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FBF'S RESPONSE TO THE EUROPEAN COMMISSION'S CONSULTATION PAPER ON THE OPERATION OF THE EUROPEAN SUPERVISORY AUTHORITY

I - GENERAL COMMENTS:

The French Banking Federation (FBF) represents the interests of the banking industry in France. Its membership is composed of all credit institutions authorized as banks and doing business in France, i.e. more than 390 commercial, cooperative and mutual banks. FBF member banks have more than 38,000 permanent branches in France. They employ 370,000 people in France and around the world, and service 48 million customers.

The French Banking Federation welcomes the opportunity to comment on the European commission's consultation paper on the operation of the European supervisory authority. The FBF would like to outline the work done by the ESA(s) in the last years. The regulatory landscape has changed deeply since 2008 and the ESAs has played a major role in framing this new landscape. Since the financial crisis, the Banking Union has constituted a major step in setting up the single rule book and harmonising supervision practices. In the context of the Capital Market Union initiative and of the Single Supervisory Mechanism, the ESAs should evolved accordingly.

1. Challenges and opportunities for the European Union of reforming the ESAS in a moving regulatory and political landscape

The political environment has recently changed deeply and that in this context, the ESAs have a major role to play regarding the harmonisation and the convergence of regulation and of national supervision. The FBF would also like to highlight that the ESAs have a central role to play regarding cross border issues in order to ensure a fair level playing field between Member States. Actually, in the Brexit context, the ESAs will stand as an essential component of the equivalence process, from the initial assessment to the necessary follow up processes.

This review is a great opportunity for the European Union to:

- Optimise tasks and power of ESAs by making sure that they act in full compliance with the hierarchy of norms and with the mandates granted by the European Commission and the co-legislators ;
- Ensure that the Banking Union requirements apply to all EU Banks ;
- Adapt the functioning of the ESAs to the new political landscape including the Brexit and the CMU initiative ;
- Improve the governance of ESAs by involving more closely stakeholders to the ESAs' regulatory and policy work.

2. Reshaping a new European Banking Authority (EBA)

The FBF is particularly concerned by some dysfunctions in the elaboration of regulation by the ESA's, and specifically by the EBA:

- The ESAs guidelines do not always fully comply with the level 1 texts that they are supposed to clarify¹;
- The scope of ESAs' guidelines often exceeds the level 1 and the mandate granted by the European legislators², even where the mandate is sufficiently accurate;
- ESAs guidelines and recommendations are not legally binding and thus, their validity cannot be challenged, even though they may produce legal effects towards third parties;
- The ESA's timeline do not leave sufficient time to stakeholders to adapt³.

Thus, we believe the current political context and the post crisis environment should drive the European Commission to redefine and take over the EBA's missions and powers, rather than merging EBA and EIOPA which would create a greater risk of confusion between banking and insurance regulation. Considering the variety of European banks and financial markets, the ESAs should remain focus on regulation and leave to national regulators every day supervision. We also do not support the proposal of granting EIOPA powers to approve and monitor internal models.

The takeover of EBA's missions and powers by the European Commission would allow to ensure a better articulation of level 1 and level 2 measures. This proposal would permit to ensure that the level 2 measures are drafted as early as possible, and that they are fully compliant with level 1. Finally, this proposal goes along the line of the Lamfalussy procedure for a greater cooperation between regulators and stakeholders, and for a better control of legality. This proposal would also be relevant in the context of the Single Supervisory Mechanism involving the European Central Bank as unique supervisor.

Before taking any major institutional reform, we would also favour appointing a "Committee of Wisemen" (Lamfalussy type) gathering EU based independent personalities, to give proper thinking to the ESA's new governance and to build up concrete proposals.

We consider that most comments made on the EBA above also apply to ESMA's current functioning.

3. Proposals for an improved governance of ESAs

We believe the National Competent Authorities (NCAs) have played a major role in the functioning of the ESAs, which was essential in the 2008 economic and regulatory reform context. However,

¹ As examples :

- EBA Guidelines on the treatment of CVA risk under SREP: the EBA take an initiative to publish guidelines on the treatment of CVA risk under SREP that substantially alter exemption granted by institutions on CRR, without going back to a legislative process or control.

- EBA RTS on criteria for determining the MREL: provision contained on the draft RTS submitted by the EBA to the Commission are not compatible with provisions contain on the BRRD.

² As an example, the EBA Guidelines on disclosure requirements: EBA requires additional disclosure that are not part of the exhaustive list of items that must be subject to a separate disclosure (article 437(1) (d) of the CRR).

³ As an example, the EBA draft RTS on additional collateral outflows (in accordance with Article 423(3) of CRR) has been submitted to the Commission on 27 March 2014. On December 2015, the Commission informed that it will not be endorsed. EBA issued on 3 may 2016 amendment to this RTS. One year later, we are still waiting for the adoption by the Commission.

we would encourage the European Commission to put in place a new governance for ESAs, and in particular for ESMA (or EBA if an ambitious reform were not to be possible):

- In order to reinforce the political role of Member States, we would suggest that the **Board** (replacing the Board of Supervisors) **should be composed of representatives of the national Treasuries**: the Board would be in charge of adopting the strategic plan of the ESAs and of determining its regulation priorities.
- We would support reinforcing the role of the **Management Board** which would be the assembly of NCAs' representatives; the management board would be empowered to approve new regulations in accordance with the strategic steer given by the Board.
- We support to extend **qualified majority vote to all significant decisions of the Management Board** and to change the voting system to make sure that financial sector is fairly represented in accordance with the respective size of each national market; we would suggest to change the rule for qualified majority where one NCA vote should be balanced in accordance with the size of the market the NCA stands for. We would also suggest to make public the results of the votes.
- ESAs' governance and **cooperation with stakeholders** should also be reviewed and reinforced. As an example, the appointment process and the functioning of consultative working groups should be made more transparent. The agendas and the summaries of conclusion should also be made public. Besides, consultation process should also be improved.
- Furthermore, imposing strict entry into application date into level 1 implies rigidity which is neither effective nor efficient, as it restricts the delay for the ESAs to work on the implementing measures and as it leaves in some case insufficient time for stakeholders to adapt themselves and be compliant. We would suggest to agree in the level 1 text that the entry into application will start X months after the adoption of level 2 and/or level 3 measures.

Finally, we would support to reinforce the **accountability** process of ESAs regarding their regulatory power. The ESAs should consider the full picture and the whole context of their regulatory power by improving impact assessment processes. Follow up studies should also be considered following the implementation of a new regulation.

4. Missions and empowerments of ESAs

Regarding ESAs' missions and empowerments, some improvements should be considered:

- We do support ESMA's direct supervision powers on trade repositories and credit rating agencies which are already under ESMA's supervision; we also support ESMA's direct supervision (jointly with ECB) on **central counterparties** and **critical benchmarks**.
- We support reinforcing the ESAs empowerment regarding **convergence**.
- The ESAs have already a significant number of tools at their disposal. However, the legal power of certain tools (such as Opinion or Statement) should be improved in order for market participants to understand better the obligations applicable to them.
- A new pan-European tool should also be considered in order to relieve stakeholder from the application of certain rules at a European level for specific reasons, such as the type of **"no action letters"** as they exist under the US framework for example.

- ESAs powers to adopt guidelines and recommendations should be clarified and better circumscribed.

We do not see merits in broadening ESMA's empowerments to investor protection since investor protection covers a wide range of products and actors and require approaches and expertise unique to each sector. Actually, national investor protection is of the competence of NCAs which are closer to local markets and then have a better knowledge and understanding of their specificities; as such, NCAs are more likely to take appropriate rules to protect investors.

5. Funding of the ESAs

We do not support a change of the ESA's funding structure. We believe the current funding system entitles ESAs to be fully independent, and then to take the most appropriate decision regarding regulation and supervision. Actually, a direct funding doesn't seem to make sense considering that there is no direct supervision of ESAs (with the exception of trade repositories and credit rating agencies). It would create a precedent where industry pays for regulation (and not supervision). Moreover, a takeover of the European Banking Authority by the European Commission would make this proposal ineffective. Moreover, financial institutions already contributes largely to EU institutions' and NCAs' budgets. A direct funding of the ESAs by the industry will potentially foster an increase of the financial burden for banks instead of transferring it, as financial contributions to NCAs would not be likely to decrease. We also see a risk of unfair split between Member States and between market players if a direct funding were to be applied.

II – DETAILED ANSWERS TO THE CONSULTATION

I TASKS AND POWERS OF THE ESAS

A. OPTIMISING EXISTING TASKS AND POWERS

**Question 1 : 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 weakness be addressed ?
Please elaborate on your response and provide examples.**

The ESAs have made a tremendous effort in the last few years in promoting supervisory convergence. However, there are some areas where further convergence should still be encouraged.

The ESAs should find the right balance between necessary national leeway, when implementing rules, and national goldplating, which is not acceptable. The ESAs should be empowered with the proper tools to assess national implementation of European rules in a pragmatic way, and where necessary allowing national leeway in order to take into consideration specificities of national markets and of local investors.

In general, we would like to underline that the work carried out by the ESAs must comply with level 1 texts. It is crucial to have legal certainty, and it is of utmost importance that the hierarchy between level 1 and level 2 is obeyed by all EU authorities involved in rule making. Supervisory authorities should limit themselves to develop the technical details of the regulatory framework based on level 1 text. It would indeed be an undesirable outcome if the three main EU institutions were limited to merely defining the broad regulatory framework, whilst level 2 authorities designed strategic decisions or policy choices. Consistency between the work of the legislators, the regulators and the supervisors is key. Supervisory authorities should not take the role of the three institutions upon themselves. The EU Institutions are first and foremost in charge of launching and negotiating legislative initiatives: the European Commission, the European Parliament and the Council.

Besides, the technicality of delegated acts initiated by one of the three ESAs can make difficult and uneasy for MEPs or the Council to appreciate the rationale or the consistency of such proposals at the very end of the process. Consequently, the review of ESAs boards' composition should be considered. For instance, some seats allocated to European Commission members or national governments could help in reinforcing the coordination and cooperation between the three levels of the European Legal Framework.

Until now, we have witnessed an increasingly detailed of level 2 and level 3 regulation in order to promote common practices among countries with different financial backgrounds. Nevertheless, we believe rules should be limited to the real risks following the proportionality initiative, and should leave local regulators to control their proper implementation. In order to be efficient, there is a need for more flexibility⁴. This needs to be supported by:

1. Real practitioners able to dialogue with the industry without losing independence, and a decision making process which takes more into account regulators involved significantly in the supervision of the market. It probably implies that local regulators, based on the size of

⁴ A good example is the regulation on market sounding under MAR far too extensive – in particular, the responsibility for the sounder to assess the information without taking into accounts practices.

the market and their representation in terms of decision making, are strengthened and delegate more resources to ESAs where necessary.

2. A deep review of the controls performed by local authorities to ensure convergence in standards revisions. In this area, there is a need to ensure there is a real supervision performed by ESAs, as well as a process to deal with issues when they occur: the regulators and ESAs need to be more empowered but also accountable of the work they perform, this could be achieved under the control of the European Commission.
3. A real monitoring of the enforcement of the rules in each jurisdiction including those benefiting from equivalences regimes.
4. The transposition deadline of a level 1 text should take into account the date of the publication of all RTS and ITS requested, as well as the operational implementing constraints. As a consequence, setting the entry into application date in the level 1 text may not be the best option as it introduces too much rigidity.
5. We also believe that “no action letters” (as they exist under US rules for example) should also be considered in order to relieve stakeholder from the application of certain rules at a European level for specific reasons. This type of tool would permit to relieve market players from applying specific obligations for a limited time scale and for justified reasons. This would allow a European wide decision to waive an obligation and as such would ensure a fair level playing field at the European level and with non EU players.
6. In order to promote common practices and improve cooperation between ESAs and financial institutions, the industry could be associated with ESAs internal committees’ work. This would therefore allow institutions to collaborate to rule-making decisions and would also foster administrative remedy over the current judicial remedy that is difficult to enforce.

Finally, the reporting to European Supervisory Authorities can be streamlined. More cooperation between ESAs, NCAs and, now, the SRB would facilitate ESAs’ work for supervisory convergence and will less constrain the market participants.

Question 2 : 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.

- a) The FBF welcomes the use of specific tools to promote a common supervisory culture, such as Q&As and guidelines which are very effective tools. However, the legal basis and

legal effectiveness of certain tools may be better explained. The legal impact and enforceability of ESA's statement and opinion should also be clarified. Furthermore, the ESAs should make sure not to open or reopen political debates at the level 2 and/or level 3 and to override their mandates. As an illustration, we can question whether the new framework for financing financial research (article 13 of the delegated directive) was really covered by the general inducements provisions of MIFID 2 (level 1).

- b) As a consequence, we would suggest to reintroduce a political dimension (with representatives of National treasuries) at the Board level to make sure the technical regulation drafted and adopted by ESAs is fully in line with the political agreement reached at level 1.

**Question 3 : To what extent should other tools be available to the ESAs to assess independently supervisory practices with the aim to ensure consistent application of EU law as well as ensuring converging supervisory practices?
Please elaborate on your response and provide examples.**

In order to avoid inconsistent application of EU rules, the ESAs should have the powers to avoid conflicting national guidance by NCA's which interfere with the envisaged supervisory convergence.

A number of tools is available to ESAs in order to promote supervisory convergence. Questions & Answers ("Q & As") are a more informal way to clarify Level 1 or Level 2 legal issues, or to address issues that are more technical in nature. Hitherto, Q & As have been considered as non-binding guidance and therefore not subject to better regulation principles and stakeholders consultation.

However, we are of the view that ESAs's interpretations and clarifications have the potential to produce significant impacts across the marketplace, comparable in some instances to those resulting from the introduction of new regulatory policies or legislation. National Competent Authorities ("NCAs") also take Q&As as a key supervisory instrument and supervised entities are encouraged to strictly follow the guidance in the same way as they are compelled to follow actual rules, although Q&As should be non-binding.

In view of the weight the answers carry within the industry community, and more widely amongst NCAs, and the potential impact thereof, it is our belief that consultation and consideration with industry stakeholders ahead of the publication of Q&As is necessary. Indeed, we acknowledge the importance of Q&As in the dialogue with NCAs but we believe that the association of either the European Commission or the industry in Q&As processes would improve the understanding of those rules. As an example, the French "*Autorité du Contrôle Prudentiel et de Résolution*" has appointed members in the Supervisory Committee (Collège de Supervision) for their expertise. Ariane BOLENSKY, former CEO of the FBF, is hence part of this Committee. This would allow stakeholders to contribute to the discussions and to plan ahead on how to manage or mitigate any impacts. There should also be clarity and reasonable expectations regarding when the answers would become applicable. We recommend that ESMA explore potential mechanisms that would enhance the transparency of the Q&A process and allow for some form of stakeholder engagement, where appropriate, before answers are finalised and published. A clearer process for the submission of the questions would also be appreciated.

In that context, we also highlight that the various consultative working groups are useful for the ESAs to be provided with industry feedbacks. We note however that certain improvements could be made in order for these consultative working groups to be able to feed the ESAs ahead of the publication of each relevant technical standard and Q&As.

The transposition deadline of a level 1 text should take into account the date of the publication of all RTS and ITS requested, as well as the operational implementing constraints.

We also believe that “no action letter” should also be considered in order to relieve stakeholders from the application of certain rules at a European level for specific reasons. This type of tool, already used in foreign jurisdiction such as in the US, would permit to relieve market players from applying specific obligations for a limited time and for justified reasons. This would allow a European wide decision to waive an obligation and as such would ensure a fair level playing field at the European level and with non-EU players.

4. How do you assess the involvement of the ESAs in cross-border cases? To what extent are the current tools sufficient to deal with these cases? Please elaborate on your response and provide examples.

The ESAs and in particular ESMA have been highly involved in cross border cases.

The main case of cross border cases that has been identified so far is the case of selling CFD instruments to retail investors. ESMA has been working hard through the drafting of Q&A in order to promote supervisory convergence of CFD providers. It is also worth mentioning that MIFID grants ESMA with product intervention power to restrict the sale or ban a product in Europe. This provision will represent a significant tool in the case of cross border issues (article 47 MiFIR).

Regarding cross border issues, the FBF believes that the ESAs will have a fundamental role to play in the future regarding the equivalence process at both stages: for the initial assessment, as well as for the on-going assessment. The FBF supports regulation by regulation and rule by rule equivalence assessment.

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.

- **ESAs guideline should fully comply with level 1 texts that they intend to apply.**

ESAs guidelines aim at « *establishing consistent, efficient and effective supervisory practices within the ESFS, and to ensuring the common, uniform and consistent application of Union law* ». In consequence, new requirements cannot be added by the ESAs to the basic texts by way of guidelines. The guidelines are not designed to go any further than the level 1 texts, particularly as the debates leading up to the adoption of these texts sometimes expressly rejected the addition of some specific provisions. For example, provisions relating to the sales of tied and bundled offering were expressly excluded from the directive on consumer credit. Therefore, the banking industry strongly challenged ESAs joint draft guidelines on cross-selling.

The scope of basic texts cannot be extended through guidelines, without infringing the provisions of the treaties and ESAs founding regulations. For instance, EBA guidelines on POG created provisions on the definition of a target market for bank accounts, payment services or credits to consumers, although neither the Payment Account Directive, the Payment Services Directive II,

the Consumer Credit Directive nor the Mortgage Credit Directive cover this issue. This is not acceptable.

This tendency of the ESAs to get active without prior mandate from the legislator may also appear problematic as the democratic aspect of the process is not fully ensured. Because of the lack of Systematic legality control on ESAs processes and decisions, there can also be a risk of inconsistency between level 1 and level 2 and/or level 3 legislations. Consequently, the governance of the ESAs should be reviewed, in order to ensure a supervision of the ESAs when making level 2 or level 3 decisions (cf. question 24).

Considering the tendency of ESAs to overstep their mandate, several changes in the adoption processes can be proposed:

- Regarding level 2 rules, RTS must lead to delegated acts by the European commission under Article 290 TFEU. However, the adoption by the Commission of a delegated act is submitted to the control of the European Parliament or the Council, ensuring compliance of those acts with the mandate given to the ESAs by level 1 texts. Considering the fact that such a rule is not applied for ITS while implementing acts define specific and important rules, we would suggest introducing a control of the European Parliament or the Council on ITS in order to ensure compliance with level 1 texts as well.

- Regarding level 3 measures, two changes are suggested:
 - o Regarding the power to issue guidelines and recommendations in the prudential area, a single authority, namely the ECB, could enact them, in order to ensure a better and consistent supervision of soft law rules ;
 - o Q&As could be either submitted to public consultation or established in collaboration with the industry (see question 3).

- **The scope of ESAS guidelines should not extend the mandate given by the European legislator in the level 1 texts on which they are based, when such a mandate is sufficiently accurate.**

As explained above, we are concerned that the ESAs elaborate guidelines that sometimes overstep or contradict level 1 texts. We have recently seen some examples of draft guidelines adding requirements to the level 1 text.

For instance, Art. 91.12 CRD IV mandates the EBA to develop guidelines on assessment of the suitability of the members of the management body and lists the specific items that shall be clarified by the EBA. In particular, while the notion of key function holders does not appear in the CRD 4 package, a draft joint ESMA and EBA guidelines published on 28 October 2016 requires the supervisory authorities to assess their suitability, having considerable consequences, particularly on cooperative banks (EBA/CP/2016/17).

The way the ESAs are currently using their power to issue guidelines and recommendations could be seen as undermining the decision making process, as they are developed without any involvement of the EU co-legislators process in the Council and the European Parliament (EP) and as weakening the legislators' decisions on essentials matters.

This power of the ESA is used to re-open debates that have been willingly abandoned at both Council and EP level. Therefore such a use is not consistent with the division of powers provided for by the Treaties.

- **ESAs should not issue guidelines and recommendations where a regulatory or implementing technical standards (RTS / ITS) had been adopted on a specific matter.**

Recital 26 of the ESAs founding regulations provides that « *In areas not covered by regulatory or implementing technical standards, the Authority should have the power to issue guidelines and recommendations on the application of Union law.* » But such a provision is not integrated into the main body of the regulations.

This principle has been recently recalled for instance in recital 115 of the BRRD : « *Where provided for in this Directive, it is appropriate that EBA promote convergence of the practices of national authorities through guidelines in accordance with Article 16 of Regulation (EU) No 1093/2010. In areas not covered by regulatory or implementing technical standards, EBA is able to issue guidelines and recommendations on the application of Union law under its own initiative.* »

Moreover, with a view to better harmonising and approximating national legislations, RTS should be preferred over Guidelines. For instance, Art.5 of PSD2 empowers the EBA to issue guidelines on the criteria on how to stipulate the minimum monetary amount of the professional indemnity insurance or other comparable guarantee. Such a matter should have been addressed by RTS in order to avoid national discrepancies.

- **ESAs guidelines and recommendations are not legally binding and thus, can their validity be challenged? Some of these acts produce legal effects vis-à-vis credit and financial institutions.**

It is possible to bring an action against an individual decision taken on the basis of a recommendation or guideline. It is however not provided by the Regulations establishing the ESAs that guidelines and recommendations can themselves be the subject of an action for annulment.

These guidelines have often a de facto binding effect due to the “comply or explain” procedure and are implemented by many NCAs on national level.

As stated by the Commission itself in its Report on the operation of the European Supervisory Authorities (ESAs) and the European System of Financial Supervision (ESFS)⁵ : “*Further clarity was requested from many stakeholders on the possibility of challenging guidelines and recommendations under EU law. In the Commission's view Article 60 of the founding Regulations is limited to decisions and thus does not provide a legal basis for challenging guidelines and recommendations. To the extent Guidelines and recommendations are intended to produce legal effects vis-à-vis third parties they should be subject to review under Article 263(1) TFEU. However, the Court of Justice did not yet have opportunity to judge this particular aspect of the ESAs Regulations*”.

⁵ REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on the operation of the European Supervisory Authorities (ESAs) and the European System of Financial Supervision (ESFS), 08/08/2014, COM (2014) 509 final.

- ⇒ **Therefore, for all these reasons, the FBF recommends to reintegrate the EBA within the European Commission. Such reintegration would allow the EBA:**
 - to work as closely as possible with the co-legislator in order to make sure the level 2 and level 3 texts are fully compliant with the level 1 ;
 - to start working as soon as possible on implementing measures in order to leave more time to stakeholders to adapt.
- ⇒ **Should this reintegration not be possible, the FBF highlights the need to modify the ESAs founding regulations in order to provide or clarify that :**
 - Guidelines and recommendations shall not go beyond the provisions of the basic texts they intend to apply ;
 - If applicable, they shall not cover other items than those listed in the specific mandate given by the basic text they intend to apply (except from basic texts adopted before the adoption of the ESAs founding regulations) ;
 - In the prudential area, a single authority, namely the ECB, should enact guidelines and recommendations ;
 - They shall not be issued in areas already covered by RTS or ITS ;
 - The Council and the EP shall have a right to object to a guideline or recommendation before it is published (same proceedings as the one for RTS) ;
 - The CJEU shall review the legality of guidelines and recommendations where these acts intend to produce legal effects *vis-à-vis* third parties.

- **ESAs guidelines and recommendations should be accurately motivated.**

In the Final guidelines or recommendation, the ESAs should answer the main comments and objections raised during the consultation launched. Stakeholders have the right to know and understand exactly why their position has not been taken into account in the final text.

- **The « comply or explain » principle should be clarified.**

National competent authorities (NCA) should be clearly allowed to explain the reasons why they do not include the guidelines into their national supervisory practices, in particular when existing national legal provisions aim at obtaining the same results.

- **Clarification and more consistency should be ensured between ESAs guidelines and ECB guides or guidance.**
- **Clarification on the legal effects of some acts issued by the ESAs**

The EBA and the ECB may launch consultations at the same time on the same area and some discrepancies between their respective acts can be noted.

For instance, EBA and ESMA launched on October 28th 2016 a consultation on joint guidelines on assessment of the suitability of members of the management body and key function holders under Directive 2013/36/EU and Directive 2014/65/EU. The ECB launched a consultation in November 2016 its draft Guide on fit and proper assessments. Whereas in its Draft guide the ECB does not choose between ex-ante and ex-post assessment and leaves the option to local regulators in order to comply with national regulations, as provided for by CRD IV, the EBA/ESMA guidelines clearly promote the ex-ante assessment.

The ESAs developed a wide range of acts that were not expressly stated in their founding regulations. Therefore, we are concerned about their legal effects and their real impact:

- Statements : for instance, ESMA's statement on bail-in securities in instruments (June 2016)
- Preparatory guidelines : for instance, EIOPA preparatory guidelines on product oversight and governance arrangements by insurance undertakings and insurance distributors, which anticipated the IDD provisions.

- **The ESAs should not be allowed to adopt ITS by themselves.**

In its Opinion on improving the decision-making framework for supervisory reporting requirements under Regulation (EU) N° 575/2013⁶, the EBA stated: « *Since these issues arise principally due to the gap between the adoption of draft ITS and their final endorsement, the EBA considers that these problems can be avoided if the EBA adopts supervisory reporting requirements directly through its own implementing technical decisions, rather than through ITS.* »

The FBF fully disagrees with this proposal. This would be contrary to the Treaties provisions which delegate implementing powers exclusively to the European Commission. As an example, the role of the Commission was very important when the EBA drafted the RTS specifying the assessment criteria relating to the methodology for setting the minimum requirement of own funds and eligible liabilities (commission delegated regulation 2016/1450).

The final text – even if the FBF considered the calibration is too high especially because of the buffer – was amended by the Commission to comply with the level 1 text. In particular, it does not require any institution to have an MREL of at least 8% of total assets. Another Commission proposal was to delete the requirement that for G-SIIs the peer group should consist of the other Union G-SIIs. The ESA said that “it was unable to accept them”.

So, it is important that new regulations are submitted to the Commission before endorsement. The Commission can check if the ESA has not elaborated the regulation in a way which appears to be a breach of Union law.

- **The RTS should only cover non-essential elements of the basic texts and should be based on accurate impact assessments.**

As any other delegated act, the RTS should « supplement or amend certain non-essential elements of the legislative act »⁷.

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

⁶ EBA/Op/2017/03, 07 March 2017.

⁷ Art. 290 TFEU.

If you have identified shortcomings, please specify with concrete examples how they could be addressed?

Except in cross-border situations, we believe that consumer and investor protection is of the competence of national regulators. Actually, the investor's profiles are diverse according to their financial literacy and the financial needs.

As a consequence, it seems to us that the NCAs are the best placed to determine the need for consumer specific protection. However, in accordance with the subsidiarity principle, in cases where there is an EU wide need for protection, then there should be some specific provisions in the level 1 text to tackle the identified risk or danger for consumers and/or investors.

Besides, it is to avoid a duplication of supervision between the ESAs: EIOPA should supervise insurance products only whereas banking products and capital markets products should be supervised respectively by EBA and ESMA.

For instance, the joint RTS on PRIIP's⁸ have been very difficult to achieve and the three ESAs failed to create a real concertation between them.

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

We do not identify any specific fields where there would be a need for consumer protection which has not already been covered.

8. Is there a need to adjust the tasks and powers of the ESAs in order to facilitate their actions as regards breach of Union law by individual entities? For example, changes to the governance structure? Please elaborate and provide specific examples.

We would suggest that the ESAs make sure that a position paper of each NCA is published on time, in order to ensure supervisory convergence and to facilitate their actions regarding breaches of Union law. For instance, it could be useful for each ESA to publish NCA's position papers explaining their compliance with each ESAs guidelines.

We would also suggest that the Q&A processes of ESAs are made more reliable, firstly through their governance review (cf. question 5), and secondly by adding a time commitment for the ESAs to respond (such as 2 months). For instance, question ID 2013_529 has been submitted in November 2013 but its answer by the EBA got published only in February 2017. Such commitment would help to secure the process of preventing breaches of Union law by individual entities as it would reduce uncertainty.

⁸ EBA EIOPA ESMA Joint RTS with regard to presentation, content, review and provision of the key information document including the methodologies underpinning the risks, reward and cost information in accordance with Regulation EU n°1286/2014

We also believe that the ESAs have a crucial role to play regarding the equivalence assessment. The ESAs have technical expertise which is necessary to help the Commission in the equivalence process. The different ESAs should be involved in this process on a text by text basis and on a competence by competence basis. Actually, the FBF believes that third country equivalence should be assessed text by text and not from a global perspective, and on a rule by rule equivalence assessment.

Furthermore, this assessment should also be made on an on-going manner with a periodicity to be determined, and this follow up assessment should also involve the ESAs.

9. 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.

From a global perspective, once an initial equivalence decision has been made regarding a third country, the ESAs should be empowered to monitor regulatory, any supervisory and market development in this third country through an agile and on-going assessment.

From the banking perspective and given current mandate, the EBA often provides its advice to the Commission on Basel standards without taking into account third countries decision to apply them.

We consider that the EBA should be given responsibilities to follow third country development about implementing Basel standard regulation, as well as third country supervision and enforcement practises. By doing so, on top of dedicated UE quantitative impact study (QIS), the EBA will be in position to properly inform the legislator on transposition decision. This would inevitably reduce unlevel playing field issue with those jurisdictions not willing to implement Basel standards.

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.

As far as the EBA is concerned, we do believe that EBA current powers through direct information from market participants and through access from supervisors enable the EBA to efficiently deliver their mandates.

If there are any issues to efficiently deliver the EBA mandates, this is not due to the scope of their mandates and their powers but rather to the means or willingness to deliver their mandates. For example regarding IFRS 16 and its impact assessment prior to the issuance of EFRAG endorsement advice, the EBA had adequate powers to request from financial institutions an overall quantitative impact assessment. Such QIS, that had not been carried out, should have been part of relevant information to European authorities on the effect of IFRS 16 on banking own funds.

Setting up a central hub would also be helpful when ESAs need data to draft RTS, as it was the case for MIFID 2 transparency requirements. IT was difficult to ESMA to set out the right level of liquidity on the absence of reliable data.

11. Are the areas where the ESAs should be granted additional powers to require information from market participants?

Please elaborate on what areas could usefully benefit from such news powers and explain what would be the advantages and disadvantages.

As far as EBA is concerned, if we do not believe that additional powers should be granted to require information from market participants, a greater articulation between the EBA and the ECB respective regulatory missions should be achieved.

Within the Eurozone, the SSM framework has introduced an additional layer of constraints through the ECB's regulatory powers, the supervisory practices and the monetary and financial statistics register. Simultaneously, the EBA has developed a single set of harmonised prudential supervisory rules applied throughout the EU ("Single Rulebook"), in particular through the issuance of technical standards and guidelines. Such Level 2 and 3 texts are binding for the ECB in its supervisor role. However, the ECB has also issued a set of regulations that extend the scope of the prudential financial information to be reported to NCAs to all financial institutions and thus, that increases reporting requirements.

Therefore, there is a need to better articulate the regulatory powers between the European authorities, i.e. the ECB and the EBA. Indeed, we believe that there is an opportunity to transfer to the EBA the statutory exclusivity of the whole reporting, when the ECB is acting as a banking supervisory authority, and thus, to limit the ECB requests for specific reporting related to crisis scenarios.

Indeed, SSM multiplied ad-hoc data requests make reporting processes all the more burdensome, complex and costly for the following reasons:

- the lack of coordination on the definitions and formats of the requested data,
- the poor explanation and documentation and the short implementation timelines,
- the duplication and the overlapping of disclosures and data requested from different authorities,
- the difficulty to automatize the collection process and to integrate the ad-hoc request into the current reporting process,
- the time and resources consuming in data collection and controls in order to provide high quality data.

The key principle should remain clear: the supervising body is entitled to ask for data. Any exception would make EU regulation very difficult to understand. We agree that ESMA's direct competence should be enlarged to new segments, especially CCPs, but for the other activities that are supervised by NCAs, information flows have to come through NCAs. We think that it is possible to grant ESAs a power of injunction on NCAs to transmit data. In any case, requiring the collection of new data must have a legal basis.

If there is a central hub where data of all contributors are collected with accesses granted to NCAs as well as ESAs, the question is a simple definition of authorization, either direct, full or restricted and subject to validation.

12. To what extent would entrusting the ESAs with a coordination role on reporting, including periodic reviews of reporting requirements, lead to reducing and streamlining of reporting requirements?

Please elaborate your response and provide examples.

The FBF supports further role for ESAs in coordination reporting requirements in order to reduce and streamline reporting requirements. Reporting requirements are essential to allow an effective supervision by national and regional competent authorities. As a consequence, we would support a simplified and harmonised reporting. As suggested in our response to the Call for evidence of the EC, we would welcome European authorities to launch a cross working group, in close cooperation with the industry, to harmonize and optimize the number and the format of the reporting they are requesting.

Thus, ESMA could play a role to centralize all appropriate information and deliver it to the relevant NCA or to make it public to the market (like the list of systematic internalisers by products) under MiFID 2). This role will become even more relevant with the development of new technologies like blockchains.

Concerning the EBA coordination role on reporting, it should take into account, notably, an adequate timeline of future reporting requirements regarding the operational challenges their implementation imply, a better communication about the objectives pursued by the EBA regarding the new requirements, appropriate reporting frequencies and validation rules provided in a timely manner. A feedback on the way data are used, the results and cross checking of the reliability of such results would also be appreciate.

Adequate implementation timelines are important to banks to allow them to set up automated processes which are necessary for time and cost-efficient data reporting. Thus, when determining the implementation timelines concerning supervisory reporting requirements, the following should be considered:

- The development period should be adapted to the scale of the reporting project and its level of complexity (granularity, frequency). Moreover, a transition phase should be considered, if need be.
- Banks need a sufficient implementation time to develop the reporting projects within their systems and processes. A minimum development period of 12 to 18 months should be accepted starting from the day on which the reporting requirements are officially published (e.g. through the publication of the reporting standard in the EU Official Journal).
- The timeline for implementing a new requirement for the first time should start running only from the day at which sufficient guidance has been provided. The first relevant reporting date should, moreover, be clearly communicated as soon as possible and in the consultation paper at the very latest.

Besides, double reporting to NCAs and EBA should be avoided. NCAs and EBA should align their processes in order to avoid redundant request to market participants. We do not see how additional safeguards could prevent an undue burden to market participants in case of double information requests.

There is in our view a huge possibility for reduction of reporting requirements. The global architecture of the regulation can be largely improved in that matter. AS an example, the time stamp that has to be reported to either the milli- or the micro-second (Annex 2 of RTS 25 under MIFID2). It represents a substantial investment for participants to maintain the clock with such a level of precision. If regulators want to control the excesses of HFT, they have far more efficient means at hand among which introducing a minimum tick size and imposing a latency time of 1 second before withdrawing an order that has just been introduced into the system. Investors that participate to the price discovery mechanism and take positions (as opposed to HFT) will benefit from such a new

approach and the whole community would save lots of money with a time stamp limited to second or hundredth of second.

Another example can be found in the conception of MIFID 2 reporting. Under the MIFID 1, in case of suspicion of a market abuse, regulators would investigate and ask trading venues and intermediaries to communicate the trades and the clients on a specific time period and instrument.

With MAR/MAD and MIF 2 reporting the details about these intermediaries and clients will be reported in all instances, despite the fact that they will be useless in more than 99.9% of the cases (those where there is no suspicion of fraud). One can question the balance between supplementary administrative burden and effective improvement of supervision.

**13. In which particular areas of reporting, benchmarking and disclosure, would there be useful scope for limiting implementing acts to main lines and to cover smaller details by guidelines and recommendations?
Please elaborate and provide concrete examples.**

We understand that the intent is to give the ESAs power to adopt regulatory technical requirements through their own tools rather than by technical standard that need to be endorsed through the European due process.

Guidelines and recommendations should be issued within strict rules:

ESAs powers to adopt guidelines and recommendations should be restricted. Thus, guidelines and recommendations should be issued within the following strict rules:

- providing a strict rule that these acts should not contradict and overstep Level 1 texts;
- forbidding the issuance of guidelines or recommendations outside the areas exactly defined by the mandate given to the ESAs in the Level 1 text as well as on the subjects that are already addressed in existing technical standard (RTS or ITS);
- introducing a real possibility of appeal against these acts when they produce effects towards third parties;
- proposing, as it is already the case concerning technical standards, a right of objection of the European Parliament and the European Council during 2 months following the adoption of the act.

Besides, we question the increase of the EBA technical advices which seem very much like delegated acts, and thus, which bypass the distribution of the powers laid down in the European treaties. We insist on the necessity of concomitant drafting of Level 1 and Level 2 texts, as far as possible, to avoid overlaps and deviations.

The “soft law” tools as Q&A issued by the ESAs should be subject to strictly defined framework

We believe that the “soft law” tools issued by the ESAs should be subject to strictly defined framework, subject to comments from stakeholders and subject to adequate appeal procedure by third parties. Indeed, as commented in question 5, ESAs processes and decisions need to be subject to overseeing to avoid inconsistencies between Level 1, 2 and 3 texts.

The Q&A should be subject to proper due process

The overall objective of the Q&A of the EBA is to contribute to the consistent application of the Single Rule book and to achieve a level playing field in highly technical matters. Stakeholders are challenged by supervisors and market discipline to comply with the answers provided by the Q&A process. However, Q&A gain over years some weight within the legislative framework as they might be used as source of information to review of the Level 1 text, or the technical standards or the EBA guidelines, while the Q&A have no binding force and they are not subject to “comply or explain” procedure, as could be EBA guidelines.

For these reasons, we believe that Q&A should be made subject to proper due process. Stakeholders should be able to submit their comments that should be posted on the EBA website together with the Q&A concerned.

Concerning the EBA Q&A, the use of the Q&A tool needs to be improved as suggested below:

- The way in which the Q&A are presented on the EBA website must be revised as users can hardly manage to find their way through them. Appropriate tags indicating the areas which the Q&A cover could be helpful.
- All questions which have been submitted to EBA must be posted on its Website, including those which the EBA has not yet answered. Thus, overlaps of raised questions could be reduced, as well as administrative costs for both EBA and the stakeholders.
- EBA must provide a response in a timely manner, within a 2 months' time limit.

To be helpful reporting must be totally standardized in terms of fields content, timing, format, transfer... A tremendous effort has been made by the industry in creating a tripartite template that enables asset managers and insurers to efficiently communicate data necessary to establish mandatory reporting under Solvency 2. This type of initiatives should be recognized by authorities and transformed into a common and opposable standard. It evidences that it takes time to build a practicable template that is satisfactory for all participants. The WGRDM should act as the consultative body for ESMA to build appropriate reporting. There should be a time for an open and free round of questions of interest to the participants on reporting and data management.

We therefore believe that the methodology should be modified.

- First, timing. The legislators have not taken stock of the existence of ESAs and the delay that it introduces for the preparation and production of advice and draft regulations that have to be submitted to public consultations. Implementation of a new legislation can no longer happen in less than 2 years from the date of application. Most often, 3 years would be more realistic since budgeting exercise runs annually and decisions are prepared in Q2 and made at the juncture of Q3 and Q4 of the year preceding the investment.
- Second, content. Yes, we agree that the architecture should make it possible for details to be provided at a lower level through guidelines and ITS that are easier to adjust when necessary. The capacity to adjust without waiting for a formal review of the level 1 text is the most important evolution that is needed for a better regulation. That typically applies to reporting. Adjustments can be made to reduce and not only increase the scope and depth of reporting. Finally, we would welcome an omnibus legislation that would transversally fix reporting issues; more generally we think that omnibus directives and regulations are a good instrument to adjust legislations and modify without waiting for a formal review of each of the concerned texts: we see Omnibus legislation as a way to introduce more flexibility in EU legislation.

- Third, rely on reactions of participants. They are the only ones who can effectively assess the difficulties and a procedure for handling their remarks, comments and suggestions should be established.

In an ideal world we would favour a 3 year implementation delay and a reactive process of consultation of participants be able to have a clean reporting from the start, which has not been the case for most of the regulations of the last 10 years.

14. What improvements to the current organisation and cooperation 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

First of all, we strongly believe that the tasks regarding financial reporting – i.e. issuance of high quality standards, financial market enforcement and audit procedures and supervision of audit firms - should be strictly separated. Such segregation is a basis for the proper functioning of institutions related to accounting matters and in order to avoid conflict of interests.

Endorsement process and supervisory convergence.

The role of the EFRAG in the European process of IFRS standards endorsement has been recently revised and reorganized (2014) following extensive dialogue with all stakeholders and reflects a carefully considered balance of responsibilities. Besides, the ESMA, as well as the other European Supervisory Authorities, participates in the Board of EFRAG as an observer, what allows them to provide their comments during the endorsement standards process. At the same time, the criteria of adoption of IFRS standards were specified and the notion of “public good” was introduced. Thus, we believe that the new reform should not be reconsidered after a short period of time.

Standard setting and enforcement should be clearly separated to avoid any conflict of interests. We believe that responsibility of enforcement should lay with ESMA which should have no role in the standard setting process or its interpretation on its own. Accordingly, ESMA should stay as an observer in EFRAG.

Indeed the standard setting process and enforcement should be clearly separated. If not, there is a clear risk of conflict of interest. If involved in the standard setting process, enforcers may indeed be tempted to develop rules-based standards, while IFRS should remain principle-based. Any issue with standards that the market authorities have identified within their enforcement work should be reported to the IASB and IFRIC for consideration or interpretation.

The interpretation of IFRS standards IFRS must stay in the hands of the IFRS IC. No additional level of interpretation of IFRS standards should be created otherwise it would undermine relevant and uniform application of IFRS standards. To increase comparability and transparency, the IFRS should be applied as endorsed in EU, without guidelines or interpretations provided by local or regional authorities. Should any interpretation issues arise, these should be referred to the IASB - IFRS Interpretation Committee. The role of the ESMA should be limited to the only adoption of opinions about the implementation of accounting law as defined at present and should remain exceptional.

Supervision of statutory auditors and audit firms

The European Commission has set up the CEAOB in 2016 which acts as coordination and cooperation between national audit oversight bodies at EU level. ESMA is a member of the CEAOB alongside of national audit authorities. Thus, we believe that time should be given to this new oversight body to give full effect to its objectives before assessing its real efficiency and before suggesting potential improvements its role and its functioning.

Moreover, we believe that national audit authorities are in a better position to remain responsible for oversight at a Member State level while the European Committee should oversee cooperation between Member State Competent Authorities regarding oversight of audit firms and elaboration of audit standards.

Finally, the proposals of the EC consultation paper would increase the ESMA's powers. They would encompass all the preparation phases of financial reporting ranging from the accounting standards endorsement to the audit procedures through financial markets enforcement processes. Consequently, we question how the European public good could be properly met within the framework of such a concentration of skills.

We are convinced that the oversight of auditors and audit firms must remain different from the accounting standard-setting process, as part of an efficient governance process.

15. How can the current endorsement process be made more effective and efficient? To what extent should ESMA's role be strengthened? Please elaborate.

Accordingly to reasoning mentioned in question 14, the **current endorsement process could be made more effective and efficient** as follows:

- clarify the notion of " European public interest" in order to go beyond the only accounting aspects and in order to clearly integrate the effects on capital and prudential ratios;
- develop the means at EFRAG's disposal to better evaluate the compliance of IFRS standards with the European public good during the endorsement process. Impact assessments conducted by EFRAG or European agencies should be an integral part of the endorsement process so that the European authorities could be duly informed of the consequences of the new standards. The observers (ESAs, ECB) to the EFRAG Board could be in capacity to contribute to the quantitative and qualitative analyses through their tools (i.e. QIS);
- promote the reform of the European regulation in order to give the EU the option of modifying an IFRS standard under restrictive and precise conditions if it deems necessary when the European public interest is concerned.

Focus should be put on the **interaction between the new accounting standard and the existing regulatory framework**. It should be considered whether a change in accounting standard may have an impact on prudential ratios without any corresponding change of level of risks or losses and bank's management. The effect on prudential capital should be assessed in order to justify whether such a change in accounting standard could still provide an adequate basis for prudential framework and whether any transitional arrangement to the regulatory framework is needed. These assessments should be part of the endorsement advice provided by the EFRAG.

Accordingly, the **role of the ESMA in the enforcement** of the accounting standards could be strengthened by improving its coordination role between national securities market regulators. Notably, the ESMA should be in position to ensure convergence of IFRS standards enforcement practices for the European public interest entities between the national level and the European level.

We have a clear example of the damages that the current process of empowerment for accounting standards: IFRS 9. The point is that IFRS 9 imposes holders of open funds, UCITS or FIAs, to show any variation of valuation in the profit or loss account. It means that, contrary to a regularly reaffirmed principle with funds, there will be a breach of neutrality depending on the way investments are made. If through a fund, there is no choice in accounting method; if held directly the investor will have choice to prefer amortized cost for some bonds or P/L through OCI for some equities.

This causes a very high concern especially for all long term investors who do not want to introduce apparent volatility in their result simply because they hold their investment in a fund. Billions of redemptions are to be feared before 2018. This had been pointed out at the earliest stage of the process and taken into consideration by EFRAG in its report. But, the obligation to endorse totally, without introducing any modification has made it impossible to amend and straighten the norm.

It shows that the process is not satisfactory and we believe that the intervention of ESAs, though creating a further complexity, may help. The trouble with IFRS 9 is that the rationale for this absence of choice according to the type of investment held through the fund relies on the definition of equity and bonds which is not the subject of IFRS 9 but of IAS 32 which has not been modified.

We further think that the role of EFRAG should be reinforced with an obligation for the Commission to address all the points and reservations raised in EFRAG's report. In that process, we believe that ESAs should be asked to advise the Commission before endorsement and we would recommend ESAs to answer to public consultations run on accounting standards.

B. NEW POWERS FOR SPECIFIC PRUDENTIAL TASKS IN RELATION TO INSURERS AND BANKS

16. What would be the advantages and disadvantages of granting EIOPA powers to approve and monitor internal models of cross-border groups? Please elaborate on your views, with evidence if possible.

Like in banking sector practices, the industry is not convinced by the effectiveness of an intervention of EIOPA in the approval process of using internal models under Solvency 2. Even if EIOPA could address problems that come up in cases of disagreement between NCA, we consider that EIOPA has already overstepped its mandates (see. question 5). It seems more appropriate to reinforce the democratic framework applying to its role in regulation decision-making processes.

17. To what extent could the EBA's powers be extended to address problems that come up in cases of disagreement? Should prior consultation of the EBA be mandatory for all new types of capital instruments? Should competent authorities be required to take the EBA's concerns into account? What would be the advantages and disadvantages? Please elaborate and provide examples.

We don't think it would be appropriate for EBA to substitute NCAs in their micro-prudential missions and individual decisions. If EBA is able to take general regulatory decisions and enhances the harmonization of NCAs practices, individual decision must remain in the scope of the NCAs which have the sanctioning power.

18. Are there any further areas where you would see merits in complementing the current tasks and powers of the ESAs in the areas of banking or insurance? Please elaborate and provide examples.

We do not identify any specific fields where there would be a need for additional tasks and powers of the ESAs in the areas of banking or insurance which have not already been covered.

C. DIRECT SUPERVISORY POWERS IN CERTAIN SEGMENTS OF CAPITAL MARKETS

19. In what areas of financial services should an extension of ESMA's direct supervisory powers be considered in order to reap the full benefit of CMU? Please provide examples.

The BREXIT raises the issue of the EU's future supervision. Within this context, and based on the former proposals made by Fabrice DEMARIGNY in 2015, the CMU project may give the opportunity to analyse the potential evolution of the role of ESMA.

The FBF would support an initiative to reconsider the ESMA's role and governance. The BREXIT is likely to impact materially the ESAs, their governance, their expertise and their mission. As a first thought, it could be envisaged that the ESMA Board did not include only national competent authorities but also covered the EU's global interest while the ESMA missions could be reviewed in order to strengthen its capacity to ensure a EU convergent supervision, and even to promote the reinforcement of its role in the EU regulation, notably concerning market infrastructures (central counterparties) and benchmarks. A role of ESMA regarding convergence of supervisory practices should be put in place so as to avoid any potential free-runners and avoid any empty structure without materiality. Regarding market infrastructures and benchmarks, a European supervision should be considered positively.

Some further thoughts should be spent on the ability of ESMA to publish, when necessary, statements on regulatory tolerance that would amount to some kind of the US regulators' "no action letters" in order to allow for a temporary delay in the application of a regulation where it is acknowledged that the latter raises operational or contractual issues.

Of course, the increase in the ESMA competence should rely on the adequate "checks and balances" and the current ESMA's consultation process with stakeholders should be enhanced while (based on negative precedents such as MIFID 2 discussions) the prohibition for ESMA either to decide to adopt Level 2 measures without being explicitly entitled to do so by a Level 1 text or to proceed to any gold plating measures at level 2 or level 3 should be recalled.

In our view, ESMA's scope of action as currently defined is very wide and extensive, with a wide range of tasks and significant powers in different areas. In this respect, and in view of our previous comments on the current functioning, we consider that ESMA should primarily focus on its current mandate and ensure that existing powers of supervision are properly exercised to reap the full

benefits of a CMU. As a result, it is felt premature at this stage to envisage the extension of ESMA direct supervision powers to other areas of financial services.

As of today, NCAs are able to collect fees from the supervision missions that they fulfil and from the authorisation that they grant to the market stakeholders. As a consequence, we do not support the extension of this structure to ESAs except for critical benchmark and CPP for which ESMA (and the ECB) is or should be the direct supervisory authority. Actually, ESMA is already the competent authorities for trade repositories and rating agencies.

In the future, it could be envisaged that the ESMA's direct supervisory powers be extended to Data Reporting Services and CCPs. For Data Reporting services, this extension would be consistent with the re-definition of ESMA's role in the area of reporting. Direct supervision of consolidated tape providers (CTPs) and of approved publication arrangements (APAs) would be totally in phase with central collection and consolidation of data at ESMA level. Regarding extension of ESMA's direct supervisory powers to market infrastructures (central counterparties), this approach would require a specific review and in-depth analysis of how supervision at EU level could be exercised. In addition we are of the view that this direct supervision power must be limited to CCPs and not be extended to any other market participants.

20. For each of the areas referred in the response to the previous question, what are the possible advantages and disadvantages? Please provide examples.

We only see advantages in strengthening ESMA's capacity to ensure a EU convergent supervision, and even to promote the reinforcement of its role in the EU regulation, notably concerning CCPs and benchmarks.

Regarding no action letter, we also believe such tool would be favourable to promote supervisory convergence.

21. For each of the areas referred to in response 19, to what extent would you suggest any extension to all entities or instruments in a sector or only to certain types or categories? Please provide examples.

No answer

II. GOVERNANCE OF THE ESAS

22. To what extent do you consider that the current governance set-up in terms of composition of the Board of Supervisors and the Management Board, and the role of the Chairperson have allowed the ESAs to effectively fulfil their mandates? If you have identified shortcomings in specific areas please elaborate and specify how these could be mitigated.

We believe the ESAs have done an important work in the last years to promote regulatory and supervisory convergence. However, it seems to the FBF that in some cases, the ESAs have taken implementing measures which are not fully aligned with the level one text (For example application of the inducement rules to the provision of research – ESMA technical advice to the Commission on MIFID2) (cf. question 5).

As a consequence, we would suggest to reintroduce some political control over the regulation crafting. In order to reinforce the political role of Member States, we would suggest that the Board (replacing the Board of Supervisors) should be composed of representatives of the national Treasuries: the Board would be in charge of adopting the strategic plan of the ESAs and of determining their regulation priorities.

We would also support reinforcing the role of the Management Board which would be the assembly of National Competent Authorities; indeed the management board should be empowered to approve new regulations in accordance with the strategic steer given by the Board.

We also believe ESAs' governance and in particular their cooperation with stakeholders should also be reviewed. As an example, the appointment process and the functioning of consultative working groups should be made more transparent.

Besides, we would support the extension of the qualified majority vote, which is currently limited to some decisions (adoption of technical standards, guidelines and recommendations, budget), to all decisions of the management board. Qualified majority should be extended notably to the expression of an opinion whatever its nature (letters to external parties, opinions and questions & answers), i.e. texts which are a non-negligible part of ESMA's text production and often have a strong impact on market participants as well as on NCAs. We would support a change in the voting system to make sure that financial sector is fairly represented In accordance with the respective size of each national market; we would suggest to change the rule for qualified majority where one NCA vote should be balanced in accordance with the size of the market the NCA stands for.

Furthermore, we believe imposing strict entry into application dates to level 1 measures implies rigidity which is neither effective nor efficient as it (1) restricts the delay for the ESAs to work on the implementing measures; and (2) leaves in some case an insufficient time for stakeholders to be compliant. We would suggest to agree in the level 1 text that the entry into application will start X months after the adoption of level 2 and/or level 3 measures.

**23. To what extent do you think the current tasks and powers of the Management Board are appropriate and sufficient? What improvements could be made to ensure that the ESAs operate more effectively?
Please elaborate.**

As explained above, in response to question 22, we would support reinforcing the role of the Management Board which should be the assembly of National Competent Authorities; the management board should be empowered to approve new regulations in accordance with the strategic steer given by the Board.

We believe that the Management board could be more accountable to sort out and properly disclose misconducts or lack of controls or significant issues raised by local regulators to ensure this is properly addressed and solved. This is crucial for the credibility of the ESAs as well as to ensure adequate fair level playing field. Moreover, in order to promote common practices and improve cooperation between ESAs and financial institutions, the industry could be associated with ESAs internal committees' work. This would therefore allow institutions to collaborate to rule-

making decisions and would also foster administrative remedy over the current judicial remedy that is difficult to enforce (see question 1).

Finally, we believe the decision process should to be more proportionate to the respective size of the supervised market by extending qualified majority to all significant decisions of the Management Board and by changing the voting system to make sure that financial sector is fairly represented in accordance with the respective size of each national market.

24. To what extent would the introduction of permanent members to the ESAs' Boards further improve the work of the Boards? What would be the advantages or disadvantages of introducing such a change to the current governance set-up? Please elaborate.

We do not support the introduction of permanent members to the ESA's boards, but as explained in question 22, we support reintroducing some political control over the regulation crafting.

As mentioned in response to question 5, given the tendency of ESAs to go beyond the boundaries of their initial mandate, more control over them should be considered. Accordingly, the governance set-up in terms of composition of the Board of Supervisors and the Management Board of the ESAs can be reviewed in order to facilitate their role in ensuring supervisory convergence throughout the EU and implement more control over ESAs' work on level 2 or level 3 texts. A solution could be integrating some political powers in the Board of supervisors in logic of a compliance control of the ESAs can be a solution. In particular, a closer coordination between the European Commission and ESAs would be appreciated.

25. To what extent do you think would there be merit in strengthening the role and mandate of the Chairperson? Please explain in what areas and how the role of the Chairperson would have to evolve to enable them to work more effectively? For example, should the Chairperson be delegated powers to make certain decisions without having them subsequently approved by the Board of Supervisors in the context of work carried out in the ESAs Joint Committee? Or should the nomination procedure change? What would be the advantages or disadvantages? Please elaborate.

We believe the role and powers of the Chairperson are sufficient as they are defined today. The ESAs should remain collective bodies driven by national authorities with some political control.

Besides, in the last month, the work undertaken by the Joint Committee over the last month has shown the limit of their joint work. Actually, each ESA must take into consideration the specificities of each sector. As a consequence, accommodating the specificities of each sector in one piece of legislation seems to be a very complex task. As an example, the negotiation process of PRIIPS RTS have been subject to lengthy discussions at the technical and political levels.

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.

Increased representation of the banking and financial industry should be a priority over academics or other consultants. A broader representation of the main European markets should be ensured, taking the market shares into account.

Increased transparency is of the utmost importance for Stakeholder groups and consultative working groups. As a consequence, we support closer cooperation with market participants. For example, there should be more transparency regarding the composition of these groups, the appointment process and the detailed duties assigned to them. Stakeholder groups should be more open in order to create well considered and workable rules.

In our opinion improved transparency towards market participants and other stakeholders would enhance the effectiveness of the process of rulemaking in the ESAs. It allows market participants to better understand the discussed rules and the aim of the regulator. Broad participation in a transparent process would also improve the decision-making process as well as reduce the risk that new rules will have unintended and negative consequences for financial markets. A transparent process will also give market participants and others a better understanding of a forthcoming regulation. More transparent ESAs could also lead to more transparency regarding the work of the national supervisors, not only when they interact with the ESAs but also in other areas. Therefore, agendas and minutes of the stakeholders groups meetings should be disclosed to a wider range of persons.

Moreover, the stakeholder groups' structure is rather diverse and does not allow an efficient analysis of technical topics. We suggest a division of the stakeholder groups in two committees, one of them only composed of finance experts and professionals, allowing an improvement in the assessment process on technical topics.

We also highlight that the various consultative working groups are useful for the ESAs to be provided with industry feedbacks. We note however that certain improvements could be made in order for these consultative working groups to be able to feed the ESAs ahead of the publication of each relevant technical standard and Q&As. We believe that industry stakeholders, notably the various consultative working groups, should be formally consulted ahead of the publication of technical standards and Q&As.

III. ADAPTING THE SUPERVISORY ARCHITECTURE TO CHALLENGES IN THE MARKET PLACE

**27. To what extent has the current model of sector supervision and separate seats for each of the ESAs been efficient and effective?
Please elaborate and provide examples.**

We do not think there is a merit in maximising synergy between EBA and EIOPA because:

- we consider that banking and insurance subjects and sectors are very different and already complex on both sides;
- international standards setter are different: BCBS for banks and IAIS for insurers
- a very limited number of conglomerate operate in Europe and European Union already have a dedicated regulatory framework (FICOD).

Furthermore, we believe that sectorial supervision is necessary because of the sectorial differences that exists between actors and clients. Therefore we believe merging different supervision authorities is not an option. As an example, we would also like to mention that we remain cautious about the work of the Joint Committee because of the difficulties to take common decision for

sectors that have different functioning and diverse constraints. As an example the 2016 report of the Joint Committee on automated advice sends back to each ESAs to work further on this at a sectoral level because it was too difficult to accommodate sectorial differences.

28. Would there be merit in maximising synergies (both from an efficiency and effectiveness perspective) between the EBA and EIOPA while possibly consolidating certain consumer protection powers within ESMA in addition to the ESMA's current responsibilities? Or should EBA and EIOPA remain as standalone authorities?

First of all, we do not support the merger of EIOPA and EBA because of the sectoral differences. Such merger would create a greater risk of confusion between banking and insurance regulation and supervision.

Actually, the FBF has noted quite a number of malfunctioning of the EBA in the last years:

- (i) The EBA had extended the boundaries of its mandates and empowerments :
 - EBA Guidelines on the treatment of CVA risk under SREP: the EBA take an initiative to publish a guidelines on the treatment of CVA risk under SREP that substantially alter exemption granted by institutions on CRR, without going back to a legislative process or control.
 - EBA RTS on criteria for determining the MREL: provision contain on the draft RTS submitted by the EBA to the Commission are not compatible with provision contain on the BRRD.

EBA Guidelines on disclosure requirements: the EBA require additional disclosure that are not part of the exhaustive list of items that must be subject to a separate disclosure provides at the article 437(1) (d) of the CRR.

- (ii) The ESA and the Commission should start working as soon as possible on implementing measures in order to leave more time to stakeholders to adapt ; As an example, the EBA draft RTS on additional collateral outflows (in accordance with Article 423(3) of CRR) has been submitted to the Commission on 27 March 2014. On December 2015, the Commission informed that it will not be endorse. So the EBA issued on 3 may 2016 amendment to this RTS. One year later, we are still waiting for the adoption by the Commission.

In the context of the Single Supervisory Mechanism and of the European Central Bank, the existence of the EBA should be reconsidered. Following the financial crisis and the achievement of the banking union, a new type of “Wisemen Committee” should be envisaged for the EBA (and potentially to all the ESAs) to rethink the ESA’s’ governance and to formulate high level proposals. We also believe the Commission would be entitled to take over the EBA’s missions and powers.

IV. FUNDING OF THE ESAS

29. 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.

The FBF believes that the current funding system is a fair system which applies (indirectly) to market players and to Member States fairly. One may fear that any change to the funding may affect this fairness.

In the absence of direct supervision from ESAs, the FBF sees no reason to change the funding arrangement to a direct contribution from the industry (fully or partly). Moreover, financial institutions already contribute largely to EU institutions' and NCAs' budgets.

A direct funding of the ESAs by the industry would potentially foster an increase of the financial burden for banks instead of transferring it, as financials contributions to NCAs would not be likely to decrease. One may also fear that a direct contribution from the private sector may have negative consequences over the ESAs' independency.

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:

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.

The ESAs were formed mainly to assist the European Commission in strengthening the financial sector by developing draft technical standards and issuing guidelines and recommendations. In working on regulatory technical standards or implementing technical standards the ESAs are, in fact, performing tasks that should normally be performed by the European Commission pursuant to Articles 290 and 291 of the TFEU. This supports the argument that a significant part of the costs of the ESAs should be covered by the EU budget.

The FBF believes that the current funding system is a fair system which applies (indirectly) to market players and to Member States fairly. One may fear that any change to the funding may affect this fairness. Thus any change of the funding system may impact a small number of actors which would result in impacting a few number of member States (and consequently a few number of banks) because of the high concentration of financial activities in Europe.

31. 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.

As of today, NCAs are able to collect fees from the supervision missions that they fulfil and from the authorisation that they grant to the market stakeholders. As a consequence, we do not support the extension of this structure to the ESAs except for critical benchmarks and CPPs for which ESMA (and the ECB) should be the direct supervisory authorities. Actually, ESMA is already the competent authority for trade repositories and rating agencies.

GENERAL QUESTION

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.

Considerable efforts have been accomplished over the last years by the ESAs to develop a single rulebook for financial markets. Beyond convergence of the rules, efforts towards convergence of supervision have been at the core of the CMU agenda. A priority should be the introduction in the EU regulatory framework of a formal power to temporarily dis-apply directly applicable EU legal text, in a manner similar to the no-action letters that exist in some non-EU jurisdictions, notably the United States.

The recent operational challenges encountered in meeting the deadline of 01 March 2017 for exchanging variation margin under the European Markets Infrastructure Regulation (EMIR) provide a good example of the benefits that such an adjustment could bring. Regulators have recognised that not all firms were able to comply fully with the pending variation margin requirements. The lack of clarity regarding the mechanisms that could be used to grant forbearance in the European Union created concerns about a possible interruption of trading with a significant number of counterparties, which would have prevented them from hedging positions and would have had a wider impact on market liquidity.

The only mechanism currently available to temporarily delay the application of a requirement is the adoption of a legislative initiative by the European Commission, which is a lengthy process and could not be used to address the issue mentioned above. The introduction of a no-action mechanism would guarantee fair and orderly markets in the EU when there are temporary operational challenges to meet regulatory requirements. Beyond the broader review of the ESAs mandate, the upcoming review of the EMIR regulation could be the first vehicle to support this change, via for example the introduction of a mandate to temporarily suspend clearing obligations in exceptional circumstances (which is evoked in the Commission's proposal dated May 4).

We would also reinforce the accountability process of the ESAs regarding their regulatory power. The ESAs should consider the full picture and the whole context of their regulatory power by improving impact assessment processes. Follow up studies should also be considered when a new regulation has been put in place.