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EUROPEANISSUERS´ RESPONSE TO EC CONSULTATION ON THE OPERATIONS OF THE EUROPEAN SUPERVISORY AUTHORITIES (ESAs)

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SUMMARY

EuropeanIssuers, representing the interests of European publicly quoted companies, welcomes the consultation of the European Commission's on the operations of the European Supervisory Authorities (ESAs). Given the challenges faced, we believe that ESAs have performed rather well. Nevertheless, certain improvements are needed to ensure the well-functioning and credibility of the European System of Financial Supervision. Given the strong links between the funding model, the governance and accountability of the authorities, the review of ESAs operations should not consider the funding model in isolation, but take this opportunity to foster governance and accountability of ESAs. In our response to this Commission consultation, we also make some suggestions on how ESAs functioning and their stakeholder engagement could be further improved. Finally, we comment on the need and possible ways of achieving a more proportionate balance between level 1, level 2 and level 3 legislation.

RESPONSES TO SPECIFIC QUESTIONS

Q1: In general, how do you assess the work carried out by the ESAs so far in promoting a common supervisory culture and fostering supervisory convergence, and how could any weaknesses be addressed? Please elaborate on your response and provide examples.

In terms of supervisory convergence, two aspects need to be distinguished: the contribution of the European Supervisory Authorities (ESAs) to ensure consistent implementation of a "single rulebook" within the European Union and secondly, the contribution to a common supervisory culture in Europe.

In EuropeanIssuers view, ESAs so far have sufficiently contributed to the establishment of a "single rule book" in capital markets regulation, thereby fostering EU-wide confidence in the financial system as well as to preserve financial stability. We therefore haven't noticed any major deficiencies regarding the current set of powers conferred to ESAs in that context. However, we have observed several problems regarding results of ESMA's work which raises issuers' concerns on the process of drafting and the checks and balances applied to that process. We believe it is important to avoid:

1. overstepping the legal mandate granted by level 1 texts and;
2. overly bureaucratic level 2 measures which often do not fully reflect the intention of level 1 legislation.

Regarding the second point, EuropeanIssuers would like to stress the need to focus on the effective implementation of the ESAs current powers and, to that end, we see room for improvement of ESAs current governance and accountability.

EuropeanIssuers emphasizes that the following issues should be taken into consideration when addressing the issue of a common supervisory culture and exceeding the mandate of level 1 legislation - in Europe:

- **Appropriate balance between level 1 and level 2**

To our understanding, the major issue is **lack of appropriate balance between Level 1 and Level 2 legislation.**

Over the years, we have observed a significant increase of provisions being delegated to level 2 in many financial services dossiers. Often, these are crucial issues that in our view should be tackled at level 1. This is against better regulation principles and may create regulatory uncertainty for market participants, ESAs, National Competent Authorities. We also believe it questions a common supervisory culture in Europe.

It is important that EU co-legislators ensure that all crucial political issues are negotiated at level 1. A temptation of overcoming possible deadlocks at level 1 negotiations by deferring discussions on some key contentious matters by delegating them to level 2 should be avoided. Hence, the delegation of power must be clear, precise and detailed and may only aim to supplement certain non-substantive elements of the legislative acts.

- **Effective use of the "toolbox" provided under the ESAs regulation**

As stated above, ESAs do not lack powers to promote supervisory culture throughout Europe. We rather see room for improvement in implementation of the existing powers that are conferred to ESAs in this regard. This relates to the deficiencies in the current internal ESA governance structure, which in some cases might hinder an effective use of the tools present in the ESAs regulation.

- **Governance and accountability**

Governance and accountability should not be neglected during the ESAs review. The past has shown that ESAs have on several occasions overstepped powers conferred to them, thereby not respecting the political will set out at level 1. This risks the institutional balance being impaired and democratic legitimacy being decreased.

We believe that it is important to urgently tackle the above-mentioned issues.

In addition, a stronger and more balanced stakeholder consultation and engagement is needed to ensure that market participants' views are better reflected in the final measures drafted or proposed by ESAs.

For more detailed proposals on accountability and governance please see the answer to question 32.

Q2: With respect to each of the following tools and powers at the disposal of the ESAs:
peer reviews (Article 30 of the ESA Regulations);
binding mediation and more broadly the settlement of disagreements between competent authorities in cross-border situations or cross-sectorial situations (Articles 19 and 20 of the ESA Regulations)
supervisory colleges (Article 21 of the ESA Regulations);
To what extent:
a) have these tools and powers been effective for the ESAs to foster supervisory convergence and supervisory cooperation across borders and achieve the objective of having a level playing field in the area of supervision;
b) to what extent has a potential lack of an EU interest orientation in the decision making process in the Boards of Supervisors impacted on the ESAs use of these tools and powers?
Please elaborate on questions (a) and (b) and, importantly, explain how any weaknesses could be addressed.

The "peer review" foreseen in Art. 30 of ESA's regulation is quite important as such information can be made public. Unfortunately, the results of the evaluation process may be disclosed publicly only subject to a consent of the evaluated Competent Authority. This limitation hinders effectiveness of such provision.

At the same time, we would appreciate if ESAs were obliged to solicit comments by stakeholders when drafting the peer reviews to have a full and objective picture, not confined to the comments by the National Competent Authorities (NCAs) only.

While ESMA's Principles on stakeholder engagement in peer reviews point into the right direction, they need to be strengthened and improved. They leave too much discretion to the NCAs regarding the participation of stakeholders to ESAs activities. It seems to us that a NCA can de facto veto the participation of stakeholders.

In 2015, ESMA has established a **Supervisory Convergence Standing Committee** (SCSC) and repealed the old "Panel review", however, neither the composition nor the methodology has changed from the previous Panel. In our view, initiatives to foster supervisory convergence should not be limited to "peer reviews" but also provide for an "**independent review**". We therefore suggest that the **SCSC** is composed also **of some independent members** and promotes "independent review", being allowed to verify received information with on-site inspections (if appropriate) and hearings of stakeholders.

Q5. To what extent are the ESAs tasks and powers in relation to guidelines and recommendations sufficiently well formulated to ensure their proper application? If there are weaknesses, how could those be addressed? Please elaborate and provide examples.

1. Introduction of a scrutiny mechanism for ESA guidelines/recommendations

Although guidelines and recommendations are legally not binding, in many EU countries in practice they become binding. Many NCAs implement them in the national legislation therefore making them obligatory. ESAs Regulation emphasizes that NCAs and non-financial institutions should make every effort to comply with the ESA's guidelines and recommendations. Companies can be also required at the national level to explain in a detailed way whether they are compliant.

NCAs are also obliged to inform the respective ESAs whether they comply or intend to comply with the guidelines/recommendations. In case of non-compliance, they need to explain why. In case of ESMA guidelines, there are few instances in which NCAs declared non-compliance.

While we appreciate instruments like guidelines and recommendations as measures to foster supervisory convergence, we are concerned with the above-mentioned tendency in various EU countries. Guidelines tend to receive less attention at the EU level as are intended as not binding. We observe that sometimes guidelines are used as means to introduce new requirements through the "back door", which is against the Better Regulation.

E.g., in 2015 ESMA published guidelines on the Alternative Measures of Performance (AMPs) which are non-GAAP measures and are not regulated. The AMF did implement them into local law making them binding. We consider that ESMA and the NCA have overstepped their powers.

Moreover, guidelines should be **published sufficiently in advance** (at least 3 months) of the date of implementation of level 1 legislation, to help market participants comply with new rules. E.g., in case of the Market Abuser Regulation, guidelines were published 10 days after the implementation date of the Regulation which cause severe difficulties for market participants.

Therefore, we suggest that EU legislative bodies are involved, otherwise the process loses democratic legitimacy. A scrutiny mechanism for ESAs guidelines/recommendations should be introduced ensuring that the EU institutions have effective oversight.

2. Distinction between guidelines/recommendations and technical standards

Guidelines and recommendations can be issued to promote consistent, efficient and effective supervisory practices within the ESFS, and to ensure common, uniform and consistent application of the Union law. However, also Regulatory Technical Standards are intended to fulfil the latter function, although a formal endorsement procedure involving control by the EU institutions are in place.[1] Therefore, we call for a clearer distinction in ESAs regulation under which circumstances guidelines and RTS should be issued. Also, it should be specified that only in the areas not covered by RTS, ESAs are granted the power to issue guidelines and recommendations, as stated in Recital 26 of ESAs regulation. To give this provision a more binding character, it should be incorporated in Art. 17 of ESAs regulation.

3. Better Regulation & improved stakeholder engagement

In line with the Better Regulation principles, we believe that stakeholders should have sufficient opportunity to express views on ESAs proposals, and that their views should be properly considered.

Based on our experience, it seems that ESMA very rarely substantially changes its proposals following feedback from consultations. E.g., despite mixed views regarding financial reporting in a structured electronic format, ESMA decided to require listed companies to report using *Inline XBRL*. It was mostly supported by service providers, while many respondents believe that reporting in PDF should be allowed.

While we have observed an improvement in how the Commission considers stakeholders' views, we believe that ESMA lags behind in this respect.

See also response to Q 26 for more on stakeholder engagement.

4. Q&As

Q&As are used by ESAs to aid interpretation of level 1 and level 2 texts. E.g. under EMIR market participants faced huge compliance burdens due to permanent updates of the ***ESMA Q&As***. Similar problems are experienced with implementation of MiFID II.

To avoid such problems, we suggest to at least partially substitute Q&As by other measures as:

- While many regulators perceive Q&As as not binding, others make them binding through implementation in national legislation. This forestalls a level-playing-field.
- Q&As lack democratic legitimacy as neither the Council nor the European Parliament have a say, while stakeholders cannot comment.
- It is challenging for market participants to apply the updates due to lack of information on the timeline of the Q&As changes.

Also, we suggest that the legislator clarifies that Q&As are not legally binding and requires that companies have sufficient time to implement the changes (e.g. 6 months after the publication of the update).

Q6. What is your assessment of the current tasks and powers relating to consumer and investor protection provided for in the ESA Regulations and the role played by the ESAs and their Joint Committee in the area of

[1] See Art. 10 ESA Regulation.

consumer and investor protection? If you have identified shortcomings, please specify with concrete examples how they could be addressed.

Q7. What are the possible fields of activity, not yet dealt with by ESAs, in which the ESA's involvement could be beneficial for consumer protection? If you identify specific areas, please list them and provide examples.

Response to questions 6 & 7

Before starting a discussion on a potential extension of ESAs powers regarding consumer and investor protection, deficiencies of the current system in terms of accountability, governance and appropriate balance between level 1 and 2 should be addressed. Further explanations can be found under Q1 and Q32. Only after the shortcomings in those areas are remedied, any possible extension of ESAs powers could be considered.

While we believe that the interests of investors and consumers need to be taken into account, we have impression that ESA's have been focusing too much on investor protection while not enough on ensuring balanced markets that would serve the interests of both investors and companies.

While the regulation No 1095/2010 of 24 November 2010, establishing a European Supervisory Authority (European Securities and Markets Authority), set ESMA's objective "to protect the public interest by contributing to the short, medium and long-term stability and effectiveness of the financial system, for the Union economy, its citizens and businesses", within few years' time, there is no longer any mention of businesses or their interests in ESMA's mission. In the Strategic Orientation 2016-2020[2], ESMA's mission is to enhance investor protection and promote stable and orderly financial markets and encompasses three objectives:

1. Investor protection: to have the needs of financial consumers better served and to reinforce their rights as investors while acknowledging their responsibilities;

2. Orderly markets: to promote the integrity, transparency, efficiency, and well-functioning of financial markets and robust market infrastructures; and

3. Financial stability: to strengthen the financial system in order to be capable of withstanding shocks and the unravelling of financial imbalances while fostering economic growth.

Unfortunately, there is no mention of companies, growth or jobs. We feel this is high time, in particular in the context of the CMU Action Plan, to re-discuss ESA's mission and objectives, and to reflect what is the purpose of EU financial regulation and whose interests should financial markets serve.

Moreover, we see ESAs powers with respect to consumer and investor protection as sufficient. We would rather like to see consumer protection which is more evidence based. E.g. detailed transparency requirements which are laid down for instance in the PRIIPs Regulation or the investor protection rules under MiFID II should better reflect economic research on what information consumers really need for their well-informed investment decisions. Otherwise, we see a danger of excessive disclosure which leads to huge compliance burdens on companies while not necessarily useful for financial consumers.

It has also to be noted that most of the more recent financial regulation has been justified with the argument of investor or consumer protection. It could therefore even be argued that the Art. 9 provisions of the ESAs regulations are redundant as the mandate of consumer/investor protection is already incorporated in the Union law.

[2] https://www.esma.europa.eu/sites/default/files/library/2015/11/2015-935_esma_strategic_orientation_2016-2020.pdf

Nevertheless, the NCAs should remain responsible for ensuring that the EU legislation is properly implemented considering characteristics of the local markets.

We also believe that NCAs have sufficient powers to act against individual entities in breach of Union law with widely harmonized supervisory measures and sanctions that can be applied.

Q9. Should the ESA's role in monitoring and implementation work following an equivalence decision by the Commission be strengthened and if so, how? For example, should the ESAs be empowered to monitor regulatory, supervisory and market developments in third countries and/or to monitor supervisory co-operation involving EU NCAs and third country counterparts? Please elaborate and provide examples.

For the industry, it is crucial that processes and responsibilities are explicit, practical and effective.

As the equivalence decision is originally taken by the Commission, the subsequent decision-making power should stay with the Commission. However, as equivalence includes close cooperation between supervisory authorities in the third country and the EU, the ESAs should support the Commission in constantly monitoring and supervising third country regulation and its application. This way resources could be used more efficiently and synergies created. Yet, this should stay an advisory position and not become a decisive role.

Irrespective of the responsibilities of the different EU institutions, the procedure must become more transparent, faster and more streamlined. Although equivalence decisions take into account many details/rules and thus have to be conducted thoroughly, unnecessary delay and complexity should not deter third countries from applying them.

The Commission should better take into account the recommendations of the ESAs. For instance, we hear that under AIFMD the European Commission's equivalence decision is built on a recommendation from ESMA which evaluates the regulatory regime of the third country in question. Several countries have already gone through this process, and ESMA has given the Commission a positive recommendation, e.g. for Canada, Guernsey, Japan, Jersey and Switzerland. However, the Commission has not yet granted the third-country passport under AIFMD.

Q10. To what extent do you think the ESAs powers to access information have enabled them to effectively and efficiently deliver on their mandates? Please elaborate and provide examples.

From the perspective of a supervised entity it is not that important who collects data provided the data to be collected is not too voluminous, does not create red tape and it is clear and regulated which data will be asked for. It should be avoided that data is asked for twice, i.e. by NCAs and ESMA. It should also be avoided that ESMA and/or NCAs have too much discretion as to what information can be collected.

Besides the question who collects the data it is also important to address the question of the extent of data to be collected. Data collection should be tightly linked with the requirement on the extent of market transparency needed for the proper supervisory processes. Recently, in many areas (e.g. EMIR trade repository reporting) data collection exercises are highly bureaucratic and impose significant burdens for market participants requested to deliver the data. Furthermore, the EMIR reporting regime clearly shows that too broad and detailed approach reduces the data quality and creates massive implementation problems for both NCAs and market participants. The reason for many reporting fields, e.g. the time stamp which is not possible to determine in OTC trading, are difficult to comprehend. Therefore, we request ESAs to justify the data

requirements against the background of supervisory purposes and to communicate these reasons to market participants. Information requirements, which do not fit these requirements, should be abandoned.

Q14. What improvements to the current organisation and operation of the various bodies do you see would contribute to enhance enforcement and supervisory convergence in the financial reporting area? How can synergies between the enforcement of accounting and audit standards be strengthened? Please elaborate.

We do not see the need to equip ESMA with additional powers with respect to accounting, auditing and enforcement of financial reports.

Regarding accounting standards, the IAS regulation obliges European companies to apply the IFRS provided there has been a formal endorsement by the EU.

The definition of standards should be distinguished from the application of the standards and the enforcement of it. In our perspective, there is no role for ESMA or other European institutions that goes beyond the current status quo. Member States, based on their legal traditions and their market specifics, have developed different models that ensure that listed companies comply with the rules and that auditors perform their tasks in a proper manner. Therefore, European companies already now take financial reporting very seriously. There is no evidence of any significant compliance deficits and any significant potential for misinformation of investors. Investors in European listed companies can benefit from the existing transparency and rely on the accounts audited and assured by various (overlapping) institutional settings. Furthermore, nothing points to deficit that would need to be tackled at European level.

Against this background, we do not see the need for further action and for any additional ESMA involvement.

Considering that the current endorsement process of accounting standard has been recently revised, we do not see any shortcoming that needs to be addressed and we do not think that ESMA should be given any power in this field.

Moreover, we think that ESMA would not have a global view on accounting standards and would consider them only from the perspective of protecting investors without taking into consideration the macro-economic impacts, prudential aspects and concerns of “preparers”. We also think that IFRS should remain “principles based” and we fear that an intervention of a supervisor would favour a more “rules-based” approach

Q26. To what extent are the provisions in the ESA Regulations appropriate for stakeholder groups to be effective? How could the current practices and provisions be improved to address any weaknesses? Please elaborate and provide concrete examples.

Decisions should be based on the broadest possible input. We hence recommend greater industry involvement and adequate opportunity to comment on Level 2/Level 3. In this context, we appreciate that expert and stakeholder groups (SG) have been established in each ESA.

However, we would like to see a better engagement of ESAs with stakeholders, especially within ESMA Consultative Working Groups (CWGs).

Current situation

From experts present on ESMA CWGs, we hear that they are not presented to the Standing Committee, there are no minutes of the meetings, it remains unclear whether their advice is taken into consideration. Moreover,

there is no transparency: no information is published on the meetings (even dates), no documentation is being disclosed (even agendas), no outcomes or next steps. It is emphasised that documentation is strictly confidential, meaning it cannot be shared with anyone outside the CWG, and that the CWG members are appointed in their personal capacity.

There is also no transparency on how members of the Consultative Working Groups are being selected. There is no explanation on what categories of experts / stakeholders are being sought and in what proportions. While on the webpages of ESMA Secondary Markets Stakeholder Group there is a list of members with the CVs and information in which category they have been selected, on the website of CWGs there is only a list of names and what company / institution they work for but no other details. We think this is against the Better Regulation principles. We would like to see more transparency in that respect.

Recommendations

1. **Get a more balanced representation of the interests**

We would like to see a **balanced representation** of stakeholders: while in recent years' investors and financial services consumers have become overrepresented on ESMA stakeholder and CWGs, there is often a lack of representation of non-financial companies. If at all, only one representative of SMEs is allowed, not however any representative of non-financial companies. Thus, EuropeanIssuers asks for **securing at least two seats on each CWG for representatives of non-financial companies** (including one for SMEs). As regards the **Securities and Markets Stakeholders Group** and the **CWG that are the most relevant for non-financial companies** (notably corporate reporting and corporate finance), **at least a quarter of the seats** should be allocated to non-financial companies, reflecting their significant role in the issue discussed by the group.

2. **Appoint representative organisations**

As it is already the case in other EU agencies, and in some Commission expert groups, for instance the European Post Trade Forum (EPTF), while certain members were appointed in their personal capacity, some are selected to represent certain stakeholder groups and are allowed to share information with their constituencies to ensure a proper and democratic decision making.

We recommend that seats in stakeholder groups are assigned to specific organisations that are representative of the interests that relevant for the group. These organisations could then appoint a representative who would express the voice of the organisation and be accountable to it. This would be beneficial to both the represented organisations that would get better access to ESMA, and to ESMA, which would receive a view reflecting compromise within the represented organisation. As far as issuers are concerned, we recommend allocating **at least one seat in each stakeholder / CWG to EuropeanIssuers.**

As a minimum, to ensure the representativeness of the experts for each category, **representative organisations registered in the "EU transparency register" should be allowed to indicate the possible candidates for a certain category.**

3. **Improve transparency**

Effective stakeholder engagement is only possible if there is transparency in the ESAs regulatory process. This includes better transparency of the ESAs decision making process and of their stakeholder groups. At the EPTF, a lot of information is public, including dates of next meetings, agendas and minutes of the meetings. We very much applaud this approach and we believe that ESAs CWGs' governance should follow a similar approach.

4. **Improve the timeline**

To further improve stakeholder engagement, it would be useful to ensure longer consultation times, e.g. 12 weeks in line with Better Regulation principles.

More importantly, it is of paramount importance that the level II measures are finalised well ahead of the date of application of new rules. Companies all over European were in a difficult situation regarding new Market Abuse rules, as when the new rules became applicable, a lot of level II measures were not yet finalised. This should be avoided in the future as it creates a lot of regulatory uncertainty.

Q29. The current ESAs funding arrangement is based on public contributions:
a) should they be changed to a system fully funded by the industry;
b) should they be changed to a system partly funded by industry?
Please elaborate on each of (a) and (b) and indicate the advantages and disadvantages of each option.

EuropeanIssuers strongly opposes to change the current ESAs funding model to a system fully or partly funded by the industry.

The current model should be maintained for the following reasons:

- **The mission of the ESAs to develop regulatory and implementing technical standards should be funded by the European Union** since this responsibility would come from a delegation of powers from the Parliament and the Council to the Commission to adopt technical standards;
- **The tasks carried out by the ESAs to foster a common supervisory culture and ensure supervisory convergence should be funded by the competent authorities because they directly benefit from the convergence work.** The building of a European System of Financial Supervisors was specifically aimed at upgrading the quality and consistency of national supervision.
- Where the ESAs have specific direct supervisory powers, **additional fees could be levied on the regulated entities** as is the case for ESMA on credit rating agencies, for instance.
- **The current model empowers the European Parliament to exert budgetary control over the ESAs and thereby ensures that ESAs can be held accountable.** It guarantees democratic control which would otherwise be largely missing. Any alteration would thus threaten the already relatively low level of democratic legitimacy of the ESAs. At present, better control and accountability of the ESAs would be needed (see above). The current funding model is a tool to control the ESAs.
- **The current funding model also ensures stable funding resources to the ESAs** compared to a model that would be based on a partial or full industry funding. As the Commission services point out in the consultation paper "*in period of crisis, the workload of supervisors tends to be heavier and their needs for resources are greater, while the capacity of the industry to pay fees is undermined*."

Any change in the funding model would furthermore **require that the "industry" is part of a representative body**. Each ESA should have a body which represents in equal terms the supervised companies and the officials which are politically responsible for the ESAs. These bodies could monitor the management of the ESAs and support the ESAs in the performance of its supervisory functions.

Another point that must be considered is that national constitutions place high demands on the legitimacy of such special levy on private companies. For example, according to the German Constitutional Law, these contributions must be justified both by legal reason and by amount of the contribution.[3] According to the jurisdiction of the German Federal Constitutional Court (BVerfG), only companies may be charged which are

[3] Cf. BVerfG v. 03.02.2009 – 2 BvL 54/06, Rn. 104; BVerfG v. 28.01.2014 – 2 BvR 1561/12, Rn. 121; BVerwG v. 23.11.2011 – 8 C 20.10, Rn. 31 und 32 ff.

the cause of supervisory acts or are at least the main beneficiaries of the financed activity.[4] The levy must also be documented in budgetary terms und regularly be reviewed by the legislator.[5] In Germany, the contributions are then allocated according to the principle of causation and in an activity-based costing structure to achieve legitimacy of the model (§§ 16 ff. FinDAG).[6] In practice, there are difficulties encountered, which is why it is necessary to constantly improve. The needed transparency and the activity-based costing structure taking into account the causation principle creates huge administrative expenses and other costs as every single act of an employee has to be allocated in the activity-based costing structure. Therefore, for the ESAs a legitimate change would entail a lot of time, very high introductory costs and increased administrative burdens and costs.

Similarly, in Italy (Art. 40 Legge 724/94) the funding must be calibrated to the costs sustained by CONSOB for its supervisory activity on each specific category of supervised entity. Moreover, the fees must be approved by the Ministry of Economy.

Finally, requiring non-financial companies to contribute to the ESA budget would create an additional burden. Non-financial companies are already exposed to a significant number of requirements under capital markets regulation and, in most countries, also to the economic contribution to NCAs. Any additional burden would contradict the European Commission's agenda of pursuing a Capital Markets Union, which aims at more attractive capital markets fostering investment and growth.

Q30. In your view, in case the funding would be at least partly shifted to industry contributions, what would be the most efficient system for allocating the costs of the ESA's activities:
a) a contribution which reflects the size of each Member State's financial industry (i.e., a "Member State key"); or
b) a contribution that is based on the size/importance of each sector and of the entities operating within each sector (i.e., an "entity-based key")?
Please elaborate on (a) and (b) and specify the advantages and disadvantages involved with each option, indicating also what would be the relevant parameters under each option (e.g., total market capitalisation, market share in a given sector, total assets, gross income from transactions etc.) to establish the importance/size of the contribution.

EuropeanIssuers recommends not to change the distribution of the ESAs' funding model. We do not see any valid reasons for changing the current system.

Application of a few criteria will not make the funding model just. It is not only the size of a Member State's financial industry or the size/importance of sectors/entities that need to be taken into consideration. A small financial industry may require much more supervisory activities than a proven big one. Furthermore, the beneficiaries of the financial market are also investors of other countries. There are so many criteria and all of them must be evaluated and considered.

A more proportionate division than the current distribution system (qualified majority voting rule of the Council) could be in principle possible in case many various criteria and key figures are considered, which is very difficult to calculate. A fairer distribution would only be possible by taking into account the principle of causation. An example of this would be the financing of the German NCA (BaFin). But such a financing has the

[4] Cf. BVerfG v. 28.01.2014 – 2 BvR 1561/12, Rn. 121.
[5] Cf. BVerfG v. 17.07.2003 – 2 BvL 1/99 u.a., Rn. 120 and at last for the BaFin-Levy BVerwG v. 23.11.2011 – 8 C 20.10, Rn. 27.
[6] Compare also the official justification of the FinDAG - BT-Drs. 17/11119, S. 30.

disadvantage that is causes a lot of time, very high introductory costs and increased administrative burdens and costs. A simpler solution would only create an illusion of fairer financing.

In any case, an appropriate distinction should be drawn between **financial and non-financial companies** as their systemic risk level is different and therefore supervision of financial companies is more resource intensive.

Q31. Currently, many NCAs already collect fees from financial institutions and market participants; to what extent could a European system lever on that structure? What would be the advantages and disadvantages of doing so? Please elaborate.

In principle, those who cause the costs should cover them, as long as the industry is not asked to double their fees (or pay twice). In addition, market participants like foreign investors could be obliged to participate.

Q32. You are invited to make additional comments on the ESAs Regulation if you consider that some areas have not been covered above. Please include examples and evidence where possible.

In the context of ESA's review, special attention should be given to ESAs accountability and governance.

1. Accountability

ESAs' activities should be better scrutinized by EU legislators to better hold ESAs accountable for their work.

We suggest considering:

a) Extending deadline for the EU Parliament and the Council to object Regulatory Technical Standards (RTS)

According to art. 13 of ESAs regulation, the European Parliament or the Council may object a RTS within a period of 3 months from the date of notification of the RTS adopted by the Commission. At the initiative of the European Parliament or the Council this period shall be extended by 3 months. However, where the Commission adopts an RTS which is the same as the RTS standard submitted by the Authority, the period during which the European Parliament and the Council may object is 1 month from the date of notification. At the initiative of the European Parliament or the Council that period shall be extended by 1 month.[7]

The time frame to examine the draft should be extended in the case the Commission has endorsed the technical standards submitted by the ESAs without revision. The one month period is too short to scrutinize the texts, given the complexity of most of the drafts. The Parliament and the Council must be given enough time to consider the draft, otherwise the process loses democratic legitimacy**.**

b) Clarifying criteria determining deadlines to reject RTS

We see a threat that the Commission may consider the RTS as being "the same" to the draft RTS submitted by the ESA, even though they had been changed in a way that goes beyond i.e. pure linguistic corrections and counts as a substantial change. The European Parliament and the Council pointed out that in many cases the delegated regulation and the ESAs draft RTS could not be considered "the same" - therefore the short one-month deadline set by the Commission was not justified and a three-month objection period should be applied.

[7] See Art. 13 ESA Regulation.

In our view, criteria according to which deadlines for objection to RTS are set out and/or extended need to be clarified, i.e. in which cases can it be considered that draft and final RTS are not "the same" and the 3-month deadline for objection applies. Also, any amendment by the Commission beyond a correction of an obvious mistake of the ESAs' initial draft should be signalled to the co-legislators ASAP and at the latest at the time of the adoption of the act as provided by Art. 14 of the ESA Regulation. Lastly, the Commission should be required to provide, on request, clarifications about changes made to the draft RTS in case there are doubts about their non-substantial nature.

c) Concerns regarding the so called "bundling"

"Bundling" is called the process when the Commission regroups several empowerments for draft RTS into one single act. To do so, the Commission uses two criteria: possible interlinks in the subject matter of the empowerments and the common deadline for the adoption of the measures.

The downsides of this procedure are:

- the relative reduction of time for the Parliament and the Council to scrutinize the proposal during the objection period, since there is only one deadline for several acts running at the same time.
- in the Commission's view, in the case of "bundling", no right to oppose only part of the bundled delegated act is granted to the Parliament and the Council. The institutions can only approve or object the whole "package". In our view, it should however be possible for the Parliament and Council to object to each of the delegated acts separately. This issue should be solved e.g. in the context of the on-going negotiations on the Inter-Institutional Agreement on Better Regulation.

d) Participation of the institutions in the drafting phase

Regular informal exchange between the EU Institutions and the ESAs – e.g. as established between ESMA and the ECON committee of the European Parliament since 2012 – help in that regard. The consultation might probe an idea of ESAs forwarding preliminary versions of draft RTS, working documents or non-papers to at least the rapporteur on the file in the Parliament and the chair of the working group of the respective Council Presidency before they are approved by the Board of Supervisors (BoS). Such an approach would help the EU institutions better follow the discussions.

e) Improvement of ESA's chairs hearings

Hearings of the chairs of ESAs before the European Parliament should be improved, as current procedures do not allow for a proper debate. MEPs cannot ask questions related to the responses to the previous questions.

2. Transparency and determination of tasks, priorities and competences of ESAs

The review could be a great opportunity to assess ESA's tasks, priorities and competences. We believe that the work programmes of the ESAs should be focused on ensuring resource efficiency as well as effectiveness. Redundancies or overlapping competences on European and national level between ESAs and NCAs should be avoided. We would like to see more transparency in elaboration of priorities and work programmes and they correspond with the budget.

3. Functioning of ESAs

We wish to also flag up certain issues with respect to the functioning of ESAs. An improvement in those areas would contribute to the efficiency of ESAs.

a) Better regulation

The Better Regulation Agenda aims at ensuring that European law-making procedures remain at the highest standard in terms of impact assessment, transparency, public consultation, and implementation. Laws should be finalized well before their application and stakeholders should have the time to prepare for the new rules. Improvement is specifically needed regarding the timeline for the adoption of level 2 measures. The Market Abuse Regulation applies from 3 July 2016. However, out of 16 level 2 measures 7 have been published only in June (2 of them on 30 and 29 June); 6 in April; 2 in March; 1 in December. Guidelines were published on 13 July 2016. Therefore, companies did not have enough time properly prepare for implementation of new rules.

Also, as MAR extends some disclosure requirements to companies on MTFs (mainly small and mid-caps). Those companies did not have any experience nor structure in place to cope with those requirements, while the lighter regime foreseen for companies on the "SME Growth Market" is not yet applicable because of the postponement of MIFID II application.

Given heavy obligations and serious consequences in case of non-compliance (including criminal sanctions) stemming from MAR provisions, the situation is particularly difficult. Thus, we think that the consultation should consider this kind of situations and how to avoid them in the future. Our recommendations are:

- when level 1 foresees many level 2 measures, the legislator should allow a longer transition period
- a general provision in ESMA regulation (or a specific provision at level 1) should state that level 2 measures must be published at least 6 months before the date of application of level 1 legislation
- a general provision in ESMA regulation obliging ESMA to notify the Commission in case ESMA is not able to deliver certain measures on time. Subsequently, the Commission should take an appropriate action (for e.g. postponement of the date of application of level 1).

b) Emergency situations

ESAs do not have a possibility to declare a state of emergency. They may only issue a confidential information to the Council, while the latter shall then assess the need for a meeting and afterwards inform the Commission and the Parliament (Art. 18 of ESAs regulation).

The process is incompatible with the nature of an emergency which may require, e.g. to decide to suspend trading on certain classes of financial instruments or to limit short selling immediately. Moreover, per the safeguard clauses (Art. 38 of ESAs regulation), ESAs shall ensure that no decision adopted in case of an emergency and settlement of disagreements impinges on the fiscal responsibilities of Member States. The concept of 'fiscal responsibility', as it has been proposed, seems vague and potentially too extensive. While in case of ESMA, a typical decision in case of an emergency would be by definition excluded by Art 18.