The European Association of Corporate Treasurers

Response to the European Commission's consultation on the operations of the European Supervisory Authorities

16 May 2017

The European Association of Corporate Treasurers (EACT)

The EACT is a grouping of national associations representing treasury and finance professionals in 18 countries of the European Union. We bring together about 13,000 members representing 6,500 groups/companies located in the EU. We comment to the European authorities, national governments, regulators and standard-setters on issues faced by treasury and finance professionals across Europe.

We seek to encourage professionals across treasury, corporate finance and risk management, promoting the value of treasury skills through best practice and education.

Introduction

The EACT welcomes the opportunity to respond to this consultation.

We fully support the European Supervisory Authorities and believe they have played an important role in setting up a strong legislative framework for financial services in the EU. Since their establishment the ESAs have taken up significant tasks and delivered an impressive amount of standards. Generally speaking we do not see a need to fundamentally change the framework governing the ESAs but some changes and clarifications are necessary in order to improve the ESAs functioning and their interaction with all relevant stakeholders.

These changes, which we will discuss further in our responses to the questions, include the following:

- Establishing more clearly that the ESAs, although independent authorities, are providing technical work and policy decisions impacting the wider European economy and its

functioning will be systematically taken by the European Commission, the European Parliament and the Council.

- Introducing a procedure whereby the above institutions would have a formal approval of any guidelines and recommendations drafted by the ESAs.
- Formally including non-financial companies as a group of stakeholders to be included in stakeholder groups.

We have limited our responses to the consultation questions to only the ones that are relevant to us.

Responses to specific questions

5. 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.

We believe the ESAs' tasks and powers in relation to guidelines and recommendations should be formulated with greater detail. In addition, the Commission, the Parliament and the Council should be given a formal role to check and endorse any guidelines and recommendations issued by the ESAs, in a similar way that is currently done for the endorsement of any draft Regulatory Technical Standards and draft Implementing Technical Standards. The institutions should not only make sure that any draft guideline or recommendation falls within the limits intended in the ESAs' mandates i.e. that they are issued *"with a view to establishing consistent, efficient and effective supervisory practices within the ESFS, and to ensuring the common, uniform and consistent application of Union law" (*as is specified in the ESMA/EBA/EIOPA Regulations) but they should also examine and have the possibility to challenge the contents.

Guidelines and recommendations have too often been used by the ESAs on issues exceeding their intended application, and have even clearly gone against the relevant level 1 text. In our experience the most prominent example of an ESA clearly exceeding its powers with regard to guidelines is the EBA's draft guidelines concerning the treatment of credit value adjustment (CVA) risk under the supervisory review and evaluation process (SREP)[1]. These draft guidelines aimed at (partly) eliminating the exemption for the calculation of CVA risk capital charge defined in Article 382 (4) of the Capital Requirements Regulation (CRR) where certain counterparties, such as non-financial counterparties, were subject to specific exemption decided by the co-legislators. The level 1 text of CRR conferred no power to the EBA for any level 2 or level 3 measures concerning these exemptions, but the EBA decided on its own initiative to start developing such guidelines. In the draft guidelines the EBA proposed to include exempted counterparties when calculating the appropriate level of CVA risk coverage. We understand that the EBA has subsequently decided not to adopt these guidelines, at least in the near future. Even with such outcome, EBA plans to issue the guidelines created considerable uncertainty to all market participants, which in some cases has reflected negatively on e.g. the pricing that non-financial companies are able to obtain from their financial counterparties for OTC derivative transactions.

10. 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.

We do not have visibility on this aspect of the ESAs' work and are therefore not able to assess the extent to which they effectively deliver on their mandates. We would like to point out that currently

[1] https://www.eba.europa.eu/-/eba-consults-on-draft-guidelines-on-the-treatment-of-cva-risk-under-srep

a lot of data is being reported to the ESAs (directly or indirectly such as through Trade Repositories) which put a heavy burden on especially the non-financial companies with a reporting obligation, but the ESAs do not give any 'feedback' on the reported data, such as the level of matched transactions, volumes etc. It could be useful to put in place a feedback mechanism so that all parties have sufficient visibility of the reported data.

26. 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.

We understand the challenges that the ESAs face in terms of composing well-balanced and representative stakeholder groups. Certain amendments to the composition process should be considered in order to help the ESAs in their work and to ensure that stakeholder groups are adequately composed. One such amendment would be to include non-financial corporates, which are not SMEs, as their own group of stakeholders or to explicitly include them in an existing stakeholder category. Currently only SMEs and issuers (included in the category of financial markets participants in the ESMA SMSG) are included as stakeholders but other non-financial companies are not granted a seat, which we find inconsistent and discriminatory. Non-financial corporates use financial services and participate in financial markets in diverse ways - as issuers of securities (but it is important to note that not all non-financial companies issue securities), as counterparties to derivatives transactions, and as end-users of a variety of banking services and products and have a legitimate interest in the development of financial regulation in the EU.

30. 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:

1. **a) a contribution which reflects the size of each Member State's financial industry (i.e., a "Member State key"); or**
2. **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.

We do not have specific views as to whether the ESAs should shift to being fully or partially industry-funded, but we acknowledge that such a development might be needed given the current lack of resources and a potential future increase of funding needs if tasks and responsibilities are added to ESAs mandates.

If the funding model is changed, either through a Member State key or an entity-based key, the entities that will be funding the ESAs should be clearly described and above all limited to only financial sector participants, leaving out non-financial companies that participate in financial markets and use financial services as end-users, as well as consumers and SMEs. Financial institutions, as the institutions that the ESAs have been established to monitor and to regulate, are the ones that should bear the cost of any funding obligation towards the ESAs. Extending the funding obligation to any financial market end user would not be justified or proportionate.

32. **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.**

The ESAs review should seek to tackle one fundamental issue that frequently emerges in the context of the ESAs work: ensuring coherence and consistency with the basic legal text (level 1) and the delegated and implementing acts (level 2), and ensuring that the ESAs work remains truly technical in nature and does not involve policy choices, as Recital 22 of the ESAs Regulation already stipulates. What precisely is meant by policy choice should be developed in greater detail and how the ESAs and the Commission coordinate those decisions should be developed in clear procedures. Currently the ESAs' work often involves aspects that might have fundamental impacts on financial and non-financial companies within the EU, which is not appropriate, as all policy decisions should be left to the Commission and/or the Parliament and the Council.

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