activated at different levels. The main issues, however, are to do with their effective activation and the extent to which they are used. We acknowledge that some of these tools have been introduced quite recently and more time is therefore needed to assess their effectiveness. Nevertheless it is apparent that some need to be used in a broader way (e.g., peer reviews, CSAs, investigation of breaches of Union law...) while others should be improved (e.g., No Action Letters, Q&A process, issuance of guidelines...).

Governance:

From a general perspective, we acknowledge that the ESAs review in 2019 has contributed to reinforce the independence and objectivity of the decision-making process. Notably with the new voting regime of the Board of Supervisors.

This being said, we are of the opinion that there are still many situations where influence of some NCAs still prevails and may result in gold plating when implementing rules / supervision at national level. Further consideration should be given to avoid this type of outcome.

Transparency of ESAs governance: Globally the current situation could still be improved, as there are some situations where the decision making process remains quite opaque, in particular:

- For the adoption of regulatory/technical standards / guidelines, there is still lack of clarity on how final decisions are made. It appears that in many cases, whereas the industry has significantly contributed to the consultation process, very limited part of its contribution is taken into consideration, including on quite technical and operational topics on which views of experts are of true added-value. There should be full disclosure on this part which is quite impactful for most stakeholders, with in particular information on voting (i.e. votes of each NCA)
- In many situations, the ESAs provide a presentation of inputs received by the various stakeholders but do not justify properly how these inputs have been effectively taken into consideration as final decisions are not aligned accordingly.
- We also consider that there is still limited access to the ESAs. Much more constructive dialogue should be engaged with the various stakeholders, including on a bilateral basis.
- In the case of Q&As, as this process is not submitted to consultation, most stakeholders do not have the opportunity to express their views and provide technical advice on complex topics. In addition, there is no transparency on the discussion within the ESAs and why one option is retained instead of another one. As for regulatory decisions, there should be full disclosure on this process. We also note that there is today no consultation at all on the Q&As established by ESAs and no transparency on the associated timeline. This approach is not fully satisfactory and does not allow the industry to prepare itself correctly to the changes resulting from some Q&As.

Consultations: We agree that stakeholders have the opportunity to provide their views, however this is not satisfactory on two main aspects: (1) deadlines to contribute are often quite short and do not allow for sufficient time to involve the right experts for proper consideration of questions and for coordination actions; and (2) in the end, it seems that responses sent by stakeholders are not really taken into consideration.

Stakeholder groups: Their existence is very positive as it creates a forum for discussion. Here we would note that it is important that members of these groups have the possibility to get feedback from experts in their own organisations in view of the technicality of some the issues addressed. One unique person in most cases is not in capacity of having sufficient experience and expertise to contribute in a constructive way.

Two additional remarks regarding stakeholder groups: Effective consideration of advice made by these stakeholders groups is not fully transparent; and there is no real transparency on which criteria are used in the end for composition and selection of these groups.

Board of Supervisors: We consider that transparency regarding the decisions of the Board of Supervisors (BoS) should be enhanced. In particular, the votes of the BoS should be made public.

In addition, to benefit fully from the expertise of the industry, we recommend the presence of recognized impartial experts with deep experience in the financial industry as observers in the BoS particularly within ESMA: they could be, for example, recently retired high-level top managers and experts to avoid conflicts of interest.

Lastly, in regards to ESMA, the voting weight of NCAs with real expertise in capital markets and asset management issues should be commensurate to the size of the industries they supervise. A possible criterion could be the share of EU risk weighted assets that they supervise.

Direct supervisory powers

Following the ESAs review, ESMA has more supervisory responsibilities for central counterparties, benchmarks and securitization repositories in addition to credit rating agencies, but it is still too early to assess its performance in this area. We would underline, however, the importance of the task, in particular with regard to credit rating agencies in the context of the expected, and far-reaching, sustainable finance reporting requirements and the need for the related data.

More generally, in our view, ESMA's scope of action is very wide and extensive with significant powers. In this respect, we consider that ESMA should focus on these matters to contribute to addressing the challenges facing by EU's capital markets. There is a case for which this approach, however, would be valuable: that of EU labelled investment funds, e.g. ELTIF vehicles.

The supervision of critical third-party ICT service providers is another area where direct supervision is desirable because of the specific nature of the activity. This is considered in the ESA's guidelines on the use of cloud services and ICT security and in the current European Commission proposal on the Digital Operational Resilience of the Financial Services Sector (DORA). The existing provisions on the outsourcing of critical functions and services to third parties and the foreseen oversight duties for the outsourcing undertakings might fall short where there is a significant imbalance of power between the contractual parties. Furthermore, the size and concentration of the markets for some of these services (eg cloud) would make a centralised supervisory assessment and certification very efficient, avoiding repetitive procedures for outsourcing undertakings/users and supervisors alike.

Development of Regulatory Technical Standards

We have witnessed co-legislators transferring responsibility to the European supervisory authorities (ESAs) for crucial technical elements at Levels 2 or 3. This has led to the ESAs becoming quasi-legislators, and the role of the co-legislators in the adoption of Level 2 measures lowered to either fully rejecting or accepting the text proposed by the ESAs and the Commission.

One way to reach the right balance between what needs to be adopted in each regulatory level is to have effective participation of the ESAs in the negotiation process for the L1 legislation, as suggested above. The ESAs can constructively contribute by sharing their expertise on technical provisions and anticipating what types of standards can be provided through the RTS and the ITS. In addition, it is important to limit the mandate of the ESAs to the provisions for which implementing rules are effectively needed. The ESAs should not be involved in the definition of high level rules that are to be validated at the co-legislator level.

Looking forward, priority should therefore be given to jointly reaching high-quality and technically sound legislation with no legal uncertainty. To this end, co-legislators need to fully play their role of

brokering the political compromise, whilst respecting the advisory role of the ESAs. Hence, Level 1 legislation should limit the number of mandates for Level 2 and 3 measures to what is technically necessary, and the ESAs should adhere to the Level 1 text mandate.

The timelines for drafting the Technical Standards should be defined in a more realistic way. Technical standards should only cover technical issues. Level 1 texts should be more precise and clear. For example, the scope of the Technical standards should be more precisely defined in Level 1 texts.

Moreover, the implementation constraints need to be taken into account. The dates of entry into application of the Level 1 texts should be determined by reference to the dates of publication of the Technical Standards when required by the Level 1 texts and should enable the industry and the financial institutions to adapt their process, contracts or IT tools.

We consider that there are too many situations where there is no sufficient time to ensure high quality and timely deliverables due to unrealistic timelines mentioned in the L1 text. In addition, as explained in our response, the current no-action letter mechanism does not allow addressing this type of situation efficiently.

Additional Mandates for ESMA:

With regard to non-financial reporting we believe that it is too early to decide whether or not to extend the mandate of ESMA on this topic as the final decision to entrust EFRAG with the development of the possible EU non-financial reporting standards has not yet been taken.