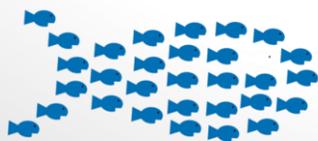




Better Finance response to the CONSULTATION ON THE OPERATIONS OF THE EUROPEAN SUPERVISORY AUTHORITIES

16.05.2017

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Better Finance, the European Federation of Investors and Financial Services Users is the dedicated representative of financial services users at European level. It counts about fifty national and international members and sub-member organizations in turn comprising about 4.5 million individual members. Better Finance acts as an independent financial expertise centre to the direct benefit of the European financial services users (shareholders, other investors, savers, pension fund participants, life insurance policy holders, borrowers, etc.) and other stakeholders of the European financial services who are independent from the financial industry.

Better Finance is the most involved European end user and civil society organisation in the EU Authorities' financial advisory groups, with experts participating in the Securities & Markets, the Banking, the Occupational Pensions and Insurance and Reinsurance Stakeholder Groups of the European Supervisory Authorities; as well as in the European Commission's Financial Services User Group. Its national members also participate in national financial regulators and supervisors bodies when allowed. For further details please see our website: www.betterfinance.eu

General Comments

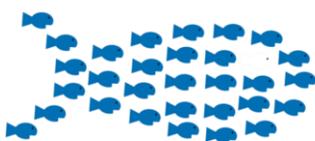
Better Finance – the European Federation of Investors and Financial Services Users - welcomes this public consultation.

Better Finance has been and is the most involved user-side NGO with the ESAs' work, with up to 20 expert members in the ESAs stakeholder groups, vice chairing three of them (EBA, ESMA and EIOPA Insurance) and having chaired the first ESMA one. It is happy to share this six-year experience with regard to the questions raised by the European Commission on the operations of the ESAs.

The ESAs have worked a lot since their inception in 2011, and have been much more effective in promoting a single rulebook and supervisory convergence than their predecessor committees. However improvements are required in several key areas.

Investor and consumer protection

The priority has been given from the start to prudential matters not to customer protection, as recognised by the European Commission in its





Consultation Document: “*While the ESAs have started to shift attention and resources to analyse risks to consumers and investors ... work in this area must be accelerated*”. Customer protection comes sixth and last of the ESAs legal objectives.

The supervision and enforcement of EU rules with regard to fair, clear and not misleading information and on the prevention of conflicts of interests in the distribution of financial products and services has been very poor. The task to collect, analyse and report on consumer trends (article 9.1(a) of the ESAs Regulations), and on market developments (article 8.1(f)), has not been entirely fulfilled, particularly regarding the performances and fees of retail financial products. Product intervention powers have not been used against toxic ones, same for the ESAs powers regarding cases of non-implementation of EU Law. The ESAs’ Stakeholder Groups have yet to really fulfil their legal duty to “*allow persons that are neither well-funded nor industry representatives to take part fully in the debate on financial regulation* ».

The public consultations of the ESAs are available only in the English language, are often very long and technical and lack a summary in plain English: they are tailor-made for industry experts not to reach the end users. This puts retail user organisations at a severe disadvantage compared to those of the financial industries. In addition, when user expert representatives make the effort to reply in detail to important investor protection consultations, the ESAs sometimes blatantly ignore their input and requests (see reply to Q6 for more detail).

Stakeholder Groups

The ESAs Stakeholder Groups should be more balanced between the industry side and the retail user side, as required by EU Law (article 37 of the ESAs Regulations). This is not only an issue of numbers even if Better Finance had to complain to the EU Ombudsman to have this rule enforced in some cases in the past. A balanced representation also implies an “adequate” compensation for the not-for-profit user side members - as mandated by the ESAs Regulations but not currently enforced – and “adequate” secretarial support for them, since they are not even remotely as well-resourced as the industry members and have to deal with very specific and technical issues, especially when they take additional responsibilities and tasks such as chairing or vice-chairing the Stakeholder Groups. Special attention should also be given by the ESAs to publish papers with executive summaries in plain English and in the major languages of the Union. Otherwise it is very difficult for retail user expert representatives to collect the feedback of their





constituencies on the ESAs consultations. This is an issue of democracy, no less.

Governance of the ESAs and effective supervision

Our organisation has repeatedly pointed out the flaws in the ESAs' governance. We believe that there are significant aspects to be improved in this area that would ultimately lead to a great improvement of the enforcement of EU Law.

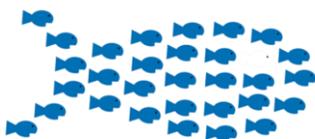
As mentioned before, the ESAs have inherent contradictions impacting their governance and impartiality. The board of supervisors of the ESAs is solely composed of national Member State supervisors (in fact much more supervisors than regulators). Thus, it is politically very difficult for the ESAs to increase the effectiveness of their supervisory activities since the institutions that they have to control are their board members. A crucial example of this is the investigation of potential breaches of EU Law or of non-implementation of EU Law (article 17 of the ESAs Regulations) by one or several of their board members. This has never happened as far as investor and consumer protection is concerned as mentioned in the previous section.

Better Finance once more asks the EU to consider changing the governance of the ESAs. Better Finance reiterates the proposal it made in 2013 for the Review of the ESFS (the ESMA Stakeholder Group did the same): to introduce independent members to the supervisory and management boards of the ESAs, like it has been done for the ECB. Likewise, the supervisory board of the ESAs should be more open to national regulators (not only supervisors) to better achieve a single rulebook at EU level.

For a “Twin Peak” approach

Better Finance has been advocating a “Twin Peak” approach to EU financial supervision, separating (as it has been done in the US and in the UK for example) prudential supervision from conduct of business and client protection supervision. For example:

- Prudential supervision merging prudential competencies from EBA and EIOPA, and also from ESMA, although this ESA has far less competencies in this area. Direct supervision competencies should remain with ESMA (such as credit rating agencies)
- Financial conduct for all financial products to fall under ESMA competencies (which would have to change its name)





This is the best way to end the conflict of objectives between the prudential ones – which have always taken precedence since the 2008 financial crisis – and the conduct of business and consumer protection ones, which come sixth and last in the current Regulations governing the ESAs. Contrary to the dominant vision, it is not only taxpayers that footed the bill for failed financial institutions, but also, and often far more so, non-insider investors and customers. And BRRD only reinforces this damaging trend.

Ending the “Silo approach”

Continuing with a supervision fragmented by type of financial provider is not appropriate in our view. This “Silo approach” – typical of the EU institutions - creates an inconsistent level of consumer protection at the point of sale, depending on the financial product and depending on the types of financial provider and distributor. This separation ignores the reality of retail financial markets in Europe where most investment products are “substitutable” at the point of sale, and the same retail distributor may propose alternatively securities, funds, life insurance, banking products or pension ones, sometimes insurance-based, sometimes not. The saver can also often compare these options with those offered by his employer, like corporate DC pension products. Already several national supervisors have faced this reality (UK, Netherlands, Belgium, etc.) and supervise all financial products offered at the retail level.

In other words, we see no compelling rationale for not having a single public supervisor for all financial products sold to EU citizens.

Product intervention

The ESAs have never used their product intervention powers to protect consumers. This is certainly in part due to the same governance issue that refrained them from using their powers with regard to breaches of EU Law (see above), but also due the current limitations of the ESAs rules. The ESAs should be able to ban or even temporarily prohibit the distribution of toxic or dangerous financial products (Article 9.5 of the Regulation)¹. Better

¹ “Article 40 - MiFIR - ESMA’s temporary intervention powers:

1. In accordance with Article 9(5) of Regulation (EU) No 1095/2010, ESMA may, where the conditions in paragraphs 2 and 3 are fulfilled, temporarily prohibit or restrict in the Union:

(a) the marketing, distribution or sale of certain financial instruments or financial instruments with certain specified features; or





Finance proposed a definition of toxic savings products to the EU Authorities: products that are very likely going to destroy the real value of the savings of the client. Minimising product toxicity is a key objective for drug, food and health supervisors but not yet for financial ones. Product toxicity is even absent from the new MIFID and IDD rules for product governance. Moreover, article 9 refers only to financial risks and stability issues² as a basis for any product intervention, not to consumer protection motives. In this respect, we believe that article 9.5 should be amended to provide the ESAs with real power to ban or put on hold the selling of financial products that are toxic or not suited for retail clients in particular.

Better empowerment of ESAs to track and sanction large market abuses

The ESAs should develop tracking tools and be allowed to impose financial sanctions proportional to the magnitude of the abuses. The Market Abuse Regulation and Directive should be reviewed soon, in particular in order to assess their effectiveness in terms of administrative sanctions by Member States and by EU Authorities. A more successful fight against market abuse is critical to restore investor confidence and for the integrity and usefulness of capital markets.

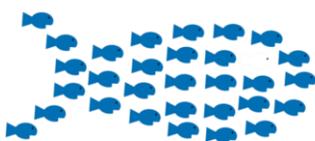
ESAs scope

Better Finance sees value in entrusting the ESAs with competencies vis-a-vis financial data providers, and not only with regard to those providing capital market trade data, but also those providing data on savings products such as investment funds. Currently the ESAs do not have the proper tools to easily and efficiently collect the data necessary to fulfil their role. The ESAs should be empowered with ensuring that the provision of such data is competitive, independent and easily accessible to individual savers and investors.

Extending the ESAs competencies to “post-trade” issues such as securities ownership identification, securities lending and cross-border voting of shares inside the EU, would also be sensible, given the very important impact of these activities on investor protection, on shareholders’ rights, on

(b) a type of financial activity or practice”.

² “The Authority may temporarily prohibit or restrict certain financial activities that threaten the orderly functioning and integrity of financial markets or stability of the whole or part of the financial system”





corporate governance and more generally on sustainable and responsible investments and finance.

And ESMA should get direct supervisory power on the forex market in the EU. The 5 trillion US \$ forex market is by far the largest in the world and totally unregulated and unsupervised. Also, EBA should get direct supervisory power on the interbank money markets (especially the Euribor-related ones), and on alternative currencies (bitcoin and the like), to ensure a level playing field with mainstream currencies and consistent user protection.

I. TASKS AND POWERS OF THE ESAs

A. Optimising existing tasks and powers

I. A. 1. Supervisory convergence

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 weaknesses be addressed?

The ESAs have been much more effective in promoting supervisory convergence than their predecessor committees, and have made it one of the priorities of their work programmes.

However, the ESAs have not been able to use their most effective powers to achieve this convergence which is still very far from being completed, not mentioning the upcoming flurry of new rules to be implemented in 2018 and beyond: MiFID II, IDD, PRIIPs, Prospectus, IORP II, SRD, etc.

In fact the ESAs have never used their powers regarding the breaches or non-implementation cases of EU Law (article 17 of the ESAs Regulations) except in one very specific case (EBA / Bulgaria). Also, they have not used their product intervention powers as defined by article 9.5.

And Better Finance finds that their supervisory convergence efforts have been further hindered in the area of user protection for the following reasons:

- the priority has been given from the start to prudential matters, as recognized by the European Commission in its current Consultation Document: *“While the ESAs have started to shift attention and resources to analyse risks to consumers and investors ... work in this area must be accelerated”*





- Up to 2017, Product intervention powers have not been authorised when products are toxic or creating risks for users, but only for “*financial activities that threaten the orderly functioning and integrity of financial markets or stability of the whole or part of the financial system*”: again the prudential objective supersedes and eliminates the customer protection one in the area of product intervention.
- The ESAs have always excluded performance and price of retail financial services when executing their task to collect, analyse and report on consumer trends (article 9.1(a)) and on market developments (article 8.1(f)): one cannot effectively supervise what one does not even measure.
- Stakeholder Groups: ESAs have not always fully complied with the rules of article 37 of the ESAs Regulations requiring balanced representation between the industry and retail users, adequate compensation for the representatives of retail users and adequate secretarial support.

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);

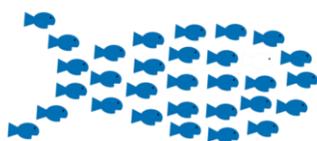
To what extent:

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?

Not much. Again article 17 and article 9.5 powers would have been much more effective if used.

b) 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?

This is quite obvious and is the number one explanatory factor for the supervisory convergence issue: the Boards of Supervisors are exclusively composed of the very institutions that the ESAs are supposed to supervise.





Therefore, Better Finance reiterates the proposal it made in 2013 for the Review of the ESFS (the ESMA Stakeholder Group did the same): to introduce independent members in the supervisory board of the ESAs, like it has been done for the ECB. Likewise, the supervisory board of the ESAs should be more open to national regulators (not only supervisors) to better achieve a single rulebook at EU level.

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.

As mentioned before, there are other tools readily available but not actually used by the ESAs such as relating to breaches and non-implementation of EU Law, and to product intervention.

For example, NCAs, EU level I Authorities (Parliament, Council, Commission), stakeholder Groups – in addition to the ESAs themselves – have the power to request the ESAs to investigate breaches or non-implementations of EU law. Better Finance is not aware of any of the first four having ever made such a request. And we are aware of only one own initiative ever taken by the ESAs (EBA / Bulgaria). The ESMA Stakeholder Group (SMSG) made such a request but no investigation ever followed.

The SMSG November 2011 advice paper on ETFs asked in its first paragraph ESMA to “investigate how to make indexed ETFs more offered to retail investors”. In 2012, the SMSG tried unsuccessfully to have ESMA launch an article 17 investigation on this issue, ESMA responding that it was not a clear cut enough case of non-implementation of EU Law³.

Question 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?

³ The summaries of the joint SMSG / Board of Supervisors meetings are missing for September 2012 and January 2013 on ESMA’s website, but this attempt is also referred to in other ESMA / SMSG documents:

<https://www.esma.europa.eu/sites/default/files/library/2015/11/2012-smsg-72.pdf>

https://www.esma.europa.eu/sites/default/files/library/2015/11/2013-smsg-02-summary_of_conclusions_smsg_meeting_30-31_january.pdf





1. A. 2. Non-binding measures: guidelines and recommendations

Question 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?

Better Finance welcomes guidelines and recommendations from the ESAs pertaining to customer protection, including own initiatives ones.

But our experience is not always positive on the management and enforcement of such guidelines as the example of the ESMA guidelines on ETFs and other UCITS issues shows.

These guidelines (ESMA/2012/832) were published on 18 December 2012 by ESMA. But the Guidelines compliance table has been published only on 12 April 2016: more than three years later instead of the legally required two months maximum. In addition, Better Finance has found evidence that these guidelines are not properly enforced, at least with regard to the requirement that 100 % of the profit of securities lending transactions must be credited to the investment funds.

These weaknesses can only be addressed in our view by introducing independent members in the supervisory and management boards, representing EU level interest and EU citizens' interest, in addition to the NCAs ones. Also, the compliance units of the ESAs should report regularly to the supervisory boards on any such compliance issues with ESAs rules and procedures.

1. A. 3. Consumer and investor protection

Question 6: What is your assessment of the current tasks and powers relating to consumer and investor protection provided for in the ESA Regulations and the role played by the ESAs and their Joint Committee in the area of consumer and investor protection? If you have identified shortcomings, please specify with concrete examples how they could be addressed.

Again, the ESAs have been largely focusing on – and prioritizing - prudential and systemic risk issues, at the expense of customer protection ones.

- The priority has been given from the start to prudential matters, as recognised by the European Commission in its current Consultation Document: *“While the ESAs have started to shift attention and resources to analyse risks to consumers and investors ... work in this area must be accelerated”*. The contrary is unfortunately currently happening as:





- The supervision and enforcement of EU rules with regard to fair, clear and not misleading information and on the prevention of conflicts of interests in the distribution of financial products and services is very poor, as illustrated by many cases⁴.
- Collect, analyse and report on consumer trends (article 9.1(a) of the ESAs Regulations): EBA has recently considered discontinuing altogether its legal task of reporting on consumer trends. For 2017 it finally decided to produce only a very light version of its annual “consumer trends” report, eliminating all the statistical part, and merely only collecting issues from user organisations. ESMA has never published any “consumer trends” report, only a bi-annual “trends, risks and vulnerabilities” report where consumer and investor protection issues make only 2.5 pages out of a total of 19 pages on “trends” (last edition)⁵, and where the few statistics on “retail investor portfolio returns” are incorrect as they are in fact capital markets returns, not retail investment products’ returns.⁶
- The ESAs have always excluded performance and price of retail financial services when executing their task to collect, analyse and report on consumer trends (article 9.1(a)) and on market developments (article 8.1(f)): one cannot effectively supervise that one does not even measure.
- Up to 2017, Product intervention powers have not been authorised when products are toxic or creating risks for users, but only for “*financial activities that threaten the orderly functioning and integrity of financial markets or stability of the whole or part of the financial system*”: again the prudential objective supersedes and eliminates the customer protection one in the area of product intervention.
- Stakeholder Groups: ESAS have not always fully complied with the rules of article 37 of the ESAs Regulations requiring balanced representation between the industry and retail users, adequate compensation for the representatives of retail users and adequate secretarial support. Contrary to EU Law, this has not allowed “*persons that are neither well-funded nor industry representatives to take part*

⁴ We refer for example to Better finance Briefing paper on « [A major enforcement issue : the mis-selling of financial products](#) » (May 2017).

⁵ [ESMA Report on trends, risks and vulnerabilities No 1, 2017](#)

⁶ This issue is explained in detail in [the Better Finance 2016 research report on the real return of long term and pension savings in Europe](#), pages





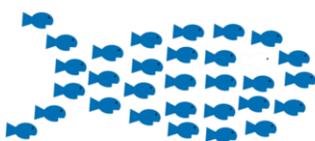
fully in the debate on financial regulation.” See our reply to Q.26 for a precise analysis.

- Also, their management of public consultations is not functioning appropriately and is not acceptable in a democratic Union. The public consultations of the ESAs are available only in the English language, are often very long and technical and lack a summary in plain English: they are tailor-made for industry experts not to reach the end users. This puts retail user organisations at a severe disadvantage compared to those of the financial industries. Better Finance also found several very important instances where the feedback assessment provided by the ESAs was inappropriate and quite unfair, creating a democratic issue.
- Our assessment of the role of the ESAs and of its Joint Committee in dealing with the feedback from all user stakeholders is indeed very poor: the Joint Committee totally ignored the massive protests it received as a response to its public consultation from:
 - the European Commission’s Financial Services User Group (FSUG, representing all user side experts at EC level);
 - the entire Securities and Markets Stakeholder Group (SMSG) of ESMA;
 - Better Finance, etc.

who all responded to the ESAs’ Joint Committee public consultation on *“Risk, Performance Scenarios and Cost Disclosures in Key Information Documents for Packaged Retail and Insurance-based Investment Products (PRIIPs)”* (on discussion paper JC/DP/2015/01), which closed on 17 August 2015. Better Finance could only find a “provisional feedback assessment”⁷. To this date (May 2017) we have not been able to find the final one.

In addition, and even much more worrying, this feedback assessment blatantly ignored the major and prominent warnings and comments brought up by all these important stakeholders regarding the disastrous “future performance scenarios” and the elimination of all past performance and benchmark disclosures in the Key Information Document. The FSUG and the SMSG even complemented their replies to the public consultation with

⁷ http://esas-joint-committee.europa.eu/Publications/Consultations/20151111_JC_2015_073_Joint_CP_PRIIPs_KID.pdf, pages 83 to 91.





official letters to highlight these issues further. But the “provisional” feedback assessment does not mention this issue at all.

This unacceptable behaviour of the ESAs in managing the public consultation process must be terminated asap. Better Finance asks the European Commission and the European Parliament to investigate into this issue to ensure that the ESAs public consultations inputs are considered much more seriously, professionally and ethically by the ESAs.

Question 7: What are the possible fields of activity, not yet dealt with by ESAs, in which the ESA’s involvement could be beneficial for consumer protection?

As mentioned in reply to question 1, The ESAs have always excluded performance and price of retail financial services when executing their task to collect, analyse and report on consumer trends (article 9.1(a)) and on market developments (article 8.1(f)): one cannot effectively supervise that one does not even measure.

In addition, as part of its September 2015 CMU Action Plan, the European Commission has expressly requested the ESAs to “*work on the transparency of long term retail and pension products and an analysis of the actual net performance and fees, as set out in Article 9 of the ESA Regulations*”. But as of today, there have been not improvements at all.

Also, the supervision and enforcement of EU rules regarding:

- fair, clear and not misleading information
- the prevention of conflicts of interests in the distribution of financial products and services are very poorly enforced in the EU and this should become a priority of the ESAs in order to restore the confidence of investors and financial services users.

Lastly, ESMA should get direct supervision powers on the biggest - and yet unregulated – capital market of all: the foreign currency one, where retail users get abused by very uncompetitive and opaque business practices.

I. A. 4. Enforcement powers – breach of EU law investigations

Question 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?

NCA, EU level I Authorities (Parliament, Council, Commission), stakeholder Groups – in addition to the ESAs themselves – have the power to request the ESAs to investigate breaches or non-implementations of EU law. Better Finance is not aware of any of the first four having ever made such a





request. And we are aware of only one own initiative ever taken by the ESAs (EBA / Bulgaria).

As a specific example, the ESMA Stakeholder Group (SMSG) made such a request but no investigation ever followed. The SMSG November 2011 advice paper on ETFs asked in its first paragraph ESMA to “investigate how to make indexed ETFs more offered to retail investors”. In 2012, the SMSG tried unsuccessfully to have ESMA launch an article 17 investigation on this issue, ESMA responding that it was not a clear cut enough case of non-implementation of EU Law⁸.

This severe weakness can only be addressed in our view by introducing independent members in the supervisory boards, representing EU level interest and EU citizens’ interest, in addition to the NCAs ones.

1. A. 5. International aspects of the ESAs’ work

Question 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?

Monitoring supervisory co-operation involving EU NCAs and third country counterparts should be part of the ESAs powers and tasks as this can impact the single rulebook and supervisory convergence within the EU.

1. A. 6. Access to data

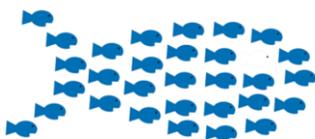
Question 10: To what extent do you think the ESAs powers to access information have enabled them to effectively and efficiently deliver on their mandates?

Better Finance sees value in entrusting the ESAs with competencies with regard to financial data providers, and not only with regard to those

⁸ The summaries of the joint SMSG / Board of Supervisors meetings are missing for September 2012 and January 2013 on ESMA’s website, but this attempt is also referred to in other ESMA / SMSG documents:

<https://www.esma.europa.eu/sites/default/files/library/2015/11/2012-smsg-72.pdf>

https://www.esma.europa.eu/sites/default/files/library/2015/11/2013-smsg-02-summary_of_conclusions_smsg_meeting_30-31_january.pdf





providing capital market trade data, but also those providing data on savings products such as investment funds. Currently the ESAs do not have the proper tools to easily and efficiently collect the data necessary to fulfil their role. The ESAs should be empowered with ensuring that the provision of such data is competitive, independent and easily accessible to individual savers and investors.

Better finance believes the ESAs are indeed heavily lagging behind in terms of access to information, in particular for market trade data, and for investment products performance metrics.

Ten years after the capital markets' fragmentation induced by MiFID I, there is still no "consolidated tape" of all listed securities trades, starting with equities. Such a publicly monitored consolidated tape has been in place for many years in the US. In addition, retail investors have no access to such consolidated trade data: only the regulated markets do generally provide easy internet and free access to post- and pre-trade data on listed equities to retail investors (with a time lag). But regulated markets now represent less than half of listed equity trade in Europe.

Regarding investment funds and other investment and savings products, the ESAs find themselves also quite impotent. For example, when Better finance asked ESMA to investigate about falsely active equity funds in the EU ("closet indexing"), ESMA investigated the matter but could only look at UCITS funds, not the more numerous and more sold to retail investors AIFs. In addition, they had to rely entirely on a private commercial database, and could analyse only less than half of the UCITS equity funds selected for lack of the necessary data on the majority of the funds.

This lack of adequate access to information will increase with the elimination of the mandatory and standardised disclosure of the 10 year past performance of all UCITS funds and of their benchmarks (currently required by EU Regulation No 583/2010) when the PRIIPs Commission Delegated Regulation of 8/3/2017 comes into force.

ESMA should have a much more comprehensive and easier access to these data and also make them easily available to the public. Indeed, ESMA's main recommendation to retail investors following its "closet indexing" investigation was to assess « *whether a fund has been able to achieve the objectives referred to in the fund documentation* ». As this will become impossible for retail fund investors to find in the Key Information Document (KID), ESMA, in coordination with the NCAs, should ensure the easy access by retail fund investors to these most necessary data.





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

See reply to question 10 above.

Extending the ESAs competencies to “post-trade” issues such as securities ownership identification, securities lending and cross-border voting of shares inside the EU, would also be sensible, given the very important impact of these activities on investor protection, on shareholders’ rights, on corporate governance and more generally on sustainable and responsible investments and finance.

I. A. 7. 7 Powers in relation to reporting: Streamlining requirements and improving the framework for reporting requirements

Question 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?

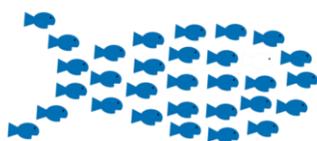
Question 13: In which particular areas of reporting, benchmarking and disclosure, would there be useful scope for limiting implementing acts to main lines and to cover smaller details by guidelines and recommendations?

I. A. 8. Financial reporting

Question 14: What improvements to the current organisation and operation of the various bodies do you see would contribute to enhance enforcement and supervisory convergence in the financial reporting area? How can synergies between the enforcement of accounting and audit standards be strengthened?

The harmonisation of financial reporting within the EU is very important for EU citizens, in particular as individual investors.

ESMA should take a role in the enforcement of IFRS within the EU. But any increase in ESMA’s role would need to be appropriately resourced. We acknowledge the substantial progress that has already been made over the past years, e.g. by issuing Guidelines on Alternative Performance Measures, Guidelines on Enforcement of Financial Information, by issuing its individual IFRS review reports or by performing a peer review of national enforcement agencies including onsite inspections. These ongoing convergence activities should continue to take into account the diversity of different national





enforcement models and processes, which may serve as best practice solutions to be shared among national enforcers.

Better Finance asks that the recommendations of the Maystadt report endorsed by the European Commission be enforced as far as the governance of EFRAG (European Financial Reporting Advisory Group). EFRAG remains one of the very few EU funded financial advisory groups not to include any representatives of the end users (individual investors in this case) in its supervisory body.

The EU should also further study the effectiveness of having the ESAs, the ECB and EFRAG involved at the same time on the design, the proposition and the enforcement of financial reporting standards.

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

B. New powers for specific prudential tasks in relation to insurers and banks

I. B. 1. Approval of internal models under Solvency II

Question 16: What would be the advantages and disadvantages of granting EIOPA powers to approve and monitor internal models of cross-border groups?

Systematically Important Financial Institutions ("SIFIs") are not only banks but also large international insurers. Although those have shown to be more resilient through the last financial crisis, they could be more sensitive to the historic drop and ultra-low level of interest rates. In addition, life policyholders are entitled to get reliable and understandable information about the solidity and creditworthiness of their insurers. "Internal models" for solvency purposes should not remain a black box for the clients. Therefore, Better Finance believes EIOPA should have the power to ensure the validity and consistency of these insurers' internal models.

I. B. 2. Mitigating disagreements regarding own funds requirements for banks

Question 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?





I. B. 3. General question on prudential tasks and powers in relation to insurers and banks

Question 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?

Our comments on the lack of collection, of analysis and of reporting by the ESAs on performances and fees of retail financial products do apply to EIOPA and EBA, which are supervising the major part of them, in particular, about 77 % of all retail financial savings products (bank savings accounts, life insurance, pensions).

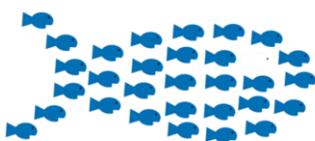
C. Direct supervisory powers in certain segments of capital markets

Question 19: In what areas of financial services should an extension of ESMA's direct supervisory powers be considered in order to reap the full benefits of a CMU?

Better Finance sees value in entrusting the ESAs with competencies vis-a-vis financial data providers, and not only with regard to those providing capital market trade data, but also those providing data on savings products such as investment funds, life insurance, pensions, bank savings products. Currently the ESAs do not have the proper tools to easily and efficiently collect the data necessary to fulfil their role. The ESAs should be empowered with ensuring that the provision of such data is competitive, independent and easily accessible to individual savers and investors.

Extending the ESAs competencies to financial reporting standards and to "post-trade" issues such as securities ownership identification, securities lending and cross-border voting of shares inside the EU, would also be sensible, given the very important – but currently largely overlooked – impact of these activities on investor protection, on shareholders' rights, on corporate governance and more generally on sustainable and responsible investments and finance.

ESMA should therefore have direct supervisory powers over capital market trade data providers (currently a private duopoly), and also on CCPs with the view to streamline and modernise the post trade processes (in particular the voting chain one) in order to meet the requirements of the single market, to lower the costs like in the US markets and the requirements of the upcoming Shareholders rights Directive II, which requires intermediaries to ensure all





beneficial owners of securities are able to vote and in time at general meetings.

We also again advise the Commission to study the effectiveness and efficiency of the current institutional framework around the production and the monitoring of financial reporting standards.

And, as previously mentioned (Q.7), ESMA should get direct supervisory power on the forex market in the EU. The 5 trillion US \$ forex market is by far the largest in the world and totally unregulated and unsupervised. Also, EBA should get direct supervisory power on the interbank money markets (especially the Euribor-related ones), and on alternative currencies (bitcoin and the like), to ensure a level playing field with mainstream currencies and consistent user protection.

Forex and Libor/Euribor markets suffered very large abuses at the wholesale level in the recent years. Only one EU NCA to our knowledge has sanctioned those. But The EU Public Authorities have yet to measure the impact on the end users. And “Alt coins “abuses are next to happen: EU supervisors should not wait.

Question 20: For each of the areas referred to in response to the previous question, what are the possible advantages and disadvantages?

We see only advantages.

Question 21: For each of the areas referred to in response to question 19, to what extent would you suggest an extension to all entities or instruments in a sector or only to certain types or categories?

For market data providers they are very few (two for capital market trade data, one or two for Pan-European fund data bases).

CCPs are too many in Europe reducing the efficiency and effectiveness of post trade processes: they should all be supervised by ESMA.

II. GOVERNANCE OF THE ESAs

A. Assessing the effectiveness of the ESAs governance

Question 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?





Our organisation has repeatedly pointed out the major flaw in the ESAs' governance. Addressing it would ultimately lead to a great improvement of the enforcement of EU Law.

As mentioned before, the ESAs have inherent contradictions impacting their governance and impartiality, and therefore their effectiveness. The board of supervisors of the ESAs is solely composed of national Member State supervisors (in fact much more supervisors than regulators). Thus, it is politically very difficult for the ESAs to increase the effectiveness of their supervisory activities since the institutions that they have to supervise are their supervisors themselves. A crucial example of this is the investigation of potential breaches of EU Law or of non-implementation of EU Law (article 17 of the ESAs Regulations) by one or several of their board members. This has never happened as far as investor and consumer protection is concerned as mentioned in the previous section.

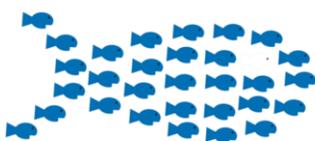
Better Finance once more asks the EU to consider changing the governance of the ESAs. Better Finance reiterates the proposal it made in 2013 for the Review of the ESFS (the ESMA Stakeholder Group did the same): to introduce independent members in the supervisory board and in the management of the ESAs, like it has been done for the ECB: independent members representing EU level interest and end user interest. Likewise, the supervisory board of the ESAs should be more open to national regulators (not only supervisors) to better achieve a single rulebook at EU level.

Furthermore, staggered terms for Board members should be created to ensure for board continuity.

Question 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?

Question 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?

Question 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?

Yes, the Chairperson should 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. The voting asymmetry of the Chairman who currently cannot exercise a vote on the Board of Supervisors but only on the Management Board should be corrected. Also the chairperson's vote should be decisive in case of even votes.

B. Stakeholder groups

Question 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?

Again, Better Finance points out that has been and is the most involved user-side NGO with the ESAs' work, with up to 20 expert members in the ESAs stakeholder groups, vice chairing three of them (EBA, ESMA and EIOPA Insurance) and having chaired the first ESMA one.

The current rules and functioning of the Stakeholder Groups are detrimental to the protection of end users and EU citizens:

The composition of the ESAs Stakeholder Groups should be more balanced between the industry side and the retail user side, as required by EU Law (article 37 of the ESAs Regulations). This is not only an issue of numbers even if Better Finance had to complain to the EU Ombudsman to have this rule enforced in some cases in the past. Currently, there is still a membership balance issue at least in the EIOPA Occupational Pensions Stakeholder Group where retail user representatives are only three out of a total membership of thirty, with the pension industry and its providers having 16 members.

Retail user members in this Group are improperly labelled as "beneficiaries"; contrary to the recital 47 of the EIOPA Regulation that – as for all other stakeholder groups - refers to consumers and other retail users. Pension savers are always contributors to pension schemes, but not always actual





“beneficiaries” of pension products. The US term “participants” seems much more neutral.

But a balanced representation also implies an “adequate” compensation for the not-for-profit user side members - as mandated by the ESAs Regulations article 37 – and “adequate” secretarial support for them, since they are not even remotely as well-resourced as the industry members and have to deal with very specific and technical issues, especially when they take additional responsibilities and tasks such as chairing or vice-chairing the Stakeholder Groups.

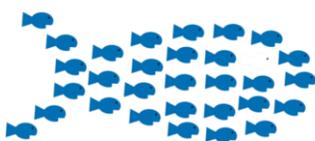
“Members of the stakeholder groups representing non-profit organisations or academics should receive adequate compensation in order to allow persons that are neither well-funded nor industry representatives to take part fully in the debate on financial regulation.” (recital 47 of the EBA and ESMA regulations).

Currently not for profit user side expert members are compensated the equivalent of € 18,75 gross per hour, with the number of hours capped. User-side not for profit vice chairs and chairs do not get any more compensated for their important extra work and responsibilities. This is not adequate by any standard and much lower than the rates paid to commercial consultants by the EU institutions. By contrast, members of the UK FCA consumer panel are paid at a minimum £ 40 per hour (£ 12,000 per year) and more hours for the chair.

Special attention should also be given by the ESAs to publish papers with executive summaries in plain English and in the major languages of the Union. Otherwise it is very difficult for retail user expert members to collect the feedback of their constituencies on the ESAs consultations. This is an issue of democracy, no less.

Even properly balanced stakeholder groups will likely not be able to use their full legal powers due to conflicting interests between members. In particular, it is very unlikely they will ever be able to use their power of requesting the ESAs to investigate breaches of EU Law or cases of non-implementation of UE Law (article 17 of the ESAs Regulations, see reply to question). Therefore, Better Finance proposes that this power could also be given to a sub-group of the ‘consumers and other retail users’ of the Stakeholder Groups to effectively allowing those to ask the ESAs to investigate cases which are damaging to retail users.

Joint work between the four Stakeholder Groups could be improved. It would be beneficial if the Stakeholder Groups cooperated and provided





advice on specific themes of common interest. This has already partly happened (e.g. Joint Advice by the BSG and SMSG on EBA and ESMA Guidelines on the Assessment of the Suitability of Members of the Management Body and Key Function Holders). However, it would be helpful to strengthen the respective mandate of the Stakeholder Groups in the ESA Regulations, provide a framework for cooperation (i.e. establishment of a Joint Committee of the Stakeholder Groups) and ensure funding of these respective activities.

Likewise, as pointed out by recital 47 of the ESAs Regulations, *“those stakeholder groups should work as an interface with other user groups in the financial services area established by the Commission or by Union legislation.”* From our experience this has rarely if ever happened, especially with the EC Financial Services User Group (FSUG). Also, we have very rarely seen any EC observer experts at the Stakeholder Groups’ meetings (except at EIOPA, where they would usually conference in) and at the joint meetings with the ESAs supervisory boards.

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

Question 27: To what extent has the current model of sector supervision and separate seats for each of the ESAs been efficient and effective?

Continuing with a supervision that is fragmented by type of financial provider is not appropriate in our view. This “silo approach” – typical of the EU institutions - creates an inconsistent level of consumer protection at the point of sale, depending on the financial product and depending on the types of financial provider and distributor. This separation ignores the reality of retail financial markets in Europe where most investment products are “substitutable” at the point of sale, and the same retail distributor may propose alternatively securities, funds, life insurance, banking products or pension ones, sometimes insurance-based, sometimes not. The saver can also often compare these options with those offered by his employer, like corporate DC pension products.

For example, unit-linked insurance contracts are supervised by EIOPA as far as the rapper contract is concerned. However the contents – which are typically “units” representing investment funds – are supervised by ESMA. This is not effective. Already several national supervisors have faced this





reality (UK, Netherlands, Belgium, etc.) and supervise all financial products offered at the retail level.

In other words, we see no compelling rationale for not having a single public conduct of business supervisor for all financial products sold to EU citizens.

As regards separate seats, this seems to Better finance to be more a political issue between Member States. Efficiency and effectiveness of taxpayers' money would advocate for a single and same seat.

Question 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?

Yes, Better Finance sees a lot of merit to this suggestion by the European Commission, which is in line with the recommendations of the De Larosière report of the High level group on financial supervision in the EU that initiated the creation of the ESAs.

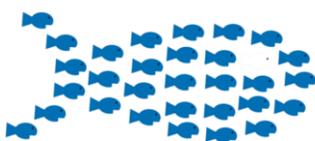
Among others⁹, Better Finance has been advocating for a “Twin Peak” approach to EU financial supervision, separating (as it has been done in the US and in the UK for example) prudential supervision from conduct of business and client protection supervision. For example:

- One prudential supervision authority merging prudential competencies from EBA and EIOPA, and also from ESMA, although this ESA has far less competencies in this area. Direct supervision competencies should remain with ESMA (such as credit rating agencies)
- Financial conduct for all financial products to fall under ESMA competencies (which would have to change its name)

This is the best way to end the conflict of objectives between the prudential ones – which have always taken precedence since the 2008 financial crisis – and the conduct of business and consumer protection ones, which come sixth and last in the current Regulations governing the ESAs. The Better Finance briefing paper on the mis-selling of financial products (May 2017)

⁹ See for example Bruegel :

<http://bruegel.org/2017/04/eba-relocation-should-support-a-long-term-twin-peaks-vision/>





illustrates such conflicts where the public supervisor decides to save a failed financial institution at the expense of its customers. Contrary to the dominant vision, it is not only taxpayers that footed the bill for failed financial institutions, but also, and often far more so, non-insider investors and customers. And BRRD (improperly labelled as the “bail-in” Directive, although the top insiders – i.e. the top management - are left totally unscathed) only reinforces this damaging trend.

Of course, specificities of each market will have to be carefully taken into account. In particular, there are many insurance products, which are not investment products (all non-life insurances). These branches have their very specific and particular conduct and mis-selling practices which experts knowing this business from an insider perspective can only understand. So there must be enough manpower for the new European "FCA" in order to be able to implement an effective supervision.

And, to function optimally though, this supervisory architecture would require to make the EU rules governing retail user protection consistent with one another which is not the case today (MiFID II, IDD, banking rules and IORP II are not aligned at all and MFID II being usually the most protective for retail users).

IV. FUNDING OF THE ESAs

Question 29: The current ESAs funding arrangement is based on public contributions. Please elaborate on each of the following possible answers (a) and (b) and indicate the advantages and disadvantages of each option.

a) should they be changed to a system fully funded by the industry?

No

What are the advantages and disadvantages of option a)?

b) should they be changed to a system partly funded by industry?

Yes

Contributions from providers are legitimate (they already exist for several NCAs) and should be collected directly by the ESAs from the providers not to give additional leverage to NCAs over the ESAs (which could happen if the NCAs are in charge of collecting such contributions)

What are the advantages and disadvantages of option b)?





Question 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")
- 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")

Yes, the contribution should be based on an "entity-based key, as we are in a single market or would-be single market. There is no rationale to adopt a "Member State key" for a direct contribution from financial institutions to the European supervisors.

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.

Question 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?

General question

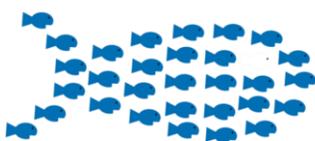
Question 32: You are invited to make additional comments on the ESAs Regulation if you consider that some areas have not been covered above.

Product intervention

We are surprised that this very important tool and power of financial supervision was not raised in this consultation.

The ESAs have never used their product intervention powers to protect consumers. This is certainly in part due to the same governance issue that refrained them from using their powers with regard to breaches of EU Law (see above), but also due the current limitations of the ESAs rules. The ESAs should be able to ban or even temporarily prohibit the distribution of toxic or dangerous financial products (Article 9.5 of the Regulation)¹⁰. Better

¹⁰ "Article 40 - MiFIR - ESMA's temporary intervention powers:





Finance proposed a definition of toxic savings products to the EU Authorities: products that are very likely going to destroy the real value of the savings of the client. Minimising product toxicity is a key objective for drug, food and health supervisors but not yet for financial ones. Toxicity is even absent from the new MIFID and IDD rules for product governance. Moreover, article 9 refers only to financial risks and stability issues¹¹ as a basis for any product intervention, not to consumer protection motives. In this respect, we believe that article 9.5 should be amended to provide the ESAs with real power to ban or put on hold the selling of financial products that are toxic or not suited for retail clients in particular.

A good step¹² will be taken from 3 January 2018, when ESMA, NCAs - and EBA for structured banking products - will have the power to temporarily prohibit or restrict investment firm's marketing, distribution or sale of:

- units or shares in UCITS and Alternative Investment Funds (AIFs); and
- financial instruments with certain specified features.

ESMA and NCAs will also have the powers to prohibit MIFID financial activities or practices which pose risks to investors, market integrity, and financial stability in the EU.

Better finance asks the EU Authorities to harmonise these rules and therefore give the same powers as ESMA to EBA and to EIOPA for all the retail financial products they supervise.

Better empowerment of the ESAs to track and sanction large market abuses

The ESAs should develop tracking tools and be allowed to impose financial sanctions proportional to the magnitude of the abuses. The Market Abuse

1. In accordance with Article 9(5) of Regulation (EU) No 1095/2010, ESMA may, where the conditions in paragraphs 2 and 3 are fulfilled, temporarily prohibit or restrict in the Union:

(a) the marketing, distribution or sale of certain financial instruments or financial instruments with certain specified features; or

(b) a type of financial activity or practice".

¹¹ "The Authority may temporarily prohibit or restrict certain financial activities that threaten the orderly functioning and integrity of financial markets or stability of the whole or part of the financial system"

¹² <https://www.esma.europa.eu/press-news/esma-news/esma-calls-consistent-application-mifir-product-intervention-powers>





Regulation and Directive should be reviewed soon, in particular in order to assess their effectiveness in terms of administrative sanctions by Member States and by EU Authorities. A more successful fight against market abuse is critical to restore investor confidence and for the integrity and usefulness of capital markets.

