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# Opinion of the European Banking Authority on the public consultation on the operation of the European Supervisory Authorities

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## Introduction and legal basis

On 21 March 2017, the European Commission launched a public consultation on the operation of the European Supervisory Authorities (ESAs). This consultation is designed to gather evidence on the operations of the ESAs focusing on a number of issues: on the tasks and powers of the ESAs, their governance and funding and possible adaptation of their supervisory architecture. Its purpose is to provide a basis for concrete and coherent action by way of legislative initiative, if required. The consultation builds on the Commission's 2014 report on the operation of the ESAs and the European System of Financial Supervision (ESFS) and is part of the regular evaluation process set in the ESAs' founding regulations.

Based on the experience gained since its creation in 2011, the European Banking Authority has decided to issue an opinion to the Commission to respond to this public consultation. Although the public consultation covers the operation of the ESAs in general, the opinion of the EBA is focused on the operation of the EBA only.

The EBA competence to deliver an opinion is based on Article 34(1) of Regulation (EU) No 1093/2010<sup>1</sup> ('EBA Regulation'). In accordance with Article 14(5) of the Rules of Procedure of the Board of Supervisors<sup>2</sup>, the Board of Supervisors has adopted this opinion.

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<sup>1</sup> Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority) amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ L 331, 15.12.2010, p. 12).

<sup>2</sup> Decision adopting the Rules of Procedure of the European Banking Authority Board of Supervisors of 12 January 2011 (EBA/DC/2011/01 Rev5).

## General comments

### **The EBA welcomes European Commission's public consultation on the ESAs operation**

During the first six years of operation of the EBA, much progress has been achieved to promote a stronger and more integrated regulatory framework, to ensure high level, effective and consistent regulation and supervision and to better protect consumers of financial services. The EBA welcomes an assessment of possible areas where its effectiveness and efficiency can be strengthened and improved.

Regarding the optimisation of its existing tasks and powers or the need for new powers for specific prudential tasks in relation to banks, the EBA has already expressed views in its Opinion on the improvement of the decision-making framework for supervisory reporting requirements issued on 7 March 2017<sup>3</sup> and its May 2017 Opinion on own funds in the context of the CRR review. In particular, the EBA underlined in its Opinion on reporting that the Commission's suggestion to address reporting issues by reducing the role of implementing technical standards and increasing the use of guidelines and recommendations, would not match the need to ensure maximum harmonisation and would weaken the current framework. A strong legal basis is necessary in this area and the EBA's view remains that the better way forward would be to streamline the endorsement process of a number of reporting, disclosure and benchmarking requirements by establishing specific, well-framed delegations to the EBA in its founding regulation or a targeted decision-making process in the CRD/CRR for the purpose of prudential reporting.

The EBA plays a major role as guardian of the Single Rulebook, a role which could be enhanced with a strengthened advisory role to the Commission and the co-legislators. Following the crisis, banking regulation has increased in political sensitivity and competent authorities understand that legislators might prefer to directly address very technical details in secondary legislation. However, it would be important to envisage a greater reliance on EBA's technical advice, as happens also in any national context. This could be achieved via three methods. First, informal engagement by the Commission services before the publication of legislative proposals, and we welcome the moves that have already been made in this direction. Second, a legal obligation should be established for the EBA to be consulted on matters falling in the fields of interest to the EBA, as defined in our founding regulation. Third the requirement to flag to the attention of the Commission areas where differences in national rules and practices hamper the functioning of the Single Market and require legislative intervention. Such requirements should be accompanied by on-going access to information on the development of the draft texts in Council and trilogue discussions and favour prior discussion of the content and timelines of mandates to the EBA

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<sup>3</sup> Opinion of the European Banking Authority on improving the decision-making framework for supervisory reporting requirements under Regulation (EU) No 575/2013

A development of other tasks and increase of powers in different areas is suggested in the consultation paper, together with possible adjustments to ESA governance. The EBA experience over the last years shows that these issues are intertwined; the current set of tools available to the EBA is appropriate for its mission, but a reflection is needed on the appropriateness of the governance framework for the exercise of specific tasks. The assessment should take account of the Banking Union which has changed significantly the governance and the decision-making process of the EBA. In particular, in order to safeguard the position of competent authorities (CAs) from non-participating Member States, a complex system based on double simple majority voting has been introduced, while the European authorities have been attributed limited role in EBA's decisions - membership without voting rights for the Single Supervisory Mechanism (SSM) and observership for the Single Resolution Board (SRB). At the same time, the Banking Union has implied for the EBA a loss of visibility of supervisory processes that were previously conducted in colleges and are now internalised in the decision making of the SSM and the SRB, while no systematic participation of the EBA in SSM or SRB governance has been envisaged, again to ensure a neutral stance of the EBA vis-à-vis authorities from participating and non-participating Member States. Such arrangements might be reconsidered, as they generate an artificial disconnect between regulatory and supervisory functions.

The EBA believes that the current governance structure has performed well. However, if changes are introduced, as suggested in the public consultation, consideration should be given to limiting such adjustments to the areas in which the decision making process could turn out to be excessively complex or insufficiently independent, such as mediation or breach of Union law.

The consultation also envisages to review the current tripartite (banking, insurance/pensions, securities) structure of the ESAs. In particular, it seeks views on whether a "twin-peaks" model of supervision, where there is one prudential regulator/supervisor for financial institutions and one market conduct regulator/supervisor for financial markets would be more relevant than the current setting.

The current organisation of the ESAs along sectoral lines has worked well. The cooperation under the umbrella of the Joint Committee has proved very useful in fostering exchanges of views and information and aligning approaches across sectors as needed, often with one ESA developing practices subsequently rolled out to the sister organisations. The Joint Committee proved less efficient as a decision making body, when Level 1 text mandated the development of joint regulatory products, due to the complex governance, requiring adoption within the three Boards of Supervisors, in some cases with the involvement also of sectoral Standing Committees. This overly cumbersome governance made proposals on topics such as anti-money laundering and cross-sectoral consumer protection issues much harder to develop and adopt than sectoral initiatives. If the Joint Committee model is retained, thought should be given to streamlining its governance processes, for instance by delegating the adoption of a regulatory product on behalf of the Joint Committee to the three Chairpersons or to the Board of Supervisors of a leading ESA, while the Boards not directly involved in the decision would maintain the possibility to block the finalisation of the regulatory product, when a specific quorum is achieved.

Reorganising the ESAs into a twin-peaks model by merging the EBA and EIOPA into a single authority as suggested in the public consultation is unlikely to create significant synergies in the core business of the authorities (regulation and supervision) but there could be possible synergies in areas where the ESAs are currently understaffed and could join forces. This would be case, for instance, in areas such as impact assessment, economic analysis, statistics, data management, human resources and procurement. However, no material benefit in terms of reduction of costs in corporate functions is envisaged, as resources in these areas are already very slim. Finally, such a merger would reinforce the need for a review of governance arrangements in order to ensure an effective and efficient balance between benefiting from the input of supervisors in different sectors and achieving the benefits of a cross-sectoral approach.

The public consultation also envisages a change in the funding of the EBA which is very much welcome as the EBA has been experiencing excessively tight budget constraints since its creation, especially compared to other EU authorities operating in the same field and financed by the industry. Because of this constraint, the EBA has not been in a position to deliver over the last years in accordance with its ambition in a number of areas such as assessments of third country equivalence and consumer protection, and has had to delay delivery of some aspects of the Single Rulebook. The establishment of an independent budget line in the EU budget, as already proposed in the contribution to the ESAs review in 2014, or direct funding from the industry would alleviate the unreasonable budgetary constraints faced in recent years, while retaining strong scrutiny and discipline exercised by the budgetary authority.

## Specific comments

### Supervisory convergence

The EBA welcomes opening of discussion on optimising and improving the supervisory convergence tools. In particular, the peer review process is an important tool although some governance adjustments could be made. More importantly the peer review process could be supplemented by additional focused reviews on a limited number of competent authorities, including on-site visits and extending the obligation to issue opinions to all areas of regulation falling within the EBA's scope of action.

The EBA should establish a methodology and a programme for carrying out such reviews with a view to ensuring that reviews of each competent authority are carried out with appropriate frequency and in a way which, over time, covers the supervisory and resolution framework within the EBA's scope of action. The EBA should publish a report on the basis of each review, which should identify good practices and recommendations for improvement.

Finally, the EBA's founding regulation has not kept pace with the range of consumer protection and payments legislation that now falls within the EBA's scope of action. This means that the EBA's powers do not apply uniformly to the current range of competent authorities and financial institutions, making it difficult, for example, to issue guidelines on a consistent basis or to investigate breaches of Union law or mediate between certain competent authorities. Adjusting

the definitions used in the EBA founding regulation to ensure they remain up-to-date would greatly aid supervisory convergence in the consumer protection and payments area.

### International aspects

EBA's role in the assessment of equivalence could be better specified in an amendment to the EBA's Regulations to clarify its role in respect of the initial equivalence assessment of a third country's regulatory and supervisory framework as well as of the necessary continuous follow-up monitoring and implementation work that takes place once equivalence has been granted. This could include to monitor regulatory, supervisory and market developments in third countries and/or to monitor supervisory co-operation involving Union competent authorities and their third country counterparts. In general, we consider that EU bodies should claim full recognition of their local (i.e. at the EU level) role at international standard setter tables such as the BCBS or the FSB.

### Reporting

The EBA agrees that more consistent and streamlined reporting is needed and that a reflection is needed in respect of processes applied to reporting, disclosure and benchmarking requirements. However, the suggested approach towards "more detailed and technical guidelines and recommendations adopted by the ESAs" on reporting is not compatible with the objective of reaching maximum harmonisation in the area of reporting.

Another way forward would be to streamline the endorsement process of a number of reporting, disclosure and benchmarking requirements by a narrow, specific and well framed delegation to the EBA by providing it with the powers to make its own decisions of general application. For example, for purposes of achieving timely, uniform technical requirements that need to be swiftly developed and updated in situations where the legal framework so allows, notably where the level 1 legislation sufficiently ensures proportionality and framing of technical specifications.

Currently these requirements (e.g. for reporting, disclosure and benchmarking) are further specified in implementing acts and the endorsement process often leads to significant delay between submission by the EBA to the Commission and formal publication in the Official Journal. This delay creates significant disruptions for the EBA, competent authorities and financial institutions and other market participants as it creates uncertainty and hence prevents planning and leads to mismatches in reporting requirements and sometimes to dual and inconsistent reporting obligations. Supervisory reporting is highly technical and aims at achieving uniformity. It needs regular updates, corrections and clarifications that are important in terms of data quality.

An additional step with regards to reporting may be to improve coordination of official sector reporting on financial institutions across the EU. Inspiration may be found in the organisational set-up in the United States where the FFIEC ensures common reporting for the financial community. At the EU level, the EBA already plays a similar role with respect to supervisory reporting, but such a coordination role could be broadened, envisaging a periodic review and assessment of the additional reporting requirements set for both micro and macro prudential purposes.

## Own funds

The EBA has always paid the highest attention to the quality of own funds of banks as the basis of all the prudential policy in the banking area. It has used to the maximum the existing legal basis existing in CRD and CRR despite some weaknesses. However, it has been successful in enhancing the quality of banks capital instruments and full convergence of them after the adoption of the CRR. It is time to clarify and provide explicit ground for the EBA's role in ensuring the consistency of own funds instruments across the EU with the capital requirements regulation. The current weakness of powers and ambiguity of the EBA's role is further exacerbated by the asymmetry in the respective roles the EBA currently plays for different types of instruments. As already expressed in the May 2017 Opinion on own funds, a mandatory prior consultation of the EBA would eradicate remaining uncertainties and cost on banks regarding the quality of their capital while indeed strengthening the full harmonisation and quality of capital instruments in the EU Single Market.

Done at London, 31.05.2017

[signed]

Andrea Enria

Chairperson

For the Board of Supervisors