

May 16, 2017

NSA response to the EU Commission consultation on the operations of the European Supervisory Authorities

The Nordic Securities Association (NSA) is a Nordic cooperation that works to promote a sound securities market primarily in the Nordic region. The NSA is formed by the Danish Securities Dealers Association (Børsmæglerforeningen), the Federation of Finnish Financial Services (Finanssialan Keskusliitto), the Norwegian Securities Dealers Association (Verdipapirforetakenes Forbund) and the Swedish Securities Dealers Association (Svenska Fondhandlareföreningen).

This document includes the response provided by NSA to the EU Commission consultation on the operations of the European Supervisory Authorities, however the answers to the commission have been provided in the special survey format required by it.

Initially, the NSA wants to highlight the timeframe for submitting responses of the consultation. The short timeframe makes it very challenging for trade organizations such as the NSA to submit well-prepared responses. Even if the discussion of the tasks and powers of the European Supervisory Authorities (ESAs) is at an early stage, the timeframe of two months is too short taking into account and evaluate the importance of the issue, the future organization of the supervision in the European Union. This especially when taking the consequences of Brexit into consideration.

Key Points in the NSA response to the ESAs Review:

- There is a need to increase the transparency of the work of the ESAs. Such increase would be beneficial for the financial industry and for the ESAs themselves.
- There is no need to increase the supervisory powers of the ESAs, i.e. the ESAs should continue to focus on co-ordination and supervisory convergence.
- There is need for the national supervisors to continue to be closely involved in ESAs work going forward; hence we see no reason to alter the ESAs governance structure.
- The ESAs should be funded through the EU budget and national regulators, not by any means through an increase of the financial industry regulatory costs.
- The possibility to empower ESAs to temporarily suspend the application of regulatory requirements should be evaluated, (similar to the No-Action letters in jurisdictions outside the EU).
- There should be a possibility to launch an appeal regarding guidelines and recommendations and, also, consultations and considerations before publication of Question & Answers.

1 Tasks and powers of the ESAs

1.1 **Supervisory convergence**

NSA recognizes that supervisory convergence is very important and an absolute key task for a well-functioning Single Market and a task of utmost importance for the ESAs. For a well-functioning Single Market it is not enough to have a common rule book but the reading of those rules by supervisors and supervisory practice need to converge. Since their establishment in 2010 the ESAs, in particular ESMA, have had a very burdensome workload related to the regulatory agenda consisting of advices to the Commission for delegated acts and implementing acts as well as proposals for technical standards.

In our view due to the amount and quality of the new regulation the ESAs have not yet been in the position to focus on supervisory convergence to the extent required. It is therefore too early to properly assess the work of the ESAs having this in mind. ESMA, for instance, has had an important impact on the functioning of the internal market not only by providing advice and proposals to the Commission but also through producing instruments such as guidelines, recommendations, questions and answers.

Hence, in our opinion it would be appropriate to evaluate the possibility for the ESAs to have a mechanism like the so-called No-Action letters used by certain non-EU financial authorities. Such a possibility could give financial markets in EU some needed flexibility when faced with for example implementation challenges unforeseen in the legislation. It could also be possibility to create so-called regulatory sandboxes for the ongoing development of financial services.

1.2 **Non-binding measures: guidelines, recommendations and Questions & Answers.**

NSA welcomes ESAs ability to issue guidelines, recommendations, Questions & Answers and other soft law instruments when necessary. Those instruments of ESAs have a very huge impact on financial markets. The current powers in relation to guidelines and recommendations are sufficient although clarification to those powers should be made.

The legal nature of guidelines is a concern and should be clarified. They are non-binding according to EU law but of a quasi-regulatory nature. According to article 16.3 financial market participants shall make every effort to comply with those guidelines and recommendations. What does that mean in legal terms?

The guidelines and recommendations should of course be consistent with the level 1 and level 2 texts. If the legal text of level 1 or level 2 is unclear it should be clarified on the same level, not by non-binding guidelines and thereby establish requirements without the correct authority or legislative process. Guidelines and recommendations should therefore never be expansive and go beyond the original intended function, namely to ensure common, uniform and consistent application of Union law. In our opinion the ESAs are permitted to issue guidelines in a view to achieving consistency in the application of EU law, provided that the EU laws are sufficiently specific and detailed so they leave no margin for policy choices. There is no or very little room for own initiative guidelines.

In our opinion it would be appropriate to establish a control mechanism for guidelines and recommendations after the issuance. NSA propose, that a right to launch an appeal towards a guideline or recommendation for market participants and other interested parties is established.

The process and timing of issuance of guidelines have also raised concerns. The main rule should be to have guidelines and recommendations published in due time before a legislation enters into force

(preferable 12 to 18 months). The NSA, however, recognizes that need can occur to clarify or interpret even after a legislation has entered into force.

Another soft law measure from the ESAs is Questions & Answers (Q&A) which can provide very valuable guidance to market participants. However, the Q&As are not consulted in advance and the answers could lead to questions regarding similar but not identical cases. Furthermore, there is a risk that answers could be questionable in the light of other market conditions and other jurisdictions.

Interested parties like investor, issuers and regulatory bodies should be able to give their views on Q&As before they are published to ensure a possibility to react in time if the proposed answers are not sufficiently clear. It would in our view increase the quality and understanding of the Q&As. Furthermore, there must be a process available to address Q&As when for example market participants have good reasons to disagree with the answers published by one of the ESAs.

1.3 Consumer and investor protection

In our opinion the consumer and investor protection must be the primary responsibility of national supervisory authorities taking into account that most consumer protection legislation is set out in national law. Moreover, it should also be noted that in securities market protection is given to investors divided into different classes.

1.4 Enforcement powers – breach of EU law investigation

Our experience regarding ESMA's authorities regarding CRAs have not convinced us that the ESAs should be given more enforcement powers. Instead our opinion is that any enforcement action by an ESA should be done in co-operation or after consultation with the relevant national supervisor.

1.5 International aspects of the ESA's work

The UK's financial markets will in one form or another, post-Brexit, continue to be of great importance for EU 27. Therefore, it is of utmost importance for the EU to create a framework post-Brexit where the ESAs in cooperation with national authorities can have an active and efficient regulatory and supervisory dialogue with the UK authorities. However, as the current equivalent regimes were not created for a market with such size and importance for EU as UKs, there are doubts about how the equivalence regimes will be structured after the UK leaves the Union. Hence, a new framework is needed to maintain the strong relationship between the financial markets of the EU and UK.

1.6 Access to data

1.7 Powers in relation to reporting: Streamlining requirements and improving the framework for reporting requirements

It is essential to gather information in a structured manner. Experience states that national specific requirements should be avoided. Complete harmonization provides the best conditions. On the other hand, the rules must take into account national specific conditions at an early stage when organizing how to collect the information.

It is of utmost importance that authorities define what they want to achieve with the information they intend to collect. This stage is important and must be controlled. If the authorities do not achieve this objective, they might need to refrain from retrieving information. It is important to

consult the industry before intended information collection. This consultation should include, among other things, the costs of developing a new reporting facility and its ongoing maintenance. It should also be emphasized that the regulatory burden is constantly growing and that the economic thresholds to enter in the financial sector is also growing. This in turn reduces competition - which is also a cost for the customer / buyer of financial services.

To avoid any undue burden on market participants, there must be thorough analysis before granting the ESAs with additional powers.

A challenge that arises during the regulatory process is that ESMA has been limited or locked by what has been decided on Level 1. This, in turn, creates problems and additional costs for both ESMA and Investment Firms. A more streamlined process to make minor changes of level 1 and 2 would be valuable.

1.8 Direct supervisory powers in certain segments of capital markets

In the opinion of the NSA, a well-functioning Single Market should be top priority. For that reason the ESAs should focus on supervisory convergence as this work is of utmost importance for the single market. As most supervision is best done on the national level we are rather skeptical to the need for any increase of the direct supervisory powers of the ESAs.

ESMA's sanction process can be improved to further cater for legal certainty and transparency for the financial institute under scrutiny.

It is essential that the alleged infringements as well as the legal grounds and argumentation therefore is clarified and transparently conveyed to the institute under scrutiny. To procure legal certainty this needs to be done in writing. This applies for all stages of the sanction process. The whole investigation should be transparent and the legal grounds and argumentation conveyed to the institute in the same way.

Currently the investigation of a potential infringement is a rather long process going on for several years. This is quite unsatisfactory from an industry perspective since it currently creates a business/legal vacuum for a considerable time. The financial institution under scrutiny is really only left with two bad options – 1) cease with the activities even if the institute deems the activities lawful. The effect is in essence that market activities are prohibited years before the legality of the activities are assessed by the decision bodies or 2) forcing the institute to take a legal risk for a considerable time.

In our opinion the ESAs should use their direct supervisory powers in close co-operation with the national supervisor.

2 Governance of the ESAs

Taking the role of the ESAs into account, in particular the responsibilities for supervisory convergence, it is of utmost importance that national supervisors take part in the decision making process. The possibility for each member state to influence the decisions taken by the ESAs should therefore not be undermined. NSA does not support changes that would undermine the role of national supervisors in the ESA decision making.

In the opinion of NSA the transparency of nearly all parts of the work done by the ESAs should be increased. More transparent ESAs could also lead to more transparency regarding the work of the national supervisors, not only when they interact with one of the ESAs but also in other areas.

2.1 Stakeholders Group

The original idea with stakeholder groups may have been good but the lack of transparency and the lack of possibility for business representatives to discuss with the members of the stakeholder groups has reduced the benefits for different stakeholders. The stakeholder groups should be given more influence and the structure must be more transparent and open to give the members of the stakeholder groups the possibility to invite investors, issuers and regulated bodies representative to take part in the discussion.

Increased transparency is of utmost importance for the Stakeholder groups. Cooperation with market participants would work much better if there were more transparency regarding the composition of these group and the detailed duties assigned to them. The extremely strict secrecy around the Stakeholder groups is not helpful, quite the opposite, for creating well considered and workable rules for the securities markets.

It is absolutely necessary for members of Stakeholders groups, tasks forces and other forms of working groups to be allowed to consult and discuss with colleagues also outside those groups.

3 Adapting the supervisory architecture to challenges in the market place

NSA does not have direct concerns on about the current structure of the ESAs. However, if structural changes are to be made, due to EBAs future relocation, such changes require would require a thorough impact assessment. Such an assessment should not only encompass an evaluation of a possible merge of the ESAs into one or two organisations, but also assess the geographical positioning and the possibility for a more efficient set-up in relation to other institutions such as the Single Supervisory Mechanism, the European Central Bank and the ESRB.

4 Funding of the ESAs

The NSA believes that there are several reasons why the resources provided to the ESAs should be evaluated. The NSA is of the opinion that the funding also in the future should come from the EU-budget. The financing structure of the ESAs should not lead to mean any increase in current industry regulatory costs as the industry is already contributing through National Supervisory Authorities a system which should be maintained.

However, we want to stress that the ESAs are independent agencies of the EU and the ESAs should also be seen as an independent organization. The legislators seem to have set the agenda of for instance ESMA without any possibility for ESMA to take any real decision regarding priority. In short, ESMA has to follow the legislator and prioritize the regulatory agenda – this setup can potentially threaten ESMAs independence. Hence, if co-legislators and/or the Commission increase the ESAs workload they should only do this after first taking into account that the ESAs have enough resources so that their independence is ensured.

Moreover, the ESAs funding level should of course be stable and they should be given resources enough to fulfil their important mandates. Any potential future increase needs a robust and accurate impact assessment. The analysis in the consultation document is clearly not sufficient to decide on the level of funding for the ESA. Hence, a forthcoming analysis should cover the possibility to merge the ESAs into one or two organisations and thus the possibility for a more cost efficient set-up.

Additional comment

The ESAs should be more transparent

We recognize ESAs (ESMAs) role in creating the single rulebook within EU. In this context, the political environment has so far called for detailed level 2 rules. Detailed rules require a high degree of involvement from interested parties due to the complex nature of the capital markets and the spillover effects from other sets of rules. If the rules are wrongly set and/or calibrated, they may have heavy, adverse consequences for the capital markets as a whole. So far, we believe that the involvement of interested parties have been much too restricted and we fear the consequences for the capital markets and the real economy.

It is crucial that ESAs should involve interested parties more in the rulemaking process on an ongoing basis. This requires the following of ESAs. A more open attitude in all phases of the process and probably more and smaller consultations. We are also of the opinion that interested parties should have better and easier access to the staff in the ESAs. It is also importance that the national FSAs should not be prohibited/limited in discussing drafts from the ESAs with interested parties, since those parties can provide necessary and valuable input to questions at stake. We are aware that our proposal could result in longer legislation process and take more time and resources. But the consequences of doing it wrong will be worse. Therefore, we urge the ESAs to take the needed time to be more open and thereby increase the possibilities to make it right the first time.