

EAPB Position Paper on ESA Review Proposal

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General comments

The EAPB generally welcomes the overhaul of the legislation on the European Supervisory Authorities (ESAs). It believes that a review of the ESAs can enable them to more strongly promote supervisory convergence, thereby contributing to more legal certainty and a level playing field.

In this paper, the EAPB would like to voice its opinion on several aspects of the legislative proposal put forward by the Commission.

With regards to the proposed new funding structure of the ESA, the EAPB believes that it risks upsetting the balance between EU and national funding by not clearly specifying the contribution of the EU budget. Moreover, it wonders whether the new structure will not incur additional costs on market participants and whether an effective control of the budget can be safeguarded.

The EAPB also notes that the supervisory powers of the ESAs and particularly ESMA would be strengthened in several ways. It welcomes the powers that would allow ESMA to directly supervise critical benchmarks and central counterparties because of their strong pan-European context. It is however critical of the proposal to allow ESMA to approve prospectuses as the NCAs have adequate capabilities in this field.

The power relation between the ESAs and the NCAs would shift in several other ways, such as by changing the role of the Supervisory Board by establishing an independent Executive Board with several decision-making powers and by allowing ESAs to have more direct access to data. Overall, the EAPB is critical of changes that would further reduce the power of the NCAs, given their knowledge of their local market.

Specific comments

Funding of the ESAs

The EAPB believes that the present funding model strikes a good balance between contributions from national supervisors and from the EU budget. The proposal would foresee a contribution from the EU budget up to 40%, there by implying that it could be lowered from the current standard of 40%. For the EAPB, a contribution from the EU's budget is warranted since the ESAs supervision contributes to the public goods of financial stability, consumer protection as well as consistent conditions to all market participants. Moreover, a degree of parliamentary control of the budget is needed to prevent a stark increase in costs. The EAPB is therefore not in favour of changing the funding model for the ESAs.

Additionally, the EAPB notes that the newly proposed funding model for the ESAs, part of the costs would be incurred directly on the financial institutions, while no mention is made of costs for national supervision to decrease accordingly. In any case, a further increase of regulatory costs for market participants should be avoided. Therefore, at least an adequate minimum financial contribution by the European Union should be assured.

Finally, the proposal specifies that the calculation of the fees to be paid to the ESAs will be done in a separate delegated act. For the EAPB and its members this is not a desirable solution as the only criterion laid aid in the level 1 text it that of size. It would be preferable to have a larger set of criteria in the level 1 text which also take into account aspects like risk and business models of the financial institutions, since size is not the only cost driver for the work of the ESAs.

Direct Supervision powers

The Commission proposal suggests additional direct supervisory powers for ESMA. The EAPB welcomes the proposed ESMA mandate to directly supervise entities acting in a pan-european context, such as critical benchmarks or CCPs in a third country.

It is however critical of also giving ESMA the power to approve prospectuses for “specialist issuers” and “wholesale non-equity security programmes” We think the argumentation “centralising the scrutiny” and “building up expertise within ESMA” in the proposed areas is not justified. According to Art 2 (r) Prospectus Regulation 2017/1129 the “scrutiny by the (...) competent authority” is about “the completeness, the consistency and the comprehensibility of the information given in the prospectus” only. The expertise of NCAs seems adequate to us. We see thus no reason to deviate from the status-quo. With respect to “supervisory arbitrage” and “level-playing field” we would like to draw the European Commission’s attention to the fact that there is already a direct applicable Prospectus Regulation in Place

Lastly, the ESAs will have the power to set the priorities for supervision. Yet as the NCAs are also still involved in supervision, we fear that despite a process of coordination, double priorities and double questions from authorities may not be avoided.

Role of the national authorities

The ESAs are currently organized as member-driven institutions, which ensures that specificities of national markets can be taken into account. The Commission now proposes to establish an Executive Board (EB) as a body independent from the national regulators and with wide-ranging competences in order to further enhance supervisory convergence.

While the EAPB is in favour of a further supervisory convergence, we still think that the NCAs should decide on all fundamental matters of supervision through their representation in the Board of Supervisors. This is specifically true for the strategic supervisory plan which would, , fall under the remit of the EB.

The EAPB is supporting the EB preparing such a plan, but Board of Supervisors should still be the decision-making-body. Otherwise, the division of powers between European and National regulations would shift significantly in the favour of the former which would contradict the principle of subsidiarity.

Additionally, direct measures against market participants not directly supervised by ESMA should remain the responsibility of the NCAs. Therefore, interventions to mitigate systemic risk and measures against market participants to remedy a breach of European law should be the responsibility of the NCAs.

On the whole, the proposal could use a clearer mapping of responsibilities, especially those of the national regulators.

Level III measures

The EAPB notes that in practice market participants must comply with ESA Guidelines even though they are not legally binding. Further, market participants cannot seek judicial review regarding Level III measures, although they may pose a hefty burden on them. Therefore, in the absence of legal remedies, a scrutiny mechanism is necessary. The proposed scrutiny by the Stakeholder Groups of the ESAs on whether the ESAs overstepped their competences with a particular guideline is welcomed as a step in the right direction. Nevertheless, EAPB believes that the direct access to judicial review would be a more efficient solution. Further, it would be helpful to clarify the legal nature of Level III measures in general.

Finally, EAPB welcomes the fact that the ESAs generally must conduct public consultations before developing new guidelines.

Stakeholders

Regarding the Banking Stakeholder Group, it has to be mentioned, that the composition should be reconsidered: its main activity is to deal with banking related aspects and therefore amount of participants from the banking industry should be significantly increased.

Furthermore, the EAPB believes that the introduced right for Stakeholder Groups to submit a reasoned opinion to the Commission in case of suspected transgression of competence of the Authorities when issuing guidelines and recommendations does not quite reach for enough. We suggest to further strengthen their tasks and rights (e.g. involving them with a voting right in case of own initiative Guidelines). Further possibilities to involve the Stakeholder Groups should be

evaluated (e.g. if the ESAs intend to come up with recommendations based on the ESAs regulations and with no mandate specified in the regulatory framework the Stakeholder Groups should have the power to reject based on a reasoned decision.).

Direct information

The EAPB believes that the EBA and ESMA should not be endowed with the power to directly request information/data from supervised entities as proposed by the Commission. It does not seem justified that supervised entities will have to bear the additional burden as, under threat of significant fines, for the failure of a National Competent Authority (NCA) to comply with a request for information by EBA/ESMA in accordance with Art 35.1 of the EBA/ESMA regulation proposal.

Furthermore, the proposed fines for the supervised entities are to not stand in proportion to the infringement, and would also be levied for a negligent infringement on part of the supervised entity. It is not clear to the EAPB and its members why supervised entities should be subject to fines of this magnitude even for negligent mistakes in answering EBA/ESMA's request.

Avoidance of overlap in data collection – one-stop shop

The EAPB does see that access to relevant information is the basis for the ESAs to carry out their activities in an effective way. The Commission proposal then wants to create a mechanism to strengthen the effective enforcement of the right to collect information.

In our view therefore data collection should generally be simplified, in the sense of a "one-stop shop". It should be focused on building a comprehensive network of data hubs combined with the approach of a common framework in order to alleviate the administrative burden of the institutions and facilitate at the same time the access to the necessary information. This is useful both to the institutes as well as to the authorities: the former is subject to a large amount of work due to multiple and at times overlapping request, the latter often cannot survey which data are already being queried from which unit and are therefore available.

On-site visits

The EAPB thinks that the EBA should not gain in operational supervision on top of NCAs and for Eurozone-banks the ECB. The proposals currently plans to increase the authority's power to require competent authorities to conduct specific reviews and on-site inspections [e.g. Arts 32 (3a) and (3b) EBA regulation proposal]. It gives the possibility for ESA-staff to participate in an on-site inspection would decrease the efficiency of the inspection.

Since these powers would likely be invoked by the ESAs only in case of disagreement between an ESA and an NCA regarding to the conduct of supervisory activities by the NCA, the relevant articles should be changed to provide for sanctions or mediation procedures in case of non-compliance on the part of the NCA with an EBA request – instead of increasing the numbers of authorities involved in the on-site inspection. Any further involvement of an additional authority in supervision will most definitely lead to efficiency losses in an already extremely complex supervisory framework.

The review of the ESAs should be driven by possible efficiency enhancements and address unnecessary overlaps such as duplications of tasks and powers.