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Delegations will find attached document SWD(2014) 261 final.

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**COMMISSION STAFF WORKING DOCUMENT**  
*Accompanying the document*

**REPORT FROM THE EUROPEAN COMMISSION TO THE EUROPEAN  
PARLIAMENT AND COUNCIL**

**on the operation of the European Supervisory Authorities (ESAs) and the European  
System of Financial Supervision (ESFS)**

{COM(2014) 509 final}

## **1. Introduction**

### **Purpose of the staff working document and underlying sources**

**The ESAs founding Regulations<sup>1</sup> require the Commission to publish a general report by early 2014** on the experience acquired as a result of the operations of the Authorities and procedures laid down in these Regulations. This report shall be forwarded to the European Parliament and to the Council together with any accompanying proposals, as appropriate. Article 81 of the ESAs Regulations sets out a non-exhaustive list of indicators against which the performance of the ESAs shall be assessed. The present staff working document contains details to support the assessment in the Commission report on the ESAs. It takes the above-mentioned indicators thoroughly into account while extending the analysis to further issues, including the process of delivering draft technical standards, the application of the supervisory powers contained in Articles 17 and 18 of the ESAs Regulations, the functioning and composition of the Joint Committee, the Board of Appeal and the stakeholder groups, the financing and budgetary process, the direct supervision of Credit Rating Agencies (CRAs) by ESMA, and the potential impact of the establishment of Banking Union on the overall ESFS and the EBA in particular.

**The present document is underpinned by various sources:**

**First, Commission representatives are participating as a non-voting member in the meetings of the ESAs' Boards of Supervisors (BoS)** and as an observer in the meetings of the **Management Boards (MB) and the Joint Committee (JC)**. The Commission services are also taking part as an observer in the work of many of the various technical working groups, standing committees and task forces of the ESAs.

**Second, on 24 May 2013 the Commission services organised a Public Hearing** on the ESFS review which attracted more than 400 participants from all sectors concerned.

**Third, the Commission services consulted on the issue between 26 April and 31 July 2013** to inform its review of the ESFS. The process comprised a public consultation and a 'targeted' consultation, including more detailed and technical questions directed at the ESAs and ESRB, national authorities, relevant institutions and agencies, and key external stakeholders. The Commission services received 137 responses in total (94 to the public consultation and 43 to the targeted consultation).

**Moreover, throughout 2012 and 2013 the Commission services maintained a dedicated dialogue** with the ESAs in the framework of an ESAs review contact group and in this

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<sup>1</sup>

See Regulations (EU) No 1093/2010, 1094/2010, and 1095/2010 of the European Parliament and of the Council of 24 November 2010; OJ of 15 December 2010, L 331, pp. 12-119.

context received several sets of quantitative and qualitative input on the performance and deliverables of the ESAs since their inception.

**Finally, the present document also takes into account the self-assessment provided by the ESAs, as well as studies undertaken by the IMF<sup>2</sup> and the European Parliament<sup>34</sup>. The analysis takes into account that the relevant legislation is under continuous development.** Therefore it is without prejudice to on-going work on various legislative proposals put forward by the Commission which are currently under negotiation (e.g. proposal on the anti-money laundering Directive; financial benchmarks etc.) in the European Parliament and the Council.

**This staff working document also reflects the principles set out in the Common Approach of the European Parliament, the Council of the EU and the European Commission on decentralised agencies of July 2012<sup>5</sup>,** which aims at making existing EU agencies more coherent by improving their governance, efficiency and accountability.

The analysis builds on data **spanning the period from January 2011 to end 2013.**

### **Background on the ESFS**

**The financial crisis** exposed important failures in financial supervision, both in particular cases and in relation to the financial system as a whole. President Barroso therefore requested a group of high level experts in 2008, chaired by Mr Jacques de Larosière, to make proposals to strengthen European supervisory arrangements, with the objective of establishing a more efficient, integrated and sustainable European system of supervision. The Group presented its report on 25 February 2009. Building on its recommendations, the Commission set out proposals to strengthen financial supervision in October 2009, which were adopted by co-legislators in November 2010. The ESAs started their operations in January 2011. The European System of Financial Supervision (ESFS) consists of:

- **Three** European Supervisory Authorities (ESAs), namely a European Banking Authority (EBA), a European Insurance and Occupational Pensions Authority (EIOPA), and a European Securities and Markets Authority (ESMA), working within a network of national competent authorities (NCAs), and the Joint Committee ensuring cross-sectorial cooperation and consistency; and
- **the European Systemic Risk Board (ESRB)** monitoring and assessing potential threats to financial stability that arise from macro-economic developments and from developments within the financial system as a whole. To this end, the ESRB is charged

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<sup>2</sup> International Monetary Fund – Financial Sector Assessment Program at EU level, March 2013.

<sup>3</sup> See PE 507.490 (on the ESRB) and PE 507.446 (on the ESAs) both of October 2013.

<sup>4</sup> Joint Committee (JC 2012 100), Self-Assessment Report of the European Supervisory Authorities, 21 December 2012 (not public).

<sup>5</sup> See: [http://europa.eu/agencies/documents/joint\\_statement\\_and\\_common\\_approach\\_2012\\_en.pdf](http://europa.eu/agencies/documents/joint_statement_and_common_approach_2012_en.pdf).

with providing an early warning of system-wide risks that may be building up and, where necessary, issue recommendations for action to deal with these risks.

The ESAs are cornerstones of the comprehensive reforms that have been initiated since the outbreak of the financial crisis with a view to creating a new supervisory architecture for European financial markets. The underlying rationale for setting up the ESAs was to ensure closer cooperation and exchange of information among national supervisors, facilitate the adoption of EU solutions to cross-border problems, and advance coherent application and interpretation of rules. In particular by preparing uniform standards and ensuring supervisory convergence they actively shape the creation of a **Single Rule Book** applicable to all 28 EU Member States and thus contribute to the functioning of the **Single Market**. **The overall objective of the ESAs is to sustainably reinforce the stability and effectiveness of the financial system throughout the EU. To this end they have been assigned regulatory, supervisory, financial stability and consumer protection roles.**

**The powers assigned to the Authorities** include the following:

- Developing draft technical standards as well as guidelines and recommendations, respecting better regulation principles;
- Resolving cases of disagreement between national supervisors, where legislation requires them to co-operate or to agree ;
- Contributing to ensuring consistent application of technical rules of EU law (including through peer reviews);
- A coordination and enforcement role in emergency situations;
- ESMA exercises direct supervisory powers for Credit Rating Agencies.

### **Challenge ahead: establishment of Banking Union**

The establishment of a Banking Union and notably of the Single Supervisory Mechanism (SSM) and the Single Resolution Mechanism (SRM) as key components will impact the functioning of the ESFS, but does not call into question its existence and necessity. The EBA will continue to be responsible for contributing to the single rulebook applicable to the EU-28 and ensuring supervisory convergence. Given the role attributed to the ECB in the field of banking supervision and to the Single Resolution Board (SRB) for resolving credit institutions, close cooperation between the EBA and the ECB and the SRB will be crucial to avoid duplications, e.g. in terms of reporting requirements.

Work on the Banking union is still on-going. While the SSM Regulation<sup>6</sup> and the changes agreed to the EBA Regulation<sup>7</sup> already entered into force, the Regulation establishing a SRM still needs to be formally adopted<sup>8</sup>. Therefore, at the current stage, any assessment of potential interactions with the ESFS remains necessarily of a rather theoretical nature. There is however broad agreement among stakeholders that any future legislative proposals for amending the system cannot ignore the expected impact of Banking Union.

## **2. Experience acquired from the operation and impact of the ESAs**

### **a. Overall effectiveness and efficiency**

**The ESAs are seen to have quickly established well-functioning organisations and to have performed well overall, even though some shortcomings have been identified by stakeholders.**

While the ESAs have been only operational for three years, they are widely perceived as having performed well and to have contributed to re-establish confidence in the financial system. They are seen as having played a particularly important role in preparing draft technical standards and in contributing to foster supervisory convergence and culture through their participation in colleges, identifying and assessing systemic risks as well as by means of the stress tests and, in particular, the recapitalization exercise of EBA in 2011/12. However, whilst most directly affected stakeholders show a good understanding of the ESAs' functioning, uncertainty seems to prevail among others about both the actual powers and competencies of the ESAs as well as about the possibility for stakeholders to approach them.

Despite identical powers assigned to each Authority in the founding Regulations, they have developed differently since their establishment, for example with ESMA also being empowered with the direct and exclusive supervisory responsibility for Credit Rating Agencies (CRAs) established in the EU and, recently, for Trade Repositories (TR).

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<sup>6</sup> Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, OJ L 287 of 29.10.2013, pp. 63-89.

<sup>7</sup> Regulation (EU) No 1022/2013 of the European Parliament and of the Council of 22 October 2013 amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority) as regards the conferral of specific tasks on the European Central Bank pursuant to Council Regulation (EU) No 1024/2013, OJ L287 of 29.10.2013, pp. 5-14.

<sup>8</sup> Proposal for a Regulation of the European Parliament and the Council establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Bank Resolution Fund and amending Regulation (EU) No 1093/2010 of the European Parliament and of the Council, COM(2013) 520. On 20 March 2014 a political agreement on the SRM has been reached which was confirmed in the Plenary of the European Parliament on 15 April. Final confirmation by the Council and the European Parliament is expected in July 2014...

The scope of the mandate of the ESAs is considered by stakeholders sufficiently broad with some room for targeted extensions, such as in the fields of consumer/investor protection<sup>9</sup>, the enforcement of International Financial Reporting Standards (IFRS) as well as in the area of shadow banking.<sup>10</sup>

## **b. Cross-cutting issues**

### **i. Regulatory scope and activities**

**The work undertaken by the ESAs on the development of the single rulebook contributed significantly to regulatory harmonisation and coherence and to mutual understanding between supervisors. Transparent and efficient processes are seen as crucial in this area.**

The Authorities may, in areas specified in the relevant sectorial legislation, develop draft technical standards in accordance with the procedures set out in Articles 10-15 of the founding Regulations. In order to give the draft technical standards legal effect the Commission needs to subsequently adopt them by means of delegated acts pursuant to Article 290 TFEU (regulatory technical standards) or by means of implementing acts pursuant to Article 291 TFEU (implementing technical standards). Technical standards are of technical nature and must not imply strategic decisions or policy choices and their content should be delimited by the legislative act on which they are based. Technical standards are ultimately adopted by the Commission. An amendment to the draft text submitted to it by the relevant authority requires prior coordination with that Authority, in accordance with Article 10 of the ESAs Regulations.

Moreover, the ESAs contribute to the establishment of high-quality common regulatory and supervisory standards and practices and ensure the common, uniform and consistent application of Union law, in particular by providing opinions to the Union institutions and by developing guidelines and recommendations pursuant to Article 16 of the founding Regulations.

Consistent procedures (manuals, codes of conduct etc.) have been established by all ESAs which facilitate appropriate action in the area of governance, consultation and impact assessment. Since their inception all three ESAs have deployed a considerable amount of their human resources in preparing and delivering a number of draft technical standards to the Commission.

**Overall, the new instrument of technical standards and the central role of the ESAs in their development are considered by stakeholders as a success. It allows the EU to equip**

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<sup>9</sup> E.g. include the Shareholders Rights Directive (2007/36/EC) and the Takeover Bids Directive (2004/25/EC) into the scope of ESMA pursuant to Article 1(2) of the ESMA Regulation.

<sup>10</sup> See Communication from the Commission to the Council and the European Parliament, Shadow Banking – Addressing New Sources of Risk in the Financial Sector, COM(2013)614 of 4 September 2013.

**itself with a significant amount of high quality rules within a very short timeframe. Guidelines and recommendations developed under Art. 16 of the ESAs Regulation proved to be a flexible instrument for convergence, although uncertainties remain with regard to their nature and scope.**

ESMA submitted during the period under review more than 55 draft technical standards to the Commission. Subsequent to the successful conclusion of the negotiations on the CRDIV/CRR framework in spring 2013, EBA submitted a first set of 27 draft technical standards, while EIOPA has been confined to extensive preparatory work given the pending negotiations on the Solvency II / Omnibus II framework. One joint regulatory draft technical standard on the Financial Conglomerates Directives was submitted by all three ESAs in 2013. During the period under review the Commission has approved more than 45 technical standards in total of which three were sent back to the ESAs for further amendments.

The following areas were identified by stakeholders to require further consideration in order to make the process for adoption of technical standards more efficient and transparent.

- **Deadlines / pending legal texts:** working under short deadlines for submission of draft technical standards has been challenging for the ESAs. Frequently, preparatory work for draft technical standards had to start whilst the legislative process concerning the basic act was still taking place. Stakeholders were particularly concerned that this resulted in shorter deadlines for public consultation than initially estimated. Recently proposed pieces of legislation, such as the 4<sup>th</sup> Anti-Money Laundering Directive, or the Mortgage Credit Directive, seek to address this concern by providing for flexible deadlines that are dependent upon final agreement of the level 1 text. The requirement for the Commission to endorse draft technical standards within three months after submission by the relevant ESA as well as the objection period by the co-legislators of 1+1 months for regulatory technical standards which were adopted by the Commission without amendment is a new process for all involved actors and has, at times, been challenging. Despite the Commission's preference for a more horizontal approach in the framework of the ESAs' review, co-legislators agreed in the context of the Mortgage Credit and Omnibus II Directives to provide for the possibility to further extend the objection period by one additional month by way of amendments to the ESAs Regulation.<sup>11</sup> Moreover, many stakeholders and the ESAs themselves requested to make better use of the technical expertise of the ESAs in the preparation of legislation, in particular as regards the timeline and scope of empowerments for technical standards.
- **Human Resources:** Regulatory workload for the ESAs has been constantly growing since their establishment. Anyway, the increase in terms of human resources and corresponding budget has been limited in light of the general reduction of staff applicable to all institutions, bodies and agencies foreseen by the Inter-institutional Agreement on budgetary discipline, which has to be effected between 2013 and 2017.

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<sup>11</sup> Directive 2014/17/EU, OJ L 60, 28.2.2014, p. 34; Directive 2014/51/EU, OJ L 153, 22.5.2014, P.1 see also Article 149 CRDIV [Directive 2013/36/EU, OJ L 176, 27.6.2013, p. 338] and Article 463 CRR [Regulation No. 575/2013, OJ L 176, 27.6.2013, p. 1]



- **Nature and scope of non-binding measures:** Article 16 of the ESAs Regulations provides for guidelines and recommendations in the areas not covered by regulatory or implementing technical standards,<sup>12</sup> however without further defining them. In addition, the preconditions for the adoption of guidelines and recommendation, in particular the need to establish consistent, efficient and effective supervisory practices so as to ensure common uniform and consistent application of Union law are viewed by many stakeholders as creating uncertainty as to the concrete scope of these measures. While guidelines and recommendations are legally non-binding, they have a certain harmonising impact through the comply-or-explain mechanism to which the addressees are subject. This is however framed by the explicit conditions required to take action under Article 16 as well as the objectives pursued by it. Notably the need of establishing consistent, efficient and effective supervisory practices as well as to ensure common, uniform and consistent application of Union law constitute preconditions for the adoption of guidelines and recommendations which cumulatively have to be met in order to ensure their legality. There also seems to be uncertainty among market participants as to the possibility for national competent authorities or financial institutions to review guidelines under Article 60 of the ESAs Regulations.
- **Ensure a transparent and inclusive process:** While stakeholders appreciated the public consultations carried out by the ESAs some criticism was expressed about (i) restricted timeframes, (ii) the publication of consultation papers in English only (iii) the lack of detailed feedback on consultations, and (iv) frequently the lack of high quality impact assessments.

## ii. Convergence in supervisory practices and common supervisory culture

**The creation of a common Union supervisory culture and the promotion of convergent supervisory practices** is necessarily a long term objective. The ESAs' focus on the regulatory agenda and shortcomings in the governance structure of the ESAs<sup>13</sup> as well as the ESAs' limited human resources have made it difficult to advance work in this regard. The tools at their disposal include, in particular, peer reviews (Article 30), the participation in colleges (Article 21), the organisation of training and staff exchange programmes (Article 29), supported by improved access to all relevant information from national authorities (Article 35). The ESAs are also active at promoting convergent supervisory practices at international level.

### Peer reviews

**Peer reviews** aim at assessing and comparing the effectiveness of national competent activities. As a follow-up, the ESAs may issue guidelines or recommendations pursuant to Article 16 of the Regulations.

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<sup>12</sup> See also recital 26 of the ESAs Regulations.

<sup>13</sup> See section vi.

**The ESAs have started to conduct peer reviews, and stakeholders suggested to make greater use of this tools in future.** ESMA and EIOPA have conducted thematic peer reviews, both via the use of questionnaires and self-assessments as well as on-site visits. EIOPA has conducted four peer reviews in total, on the pre-application of internal models by NCAs, the pre-application of internal model for colleges of supervisors, the supervision of branches of EEA undertakings and supervisory practices in relation to IORPs. ESMA has completed six peer reviews addressing the Prospectus Directive, the Transparency Directive, the use of sanctions under MAD, supervisory practices in relation to Money Market Funds and the conduct of business rules under MiFID. The EBA set up in May 2012 an independent Review panel followed by a dedicated methodology in June 2012, in order to organise and conduct peer reviews on some or all of the activities of the NCAs. So far no peer reviews have been finalised, but a peer review concerning stress testing is under way.

Many stakeholders agree that more and better use could be made of the tool of peer reviews by the ESAs. According to stakeholders, peer reviews could focus more on outcomes, make more systematically use of on-site visits and rely more on ESAs staff to ensure an independent and objective assessment. Furthermore, stakeholders suggested a more systematic follow up where deficiencies have been detected to allow making best use of this instrument.

### **Colleges of supervisors**

The ESAs are empowered to promote and monitor the efficient, effective and consistent functioning of colleges of supervisors and foster the coherence of the application of Union law among colleges (Article 21). Colleges are permanent coordination structures for the exchange of information between home and host authorities, for the planning and performance of key supervisory tasks in a coordinated manner or jointly, including all aspects of on-going supervision, and also for the preparation and handling of emergency situations.

**The ESAs, and in particular EBA and EIOPA, have been actively involved in all aspects of the work of colleges of supervisors and have, as stressed by stakeholders, improved their functioning through the provision of guidance and the oversight of agendas and annual action plans. Since September 2013, with the establishment of colleges for CCPs, ESMA has also been involved in colleges work under EMIR.**<sup>14</sup>

The establishment of the ESAs has encouraged more active college engagement and sharing of information between college members. By being present in most colleges, the ESAs gain a broad overview of the functioning of colleges and of the relevant banking groups and can enhance their efficiency by sharing best practices. However, it is considered that since the ESAs do not have a voting right in colleges, their impact is somewhat limited.<sup>15</sup>

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<sup>14</sup> A further potential role for ESMA in the supervision of critical benchmarks is foreseen under the Commission Proposal for a Regulation of the European Parliament and the Council on indices used as benchmarks in financial instruments and financial contracts, COM(2013) 641 of 18 September 2013.

<sup>15</sup> With the exception of colleges for CCPs where ESMA does have a voting right in certain instances.

With the creation of the Single Supervisory Mechanism (SSM) in the banking sector, colleges of supervisors will continue to play an important role for banks with a presence in non-SSM countries. However, if a bank operates only within the SSM countries, it will fall under the full responsibility of the SSM authorities and no college is required.

### **Access to data**

**The ESAs contributed to enhance supervisory reporting and disclosure but were faced with difficulties accessing data from competent authorities and financial institutions in practice.** Important progress has been made in the area, notably by agreeing on a common supervisory reporting framework (EBA). However, despite the fact that the founding Regulations confer the right to the ESA to request competent authorities to provide them with all the necessary information for the fulfilment of their tasks, including at recurring intervals and in specified formats, the ESAs have experienced difficulties in obtaining information in practice due to resistance of the members at the Board of Supervisors to agree on relevant demands and the legal conditions attached to the use of such powers. In addition, the different practices and approaches across the Union in the collection of data have hampered comparability and the exchange of data or their reliable presentation in an aggregated format. Some stakeholders as well as the study undertaken by the European Parliament suggested exploring the merits of giving a stronger role to the ESA Chairs by enabling them to directly request relevant information from national supervisors.<sup>16</sup>

### **International dimension**

**The international work of the ESAs is twofold,** encompassing (i) technical assistance to the Commission in preparing equivalence decisions on third country regulatory and supervisory regimes, (ii) the development of contracts and the conclusion of administrative arrangements with supervisory authorities, international organisations and third countries pursuant to Article 33 of the ESAs Regulations, e.g. the participation in international standard setting groups.

In the preparation of equivalence assessments and related advice to the Commission the ESAs have established regulatory dialogues to complement the technical assessment with countries including the US, Switzerland and China as well as Japan, Hong Kong, Singapore, Korea, Australia, the United Arab Emirates, Brazil, Mexico, Argentina, Canada, Israel and Bermuda. The ESAs also participate in the Financial Markets Regulatory Dialogues established between the Commission and in particular the United States, Russia, Japan, Switzerland and Brazil.

Examples of the conclusion of administrative arrangements include the approval by ESMA on behalf of national competent authorities under the AIFMD of 38 Memoranda of Understanding with 42 non-EU authorities and the cooperation agreement between EIOPA and the World Bank on fostering risk-based supervision in the insurance sector.

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<sup>16</sup> Article 41(1) of the ESAs regulation already provides for the possibility to delegate specific tasks to the ESAs' chairpersons but so far only very limited use has been made of this article.

The ESAs are also involved in the work of international standard setting bodies: EIOPA has become a member of the IAIS in its own right; ESMA is an associate member of IOSCO and EBA is an observer in the BCBS.

**The ESAs' activities as regards international matters** are framed by their underlying mandates. The participation of the ESAs in relevant international organisations is perceived by stakeholders as contributing to ensure consistency with global benchmarking and is expected to further strengthen and complement the European voice, alongside the Commission, in international fora. The specific requirements regarding international work of decentralised agencies set out in the Common approach to these agencies are intended to help agencies to operate within their mandate and the existing institutional framework.

### **Other aspects**

**The ESAs provided sectorial and cross-sectorial training to share** sound supervisory standards and practices across the European Union. Stakeholders praise the beneficial effects of the ESAs' work in organising trainings and workshops as well as promoting secondments. In total 130 training events were organised, out of which 56 by EIOPA, 34 by ESMA and 40 by EBA. Related activities by the ESAs also aimed at facilitating personnel exchange and thus encouraging competent authorities to intensify the use of secondments schemes and other tools.

**ESMA has been particularly active in the coordination of activities of national IFRS enforcers in Europe.** In November 2012 ESMA issued for the first time common European IFRS enforcement priorities, highlighting the areas on which all EU enforcers have to focus when reviewing 2012's financial statements.<sup>17</sup> ESMA's powers in the accounting field could be further enhanced by clarifying its mandate through a clear reference to the IAS Regulation<sup>18</sup> in the ESMA Regulation.

### **iii. Direct decision making powers: consistent application of EU law and emergency situations**

The founding Regulations confer a limited set of binding decision making powers on the ESAs, in particular in the case of national authorities incorrectly applying EU law (breach of law, Article 17), in emergency situations declared by the Council (Article 18), and in the event of disagreement between national authorities (binding mediation, Articles 19 and 20). In

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<sup>17</sup> <http://www.esma.europa.eu/system/files/2012-725.pdf>.

<sup>18</sup> Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards.

addition, where provided in Union law the ESAs may also take temporary action under Article 9(5) of the ESAs Regulations.<sup>19</sup>

### **Breach of law**

**The ESAs have not issued recommendations or decisions with respect to alleged breaches of EU law but have made use non-binding mediation and moral suasion.**

The founding Regulations entitle the ESAs to address recommendations to national authorities when a national authority appears to be in breach of Union law and, following a pre-defined procedure and as a last resort, to directly address decisions to financial institutions to ensure respect of directly applicable EU law. The ESAs assessed a number of alleged breaches of Union law for admissibility, including on the necessity for national competent authorities to cooperate and the prohibition of taking unilateral measures, in particular disproportionate measures having ring-fencing effects such as disproportionate limitations to intra-group capital flows.

These assessments did not lead to any action, which might be partly explained by the reluctance of the relevant BoS to agree to address any recommendations to national authorities or to addressing individual decisions to financial institutions. So-far the ESAs' investigatory powers have only resulted in "soft" informal measures, such as persuasion and informal ad-hoc meetings to bring about conformity of EU law.

The period of two months granted to the relevant ESA between initiating an investigation and addressing a recommendation to the competent authority is perceived by stakeholders too short and could be extended.

### **Emergency situations**

**To date no emergency situations has been declared.**

The founding Regulations set out that the ESAs shall fulfil an active coordination role between national supervisory authorities, in particular, in case of adverse developments which potentially jeopardise the orderly functioning and integrity of financial markets or the stability of the financial EU financial system. Following the determination of an emergency situation by the Council the ESAs may, as a last resort, adopt individual decisions directly to financial institutions/insurers requiring the necessary action including the cessation of any practice.

So far, no emergency situation has been declared by the Council, nor has the Council ever been called upon to do such a declaration. However, the ESAs have undertaken significant preparative work to ensure their capability to act efficiently in case an emergency action was declared, such as adopting a Crisis Management Manual/Framework and the setting up of a

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<sup>19</sup> See also section (v) on consumer protection.

specific internal decision making and monitoring framework. Pursuant to Article 9(5) of the ESMA Regulation ESMA has been entrusted with direct intervention powers under the Short-Selling Directive, subject to a number of conditions.<sup>20</sup>

### **Binding mediation**

#### **So far the instrument of binding mediation has not been used.**

The founding Regulations enable the ESAs to assist national authorities at the request of one or more authorities in reaching a common approach or settling the matter, including direct decision making powers requiring financial institutions to comply with the obligations under Union law. The ESAs have been occasionally approached by NCAs complaining about disagreements but no binding decisions have been taken by the ESAs on the matter.

As possible reasons for the lack of use of these powers stakeholders point to the current governance structure of the ESAs which does not favour decisions or proceeding against individual members of the BoS. Further explanations put forward by stakeholders may be the dissuasive effect of the relevant powers as well as the lack of clarity of the founding Regulations as to the scope of and triggers for binding mediation. Stakeholders suggested clarifying in the founding Regulations that the material scope is not limited to breaches of EU law but extends to supervisory judgement, at least in those cases where the judgement is sufficiently framed by legal conditions. Distinct investigatory powers, such as direct access to relevant information or the possibility to carry out on-site inspections, to facilitate the detection of breaches of EU law, were also suggested as additional assets.

**Article 38 of the founding Regulations which provides safeguards** to Member States in order to ensure that no decisions taken under Article 18 and 19 impinge in any way on the fiscal responsibilities of Member States has not been invoked during the period under review.

**The limited use made by the ESAs of their direct decision making powers does not lead to the conclusion that these powers are not useful.** According to stakeholders, there is a need to preserve these powers, and to examine further the conditions for their use to ensure that there are no undue obstacles preventing the ESAs from having recourse to these powers.

#### **iv. Coordination function**

**The ESAs have taken various measures to promote coordinated action and to facilitate exchange of information.** Beyond their coordination role in emergency situations the ESAs are required to promote a coordinated Union response, particularly in adverse market conditions, by facilitating information exchange between authorities, determining the scope/reliability of information to be made available by national authorities and centralising

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<sup>20</sup> Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps, Article 28.

information received, carrying out non-binding mediation, notifying to the ESRB potential emergency situations, and by taking all appropriate action to facilitate action by national authorities (Article 31 ESAs Regulations).

Stakeholders welcomed the various actions taken by the ESAs throughout the reporting period and encourage them to remain ambitious in this respect. EBA devoted a large proportion of its resources to ensuring a coordinated supervisory response to the banking crisis in 2011-2012, most notably by means of the 2011/12 recapitalisation exercise as well as by addressing a variety of different topics such as capital, liquidity and governance. EBA is the only authority that reported increasing requests from national supervisors for non-binding mediation.

All ESAs actively contributed to facilitate exchange of information. The ESMA BoS, in addition to its regular meetings, holds occasional conference calls to discuss adverse market developments and to exchange information. EIOPA has in particular coordinated the collection of information on exposures of insurance companies to sovereign debt and banking in accordance with an agreed common approach to such vulnerabilities. Further important examples for coordinated action have been delivered by the JC in its report on cross-sectorial risks<sup>21</sup>, the ESMA coordination of measures adopted by competent authorities on short selling<sup>22</sup>, and the EIOPA opinion on the low interest environment.<sup>23</sup>

#### **v. Consumer protection**

**The ESAs have established internal structures on consumer protection issues within their organisations. Work on consumer protection is taking up speed but stakeholders consider that the ESAs could be more proactive.**

Consumer and investor protection is **one of the statutory tasks** assigned to the ESAs, which so-far is perceived as not being given sufficient priority in the work of the authorities. The horizontal nature of the issue allows for its implementation through various aspects of the ESAs' work, which however seem to lack ambition in this respect. In addition, the ESAs have experienced difficulties to divide relevant tasks among themselves. There is still limited scope for the authorities in taking legally binding decisions pursuant to Article 9(5) of the ESAs Regulations and no emergency situation has so far been declared, but the relevant scope for action is not limited to these direct decision making powers and stakeholders consider that the ESAs could take a more proactive approach (e.g. issuing guidance on consumer protection

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<sup>21</sup> For the August 2013 report, see:  
[http://www.eba.europa.eu/documents/10180/43119/ESAs\\_joint\\_risk\\_report\\_autumn\\_2013\\_final.pdf](http://www.eba.europa.eu/documents/10180/43119/ESAs_joint_risk_report_autumn_2013_final.pdf).

<sup>22</sup> <http://www.esma.europa.eu/content/Update-measures-adopted-competent-authorities-short-selling-0>.

<sup>23</sup> See: <https://eiopa.europa.eu/en/publications/eiopa-opinions/index.html>.

issues). Furthermore, the scope of action is constantly increasing not at least due to the dynamic provision included in Article 1(2) of the ESAs Regulation.<sup>24</sup>

EIOPA was the first authority to put forward **specific guidelines** on complaints handling by insurance undertakings in June 2012, after having published a Report on Financial Literacy and Education Initiatives by Competent Authorities in December 2011. This was followed in February 2012 by an Initial Overview of consumer trends in the European insurance and occupational pensions sectors. In July 2012 ESMA published several sets of guidelines on issues related to MiFID and UCITS followed by consultations on guidelines on remuneration under the AIFMD and the MiFID. EBA published in March 2013 a Report on Consumer Trends, Supervisory Concerns Regarding Consumer Protection Issues. In June 2013 two opinions were adopted and published on responsible lending and on the treatment of borrowers in payment difficulties.

**Several Consumer/Investor days** have already been organised by EIOPA (November 2011, December 2012) ESMA (October 2012) and EBA (October 2012). As of 2013, Consumer Days are organised by the JC of the ESAs building on the experience gathered from the previous organisation of sectorial events. The first joint Consumer Day was held on 25 June 2013.

**So far, the ESAs have issued four warnings**, notably on investments in Foreign Exchange (Forex) (December 2011), on the pitfalls of online investments (September 2012), on Contracts for Differences (CfD) (April 2013) and on virtual currencies (December 2013), which were published on the relevant websites.<sup>25</sup>

Several national authorities represented in the respective BoS do not hold consumer protection mandates at national level and thus lack the necessary expertise and tend to prioritise other issues of more direct concern to them. To remedy this fact stakeholders consider that the ESAs could introduce a mechanism to ensure close co-operation and the involvement of the relevant national authorities in order to bring in the expertise and ensure a comprehensive approach to consumer protection at ESAs level.

Further suggestions to strengthen the role of the ESAs in this field include calls from stakeholders for a more proactive approach by the authorities towards consumer and investor protection. Moreover, stakeholders stressed the need to ensure that the ESAs can make full use of the powers laid down in Article 9 either by adopting enabling legislation on the basis of Article 9(5) of the ESAs Regulations or by directly amending Article 9(5) to broaden the

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<sup>24</sup> The power to restrict certain activities can only be exercised if an emergency situation in accordance with the conditions of Article 18 has been declared or when the power is laid down in the specific legislative acts laid down in Article 1(2). On the execution of its powers in general – including those on consumer and investor protection - Article 1(2) provides that the ESAs may act based on "any further legally binding Union act which confers tasks on the Authority". This includes future legislation in the field of consumer protections such as on Mortgage Credit, MiFIDII/MiFIR, Payment Accounts, PRIIPS, IMD, etc.

<sup>25</sup> See: <http://www.esma.europa.eu/page/News-investors>.



scope for ESAs' action. Furthermore, to ensure a framework consistent across sectors and appropriate coordination of the ESAs' activities, some stakeholders consider that more use could be made of the JC. According to those stakeholders, this could be achieved for instance, by exchange of best practices between authorities which would allow for better definition and clarification of their relevant competences in line with the legal basis.<sup>26</sup>

A number of stakeholders also suggested, at least for the mid-term, to further explore the idea of establishing a distinct market conduct authority mandated with consumer and investor protection next to an integrated authority responsible for prudential supervision, generally referred to as a twin-peaks approach.<sup>27</sup>

## **vi. Governance and decision making**

The ESAs are composed of a Board of Supervisors (BoS), a Management Board (MB), a Chairperson, and an Executive Director. The structure of the decision making bodies is broadly in line with the common approach on decentralised agencies, with all Member States being present at the BoS<sup>28</sup> and a small-sized MB<sup>29</sup>.

### **Chairpersons and Executive Directors**

**It is widely recognized that the Chairpersons and Executive Directors have fulfilled their mission in an effective way and have, in general, given a high profile to their authorities. Nevertheless there seems to be room to strengthen their role and authority.** This assessment is broadly shared by NCAs participating directly in the activities of the ESAs as well as external stakeholders. The chairpersons clearly add value by preparing and chairing the meetings of the ESAs decision making bodies (BoS and MB) and increase the visibility and efficiency of the ESAs. The Executive Directors, who are in charge of the operational management of the authority, equally fulfilled their mandate in an independent and objective manner.

However, stakeholders stressed that the current situation where the Chairpersons do not have a voting right in the BoS undermines their authority and limits their role as strong and independent representatives of the European interest. According to them, consideration should therefore be given to strengthen the standing and authority of the Chairpersons. Possible ways to achieve this, suggested by several stakeholders in the course of the review as well as in the IMF assessment, could be by providing the chairpersons with a voting right in the BoS to

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<sup>26</sup> A good example for this heightened cooperation can be found in the complaint handling area where both EBA and ESMA sought inspiration from EIOPA's groundwork and plan to develop identical complaint handling procedures for the banking and securities field.

<sup>27</sup> See section 4.

<sup>28</sup> The BoS is comparable to the composition of the Management Board in the common approach.

<sup>29</sup> Comparable to the Executive Board in the common approach.

strengthen the European dimension in the ESA decision making process or by delegating more tasks to the Chairperson such as in the field of access to data.<sup>30</sup>

### **Board of Supervisors**

**The shift away from a decision-making process based on consensus to actual voting<sup>31</sup>, either by simple majority (which is the rule) or by qualified majority (regulatory issues, budgetary matters) is considered by stakeholders as a step forward but there remain concerns about the role of NCAs in the decision making process.** The BoS is the main decision-making body and, in particular, responsible for the adoption of draft technical standards, opinions, recommendations, and decisions. The BoS is composed of the Chairperson, the heads of NCAs which are voting members, and representatives of the Commission, the ECB, the ESRB and the two other ESAs (non-voting members).

The membership structure of the BoS ensures buy-in of NCAs and voting by simple or qualified majority is now a routine task at the BoS. Nevertheless, some concerns remain that the key role of the NCAs in the BoS as their only voting members might hamper the efficiency and effectiveness of the BoS. Members of the BoS as well as other stakeholders in their responses to the public consultation stressed that since NCAs are accountable to their national parliaments, the current membership structure and voting arrangements could lead to a system representing the majority of national views which might not necessarily favour the European interest. While the ESAs regulations require the voting members of the BoS to act independently and in the sole interest of the European Union, BoS members tend, at times, to rather defend purely national interests and to take the wider European interest not sufficiently into account. This important weakness has been raised both by members of the BoS as well as other stakeholders in their responses to the public consultation. Similar observations have also been highlighted by the IMF in its recent reports on the ESAs<sup>32</sup> as well as by the Parliament.<sup>33</sup>

### **Management Board**

**Overall, the MBs of the three ESAs is considered by stakeholders to work satisfactorily while some divergences between the MB of the three ESAs can be observed.** The MB is composed of the Chairperson plus six members of the BoS. The Executive Director and a representative of the Commission participate as observers in the meeting. The Commission representative has a right to vote on budgetary matters. The MB is mainly in charge of the authority's work programme and plays a central role in the adoption of the budget.

Most stakeholders consider the MBs of the three ESAs to work effectively. It can be noted that the MBs of the three ESAs diverge to a certain extent. For instance, the EBA and the

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<sup>30</sup> Article 41(1) of the ESAs regulation already provides for the possibility to delegate tasks to the Chairperson but so far no use has been made of this possibility.

<sup>31</sup> The amended EBA Regulation introduces the principle of double majority voting at EBA.

<sup>32</sup> See IMF: Financial Sector Assessment Program – The EBA / The ESMA / The EIOPA, 2013.

<sup>33</sup> European Parliament Resolution of 11 March 2014 with recommendations to the Commission on the European System of Financial Supervision (ESFS) Review, para AU.

EIOPA MB appear to play a bigger role in preparing discussions and priorities of the BoS, similar to the role of a steering committee, whereas the role of the MB of ESMA is more limited to budgetary and organisational tasks. A stronger role for the MB could have the advantage of creating more room for the BoS to focus on policy issues and substantive discussions, a shortcoming of the BoS that was raised by several BoS members. Some stakeholders take a critical view, however. According to them, in the current composition of the MB, such a role risks not representing the European interest due to the lack of independent European representatives.

One possible way brought forward by different stakeholders with different backgrounds (supervisors, industry representatives, academics, IMF) to strengthen the role of the MB and ensure that it acts in the European interest could be to transform it into a more permanent "Executive Board" inspired by the governance structure of the Executive Board at the ECB, but of a smaller size. In line with the common approach on decentralised agencies such a strengthened MB would have a stronger operational role compared to today's situation, with the BoS giving the general orientation for the ESAs' activities, thereby contributing to enhancing their efficiency and effectiveness.

### **Preparatory bodies**

**The role of the staff of the ESAs in preparatory bodies could be enhanced.** Preparatory bodies (standing committee, working groups, task forces) play an important role for the development of draft regulatory and implement technical standards, guidelines and recommendations. The ESAs' staff always participate in the activities of the preparatory bodies, but their role diverges to a large extent. Whereas in some areas working group/standing committees are chaired or co-chaired by the ESAs, in most cases representatives of NCAs chair these bodies and the role of the ESAs' staff is limited to a secretarial role, even if it can be observed that the role of the ESAs staff is growing in importance.

Many responses to the consultation from NCAs but also from market participants to the consultation stress the advantages of the current structure which in their view ensures a high quality and practicality of the technical work and paves the way to swift agreement at the BoS. On the other hand, several responses to the consultation underscore the idea that a stronger role of the ESAs and their staff would allow for developing a more European stance already at technical level and contribute to addressing the current imbalance of contributions to the work of preparatory bodies. Some responses to the public consultation pointed to the relative overrepresentation of NCAs from some Member States in these bodies to the expense of NCAs from other Member States that may have more limited resources. A way forward suggested by some stakeholders could be that ESA staff systematically chairs preparatory bodies, while maintaining the strong involvement of NCAs to ensure buy-in and making best use of their technical expertise.

### **vii. Accountability**

**The accountability arrangements are considered by stakeholders to be sufficiently strong and to work satisfactorily.** The chairpersons of the ESAs are accountable to the European Parliament and the Council. They are regularly invited to hearings of the ECON

committee, which exercises the accountability role on behalf of the Parliament, and report in writing on the main activities of the respective ESA. With regard to the Council, the ESAs regularly attend meetings of the FSC and the EFC and, occasionally, of the ECOFIN.

This assessment is shared by a huge majority of stakeholders, with a few responses to the public consultation seeing the need for stronger accountability requirements, in particular with regard to scrutiny role of the EP for guidelines developed by the ESAs, and for a more transparent discharge process in general.

**Responses to the public consultation exposed some need for clarification of the concept of independence of the ESAs.** The ESAs are set-up as decentralised agencies and thus contribute to the implementation of Union policies. Amongst other things the ESAs pool technical expertise available at European and national level. The ESAs are independent legal entities under European public law, distinct from the EU institutions. While there is broad consensus among stakeholders that the ESAs should be independent, the concrete meaning and implication of the concept of independence are less clear. Different views were expressed, calling either for a stronger independence of the ESAs from NCAs and/or the Commission.

Regarding the independence from NCAs, concerns, as mentioned above, referred mainly to the role of NCAs in the BoS and the preparatory bodies where some stakeholders felt that the ESAs should be less dependent on financial resources and technical input of NCAs and that the European dimension in decision making should be strengthened.<sup>34</sup>

With regard to strengthening independence vis-à-vis the Commission, responses to the consultation raised concerns in the context of funding and compliance with administrative procedures and the involvement of the Commission in the work of the ESAs. Some stakeholders considered that the Commission could undermine the authority of the ESAs, in particular due to the perception that the Commission has too much influence on the work programme of the ESAs and overburdens the ESAs with regulatory tasks.

#### **viii. Financing and human resources**

**The staff recruited by the ESAs is seen to be experienced in regulatory and supervisory matters and to be composed in a way that respects broadly the principles of geographical balance and gender balance. However, stakeholders are of the view that the ESAs are understaffed.** At the end of 2013 the ESAs employed a total of 384 staff (EBA: 124, ESMA: 150, EIOPA: 110). Interest for positions has been high, which is demonstrated by an average of 47 applications per vacancy notice in the first half of 2013 with however some divergence between the ESAs (ESMA 73, EIOPA 43, EBA 26).

Stakeholders consider the ESAs to offer an attractive and challenging work environment and value the use of both temporary agents and seconded national experts.

From stakeholders' point of view the ESAs are understaffed and more human resources are needed in order to carry out their mandate satisfactorily. Furthermore, some concerns were expressed with regard to the perceived inflexibility of the EU administrative framework

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<sup>34</sup> See for more details sections vi and viii.

which the ESAs have to apply, the perceived lack of seniority of ESAs' staff as well as the possible competition with the SSM in terms of recruitment of highly qualified staff.

Stakeholders considered that the diversity of staff among the ESFS, including the ESAs and NCAs, could be further increased by simplifying exchanges of staff.

**In a similar vein current resources are considered insufficient and the funding situation needs to be addressed, both in the short and long-term.** Funding and resources of the ESAs should be commensurate to their increasing tasks and responsibilities. There is broad consensus among stakeholders that the current allocation of funding (60% by NCA, 40% by the EU, and fees raised by ESMA for the supervision of credit rating agencies and trade repositories) is unsatisfactory for at least two reasons.

First, it raises the question of the independence of the ESAs which could be at least perceived as being undermined by the role of NCAs and the Commission in financing them. Second, the current scheme, and the need to increase staffing, is not sustainable for many NCAs, in particular in the current strained economic environment. This risks leading to a situation where increasing funding at European level is financed at the expense of weaker funding for supervision at national level. Furthermore, resources at the EU level are tight under the multiannual financial framework (MFF) 2014-2020 and flexibility within the MFF is very limited.

Different options for improving the resources situation, both in the short and in the long-term, have been brought forward by stakeholders (e.g. concerning the funding mix, introducing a separate budget line for the ESAs; increasing the level of funding by raising fees and/or levies), and will need to be analysed. Two essential conditions emerge from the views expressed: i) Ensuring sufficient resources at EU and national level, while (ii) respecting the current strained economic environment and the MFF.

Stakeholders consider that any amendment to the financing of the ESAs should be accompanied by further streamlining expenses of the ESAs, where necessary. They consider this could be achieved e.g. by reducing administrative costs of the ESAs and making more use of harmonized practices across the ESAs (e.g. IT infrastructures, reporting formats, administrative procedures).

#### **ix. Involvement and role of stakeholders**

**The Stakeholder groups (SGs) were quickly set up and are valued by the ESAs and most stakeholders even if stakeholders consider that their impact could be strengthened and the resource requirements for setting up and running the SGs are extensive.**

To ensure a structured liaison with stakeholders the ESAs regulations establish specialised separate SGs for each ESA<sup>35</sup>. Each SG is composed of experts on the sector in question, representing a broad scope of stakeholders reaching from financial institutions, employees' representations, consumers and users of financial services, representatives of SMEs to

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<sup>35</sup> Two for EIOPA representing respectively stakeholders of the insurance and pensions sector.

academics.<sup>36</sup> SG members are appointed by the BoS. The SGs are consulted when developing draft technical standards, guidelines and recommendations and may also submit opinions and advice on their own initiative.

The general role and mandate of the SGs is laid down in the ESAs regulations and is complemented by rules of procedures developed by the ESAs providing further guidance on the selection and appointment procedure and for other aspects, e.g. compensation and secrecy requirements.

The ESAs quickly set up the SGs groups which were operational as of the second half of 2011. The SGs meet on average in a bimonthly rhythm and have been consulted on various occasions. In the first half of 2013 36 draft technical standards or guidelines were submitted to the SGs (EBA 24, ESMA 6, EIOPA 6).

**The impact of the SGs is considered by stakeholders to be limited for various reasons:**

- The procedure for setting up the SGs and ensuring adequate representation of the different categories while respecting geographical and gender balance is very resource intensive and appears disproportionate to some stakeholders. According to them, longer mandates for SG members, currently mandates are only 2.5 years, and staggered appointments could lighten the recruitment process and ensure more continuity.
- The requirement that SG members "shall serve in a personal capacity", restrictive rules on sharing documents, the lack of access to data and insufficient compensation of SG members representing non-profit organizations limit the quality of the contributions of the SG<sup>37</sup> and might prevent experts from providing their expertise to the SGs. These aspects are particularly relevant for representatives of consumer interests and smaller institutions.
- Many stakeholders complained about the unbalanced composition of the SGs, which are in particular deemed to insufficiently represent consumers, users of financial services, employee representatives and SMEs. The appointment process for members of the SGs is perceived by many stakeholders as lacking transparency.
- Too short deadlines for the consultation of SGs and lack of explicit and detailed feedback from the ESAs.

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<sup>36</sup> The European Ombudsman issued on 07 November 2013 an opinion on the composition of the EBA banking stakeholder group following a complaint from Uni Europa in September 2011. The opinion confirmed a number of deficiencies regarding the selection process carried out by EBA for the composition of the various stakeholder categories and called for a more balanced representation of the stakeholders of the different categories, in terms of geographical balance and gender balance. With regard to the category of "users", these should be representatives of entities clearly related to retail users of the services provided by the banking sector. See for more detailed information on the ombudsman's decision: Decision of the European Ombudsman closing her inquiry into complaint 1966/2011/(EIS)LP against the European Banking Authority.

<sup>37</sup> However, it has to be noted that the modifications to the EBA regulation addressed this issue. Similar amendments could be envisaged for the ESMA and the EIOPA regulation.

Several respondents to the consultation suggested limiting the number of SGs of EIOPA to one with alternating members depending on the subject under discussion.

The ESAs themselves appear to be broadly accessible but some stakeholders point out that they could be more transparent by publishing the agenda and minutes of Board meetings in time, improving the readability of the ESAs' websites, including facilitating access to information and publishing more detailed organization charts.

#### **x. Joint bodies – JC and BoA**

The ESAs share two joint bodies: The Board of Appeal (BoA) and the Joint Committee (JC).

**Since the BoA so far only decided on one appeal<sup>38</sup>, it would be premature to form a judgment on its structure.** The BoA ensures the right to appeal, in first instance, against decisions adopted by the ESAs. For reasons of efficiency and consistency the ESAs founding regulations set up a joint body dealing with issues related to banking, insurance and securities. The BoA has six members and six alternates and is independent from the ESAs. It was appointed at the end of 2011 and has so far heard and decided on one appeal. Several further appeals are under consideration by the BoA. The current structure of the BoA is considered by stakeholders to ensure a strong degree of homogeneity and works, as far as this can be assessed at this early stage, satisfactorily. At this stage, only few calls in favour of sector-specific specialisation were made.

**The JC has an important and increasing role but stakeholders called for improved visibility, transparency and governance.** The JC aims to ensure cross-sectorial cooperation and consistent supervisory approaches between the three ESAs. The JC has no legal personality and any decisions are to be taken by the individual ESAs, which implies that the three BoS of the ESAs have to endorse proposals of the JC in parallel. The JC is composed of the Chairpersons of the ESAs and the chairpersons of the Sub-Committees.<sup>39</sup> Furthermore, the Executive Directors of the ESAs, a representative of the Commission and the ESRB participate as observers. The Chairperson and the secretarial support for the JC rotate on an annual basis among the ESAs (2011 EBA, 2012 ESMA, 2013 EIOPA). Physical meetings take place bimonthly and are complemented with monthly teleconferences of the ESAs management staff and ad hoc discussions.

Due to the parallel establishment of the ESAs the work of the JC has taken up slowly in 2011 but reached regular speed in 2012. Overall, the JC has an important and increasing role for cross-sectorial issues (e.g. financial conglomerates, PRIPs, consumer protection in general, work on the benchmark setting process) but there are calls to improve its visibility and transparency as well as governance arrangements. Identified shortcomings, raised by stakeholders and/or highlighted by the IMF are: (i) lack of transparency on and visibility of the activities of the JC and its sub-committees; (ii) lack of dedicated staff; (iii) complex and

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<sup>38</sup> [https://eiopa.europa.eu/fileadmin/tx\\_dam/files/abouteiopa/Organisation/BoA/Decisions/BoA\\_2013-008\\_Board\\_of\\_Appeal\\_SV\\_Capital\\_OUE\\_vs\\_EBA\\_\\_Decision\\_24\\_June\\_2013.pdf](https://eiopa.europa.eu/fileadmin/tx_dam/files/abouteiopa/Organisation/BoA/Decisions/BoA_2013-008_Board_of_Appeal_SV_Capital_OUE_vs_EBA__Decision_24_June_2013.pdf)

<sup>39</sup> So far, Sub-Committees are in place for: financial conglomerates; cross sectoral developments, risks and vulnerabilities; anti-money laundering and consumer protection and financial innovation.

time-consuming decision making-process; and (iv) uneven representation of the different sectors in the sub-committees.

A way forward to improve these deficiencies in the short-term suggested by many stakeholders is the development of a dedicated website informing about the activities of the JC and making non-confidential documents easily available to interested stakeholders. Furthermore, close dynamic cooperation among the ESAs, increased visibility in the area of consumer protection and financial conglomerates, clearer prioritisation of strategic cross-sectorial topics and making better use of the JC for matters of internal organizational and process-oriented harmonisation (e.g. general procedures, training and IT) is considered to strengthen the added value of the JC.[policy orientations]

### **3. Assessment of the individual performance of the ESAs – main achievements/developments**

#### **i. EBA**

The EBA's mission is to improve the functioning of the EU Single Market, in particular by ensuring a high quality, effective and consistent level of regulation and supervision in the domain of banking, e-money and payments as well as relating areas of corporate governance, auditing and financial reporting. EBA's challenge was to establish itself as a new organization in the midst of an unprecedented crisis of the European banking system.

**EBA's regulatory activity aimed at establishing a single rulebook is at present dominated by its focus on the implementation of the CRDIV /CRR legislative framework** which was adopted in June 2013.<sup>40</sup> Until end 2013 the EBA BoS adopted 58 draft technical standards.

**A key component of EBA's oversight activities during the first three years was the initiation and coordination of an EU wide stress test exercise in 2011 and the 2012 recapitalisation exercise.** While the outcome of the stress test exercise did not fully meet the expectations, the EBA's recapitalisation exercise which raised banks' capital ratio (core tier 1) to 9% by end June 2012 and built up capital buffers to address market concerns over sovereign risks was positively received by market participants and analysts and constituted one of the most important contributions to convergence in supervisory practices in the banking sector.

**EBA is the authority most affected by the recent establishment of the Single Supervisory Mechanism** and the Single Resolution Mechanism. Stakeholders stressed the need to preserve the role of EBA if not to strengthen it in order to ensure the integrity of the Single Market and

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<sup>40</sup> Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC [CRDIV]; and Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 [CRR].



to provide a platform to participating and non-participating Member States for regular exchange of views and best practices and common decision making on the further development of the single rulebook. The legislative amendments to the EBA Regulation adopted under the SSM package are seen as providing for balanced voting arrangements between the participating and non-participating Member States once the SSM gets operational. Views expressed highlighted that close cooperation and regular communication with the ECB will be crucial notably in the fields of convergence of supervisory practices and the conduct of supervisory tasks, such as stress tests. In order to ensure that EBA can carry out credible stress tests, the amended EBA regulation strengthened EBA powers for stress testing and for requesting access to data.

## ii. EIOPA

EIOPA's mission consists in promoting a sound regulatory framework and consistent supervisory practices in order to protect the rights of policy holders, pension scheme members and beneficiaries and contribute to the public confidence in the European Union's insurance and occupational pension sectors.

**EIOPA's regulatory output was affected by the fact of the pending negotiations on the Omnibus II Directive amending the Solvency II Directive.** EIOPA however prepared and partly pre-consulted around sixty technical standards and guidelines on Solvency II in parallel to the on-going negotiations on Omnibus II. In addition, one technical standard has been adopted in the field of occupational pensions. Two sets of guidelines on consumer protection issues have been publicly consulted and one has been published so-far.

**EIOPA received several ad-hoc requests for advice and opinions from the EU institutions,** such as the technical assessment on insurance products with long-term guarantees which was submitted in June 2013.<sup>41</sup> In response to a Commission's request EIOPA delivered advice to the Commission in February 2012 on the EU-wide legislative framework for IORPs and performed a quantitative impact study (QIS) on the quantitative aspects of its study.<sup>42</sup>

**EIOPA has been the first authority publishing a set of** guidelines on consumer protection issues in June 2012, more specifically on complaints handling by insurance undertakings and was the frontrunner among the ESAs in the organisation of consumer days.

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<sup>41</sup> See: <https://eiopa.europa.eu/en/consultations/qis/insurance/long-term-guarantees-assessment/index.html>.

<sup>42</sup> See: <https://eiopa.europa.eu/en/consultations/qis/occupational-pensions/quantitative-impact-study/index.html>. Furthermore, EIOPA invested significant resources in 2013 following the request of the Commission for advice on the calibration of investments in infrastructure securities and Venture Capital expected to be delivered early 2014.

### iii. ESMA

ESMA's mission is to enhance the protection of investors and reinforce stable and well-functioning financial markets in the European Union as well as direct supervision of CRAs and recently trade repositories. ESMA's scope of action encompasses securities and markets activities, trading venues, the disclosure and content of financial information, investment, market integrity and CRAs.

**ESMA has been particularly active in contributing to the single rulebook by submitting more than 90 draft technical standards to the Commission** for the implementation of the European Market and Infrastructure Regulation (EMIR), for the new Credit Rating Agencies (CRA) supervisory regime, on the Alternative Investment Fund Managers Directive (AIFMD) and on the short-selling and credit default swaps Regulation. It provided ample advice on the legislation currently being negotiated by the co-legislators, including MiFID2, MIFIR, the Transparency Directive the Market Abuse Directive (MAD) and Market Abuse Regulation (MAR), the revised Credit Rating Agency Regulation (CRA3) and the Central Securities Depositories Directive (CSD).

**ESMA actively contributed to promoting supervisory convergence by e.g. issuing opinions on the treatment of sovereign debt under IFRS and - for the first time - common European IFRS enforcement priorities.** It assessed and issued opinions on a large number of proposals for pre-trade transparency waivers for trading systems. ESMA completed 6 thematic peer reviews and assessed numerous requests regarding alleged breaches of Union law which in one case was resolved by adoption of an opinion by ESMA to safeguard uniform interpretation and supervisory convergence.

**ESMA adopted a series of concrete initiatives in the area of investor protection,** for instance two sets of Guidelines in July 2012 on MiFID provisions relating to suitability and the compliance function and one set of Guidelines on exchange-traded funds and other UCITS issues. Further Guidelines on remuneration of alternative investment fund managers (AIFMs) followed in February 2012. ESMA was also active in issuing three investor warnings in total, in the event that a financial activity poses a serious threat to investors.

**With the entry into force of CRA2 in July 2011, ESMA assumed responsibility for supervising CRAs registered in the EU.** So far 22 CRAs are supervised by ESMA and the authority recently began to supervise Trade Repositories and to coordinate supervisory colleges for Central Counterparties. As the number of registered CRAs gradually increased, the role of ESMA progressively moved from ensuring consistency across the assessment of the application for registration being undertaken by national authorities to a more central supervisory enforcement role in line with the regulatory framework and delegated powers. The CRA Technical Committee of ESMA also acted as a forum for NCAs to exchange their views on the application of the Regulation.

#### 4. The structure of the ESAs

**Most stakeholders expressed satisfaction with the structure of the ESAs and were in favour of giving the new supervisory system more time to settle, also in light of the establishment of the Banking Union.** It is widely accepted that the current structure of the ESFS ensures that all elements of the financial sector are taken into account and close cooperation between the micro- (ESAs) and the macro-prudential (ESRB) dimension. Most stakeholders are satisfied with the current structure of the ESFS and plead for evolution rather than revolution. They stress in particular that more radical changes would be premature at this early stage and suggest giving the current structure and the Banking Union some time to settle before considering amendments to the structure. However, some stakeholders, from various backgrounds, expressed a preference for more radical changes, like merging the ESAs into a single authority, introducing a twin peaks approach, moving the ESAs to a single seat or, at least, consider more efficient arrangements in some areas.

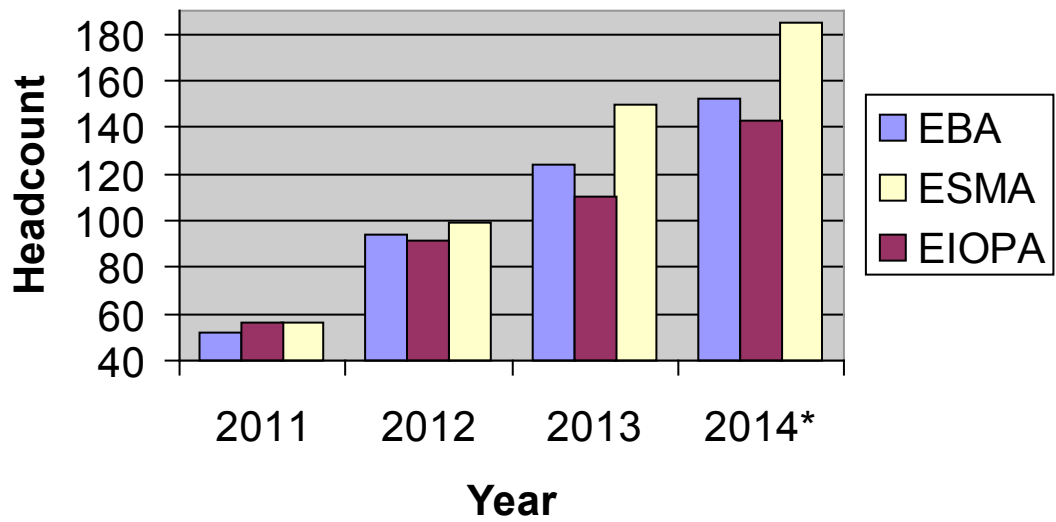
**The interaction between the establishment of the Banking Union and the ESFS and EBA in particular will have to consolidate in practice.** Many stakeholders are concerned about the interaction between the SSM and the EBA and a division between the regulation and supervision of banks in Member States participating in the Banking Union and those of Member States not participating in the Banking Union. Overlaps between the systems (such as double standards, double reporting, double stress testing etc.) should be avoided and responsibilities balanced. The EBA will maintain its prerogatives, and contribute to developing the single rulebook and in particular the single supervisory handbook, whereas the focus of the ECB will be on the supervision of institutions. With respect to the ESRB, stakeholders point out that organisational and operational changes might be necessary in light of the SSM to allow for an effective ESRB and avoid possible conflicts of interest. Sufficient time should be allowed for the parallel functioning of the ESFS and the Banking Union, covering not only the EBA and the ESRB but also the interaction with ESMA and EIOPA, to fully assess the actual relationships and possibly identify and address shortcomings.

Several responses from stakeholders from the 3 EEA states requested to rapidly agree on suitable means in order to fully integrate the EEA/EFTA States in the ESFS. Important to note, however, that relevant difficulties mainly stem from the fact that these States have raised political and constitutional issues in regard to the exact ways of such integration.

There is broad consensus on the effectiveness and efficiency of direct supervision of CRAs by ESMA and for its mandate for supervising trade repositories. Most stakeholders expressed however a more cautious position on the further extension of direct supervisory powers, at least in the short term. Possible areas for direct supervision by the ESAs highlighted by stakeholders include market/post-trade infrastructures (e.g. benchmarks, CCPs, CSDs) where the degree of concentration of actors at EU level is considered as possibly justifying a European approach to supervision.

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## ESAs' Headcount



## Regulatory activities

Year	2011			2012			2013		
Regulatory activity	EBA	EIOPA	ESMA	EBA	EIOPA	ESMA	EBA	EIOPA	ESMA
Draft regulatory technical standards**	0	0*	4	1	0*	39	36	0*	36
Draft implementing technical standards**	0	0*	0	0	0*	10	21	1*	3
Joint Draft Technical Standards***	1 Joint RTS for all three ESAs in 2013								
Guidelines and Recommendations	4	0	2	6	1	8	6	6	10
Technical advice requested from COM	0	3	5	0	3	6	1	13	18
Other****	17	42	4	25	29	11	45	10	29
Of which opinions	1	0	3	6	2	4	6	2	8
Joint opinions*****	1 Joint Opinion for all three ESAs in 2013								

\* Pending the final adoption of Omnibus II and Solvency II EIOPA had no legal powers to adopt technical standards

\*\* As submitted to the European Commission

\*\*\* Joint RTS on FICOD submitted to the European Commission in July 2013, and published in the OJ in March 2014

\*\*\*\* The category "other" includes opinions, best practices reports, surveys, final reports and other advice of the ESAs but excludes technical advice requested from the Commission

\*\*\*\*\* Joint Opinion of the ESAs on the review of the European Systemic Risk Board in December 2013

### Common supervisory culture

Year	2011			2012			2013		
Activities	EBA	EIOPA	ESMA	EBA	EIOPA	ESMA	EBA	EIOPA	ESMA
Colleges established	82	89	0	87	91	0	135	92	6
Colleges visited in % of invitations	68%	87%	-	82%	82%	-	93%	89%	100%
Training sessions	16	18	9	13	21	11	20	17	28
Peer reviews completed	0	0	2	0	0	2	1	4	2

### Governance of the ESAs

Year	2011			2012			2013		
Measures	EBA	EIOPA	ESMA	EBA	EIOPA	ESMA	EBA	EIOPA	ESMA
Meetings of the Board of Supervisors*	6/	6	7	7	6	8	6	6	8
Meetings of the Management Board*	6	7	8	6	6	6	5	7	6

<b>Meetings of the SG**</b>	4	13	3	7	12	7	7	10	5
<b>No. of documents submitted to SG</b>	8	1	8	12	9	7	56	19	22

\* Only physical meetings, teleconferences and away day are not included

\*\*\* SG stands for stakeholder group. EIOPA has two SGs

#### **Joint Committee**

<b>Year</b>	<b>2011</b>	<b>2012</b>	<b>2013</b>
<b>No. of meetings</b>	5	6	6
<b>No. of common acts and joint positions</b>	1	4	19
<b>No. of discussion notes*</b>	39	81	90
<b>Dedicated staff **</b>	3.5	8	12

\*This figure includes the persons providing the JC with secretariat, as well as the staff supporting the work of the Sub-Committees of the JC and legal and coordination aspects of the JC support